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423	Mian Feroze Shah v. Sohbat Khan ...	*Peshawar Judicial Commissioner's Court.
426	Mahabir v. Bharath Bihari ...	11 O. L. J. 312.
427	Ichhamoyi Pal v. Pearymohan Shah ...	*Calcutta High Court.
429	Abdul Shakur v. Muhammad Matin ...	22 A. L. J. 202; (1924) A. I. R. (A.) 307; 16 A. 414.

431	Bansidhar v. Pandurang ...	*Nagpur Judicial Commissioner's Court.
432	Firm of Narumal Bhagchand v. The Sehwan Municipality ...	*Sind Judicial Commissioner's Court.
434	Muthura Prasad v. Bombay Baroda and Central India Ry. Co. ...	*Allahabad High Court.
435	Assistant Commissioner of Labour, *In re* ...	46 M. L. J. 150; 19 L. W. 207; (1924) M. W. N. 108; (1924) A. I. R. (M.) 489; 34 M. L. T. 357.
436	Gobind Sahu v. Zafar Karim ...	*Patna High Court.
437	Mahadeo Ganesh Sohni v. Sadashiv ...	*Nagpur Judicial Commissioner's Court.
438	Secretary of State v. Seth Khemchand Thaoomal	*Sind Judicial Commissioner's Court.
441	Motiram v. Kunwar Muhammad Abdul Jalil Khan ...	22 A. L. J. 487; (1924) A. I. R. (A.) 414.
443	Gopi Mal v. Muhammad Yasin ...	*Lahore High Court.
444	Ida v. Muhammad Din ...	*Lahore High Court.
445	Imam Din v. Dittu ...	*Lahore High Court.
445	Saik Kasam v. Haji Yusuf Karim Abu ...	*Nagpur Judicial Commissioner's Court.
446	Dina Singh v. Jamal Singh ...	*Nagpur Judicial Commissioner's Court.
447	Dharam Singh v. Nand Singh ...	*Lahore High Court.
449	East Indian Railway Co. v. Sib Prosad Dutt Rai ...	*Calcutta High Court.
450	Pohlo Ram v. Surjan ...	*Lahore High Court.
451	Sher Muhammad Khan v. Dost Muhammad Khan ..	*Lahore High Court.
453	Jhanda Singh v. Sadiq Muhammad ..	5 L. 218.
457	Nand Lal v. Dharamdeo Singh ..	*Patna High Court.
460	Lahore Bank Ltd. v. Ghulam Jilani ..	5 L. 54; (1924) A. I. R. (L.) 448
461	Sano v. Puran Singh ..	*Nagpur Judicial Commissioner's Court.
463	Rameshwar Singh v. Wazul Haque ...	*Patna High Court.
465	Ray Binode Bihari Bose v. Tokhi Singh ...	(1924) Pat. 211.
466	Babu Ram Rai v. Maheshwar Prasad Singh ...	*Patna High Court.
467	Bhikari Behera v. Sitamoni Devi ...	*Patna High Court.
469	Jamuna Prasad Singh v. Sheorati Kuer ...	*Patna High Court.
472	Harnarayan Pande v. Suresh Pande ...	*Patna High Court.
474	Kumar Kamakshya Narayan Singh v. Surajnath Misra ...	5 P. L. T. 85; (1924) Pat. 60; 2 P. L. R. 69; 3 Pat. 320; (1924) A. I. R. (Pat.) 449.
476	Nand Kishore Chaudhuri v. Rameshwar Singh ...	2 P. L. R. 19; (1924) A. I. R. (Pat.) 515.
478	Lal Pasi v. Ramsaran Lal Chowdhry ...	*Patna High Court.
479	Sri Newas Sitaram v. East Indian Ry. Co. ...	*Patna High Court.
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482	Sheo Dhari Ram v. Gupteswar Pathak ...	*Patna High Court.
483	Abdul Haq v. Muhammad Yahya Khan ...	(1924) A. I. R. (Pat.) 81; 4 P. L. T. 553; 2 P. L. R. 181.
489	Taibunnissa Begum v. Jagdip Pandey ...	2 P. L. R. 1; (1924) A. I. R. (Pat.) 517.
492	Uchit Kopri v. Adhik Mandal ...	*Patna High Court.
495	Run Bahadur Singh v. Bajnanji Prasad Singh ...	3 Pat. 344; (1924) Pat. 193.
497	Rammesh Chandra Mitra v. Daiba Charan Das ...	28 C. W. N. 602; 39 C. L. J. 356.
503	Kasiram Kaiborta v. Boga Kaiborta ...	*Calcutta High Court.
505	Peria Miyana Marakayar & Sons v. Subramania Iyer ...	46 M. L. J. 255; 19 L. W. 342; (1924) M. W. N. 240; (1924) A. I. R. (M.) 612.
506	Behari Lal v. Maclean ...	22 A. L. J. 165; 46 A. 297; (1924) A. I. R. (A.) 492.
508	Mutsaddi Lal v. Kharag Bahadur Singh ...	*Allahabad High Court.
510	Shankar v. Murarji ...	*Nagpur Judicial Commissioner's Court.
511	Hargir v. Kumar Kamkhya Narain Singh ...	(1924) Pat. 158; 3 Pat. 534.
514	Kedar Nath Biswas v. Kamini Sundari Dassya ...	28 C. W. N. 462; (1924) A. I. R. (C.) 623.
517	Hatim Mirza v. Bhagwana ...	*Lahore High Court.
519	Sheo Prasad Dube v. Sarju Mahto ...	46 A. 35.
521	Trustees of the Firm Motharam Dowlatram v. Firm of Mayadas Dowlatram ...	*Sind Judicial Commissioner's Court.
525	Satya Ranjan Nag v. Kabitich Chandra Pal ...	*Calcutta High Court.
527	Indrarajbhau v. Sitaram ...	*Nagpur Judicial Commissioner's Court.

530	Dasarate Moshy v. Jay Chand Sutradhar ..	*Patna High Court.
531	Rajrangisingh v. Sheo Barat ...	*Allahabad High Court.
532	Mahadeo v. Sonbai	*Nagpur Judicial Commissioner's Court.
534	Firm of Jossomal Valiram v. Chellaram Bhojraj ..	*Sind Judicial Commissioner's Court.
535	Radhabai v. Pandurang	*Nagpur Judicial Commissioner's Court.
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540	Gouri Shankar v. Baksi Dube .	10 O. & A. L. R. 140; 11 O. L. J. 306.
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545	Kamta Prasad Singh v. Nanku Prasad Singh ...	*Patna High Court.
547	Gulzar Singh v. Sheo Nath ..	11 O. L. J. 275.
552	Ali Khan v. Malik Maidan ...	*Peshawar Judicial Commissioner's Court.
557	Madan Mohan Burman v. Secretary of State ...	*Calcutta High Court.
559	Kanhaya Lal v. His Highness The Maharaja Sri Prabhu Narain Singh Bahadur ...	22 A. L. J. 317; 46 A. 355.
561	Faiz Muhammad v. Latif ...	*Lahore High Court.
563	Durga Prasad v. Lachmi Narain ...	22 A. L. J. 314; (1924) A. I. R. (A.) 394.
564	Kauna Panikkar v. Nanchan ..	46 M. L. J. 340; 19 L. W. 395; 34 M. L. T. 89; (1924) A. I. R. (M.) 607.
565	Debi Bakchand v. Barakatunissa ...	*Patna High Court.
569	Manager, Encumbered Estates in Sind v. Tharumal ...	*Sind Judicial Commissioner's Court.
570	Firm Ramgopal-Bhagwan Das v. Parmeshri Das ...	6 L. L. J. 197; (1924) A. I. R. (L.) 474.
572	Balkishan Nathani v. Commissioner of Income Tax ...	*Nagpur Judicial Commissioner's Court.
573	Kundaswami Naidu v. Kanniah Naidu ...	46 M. L. J. 366; (1924) M. W. N. 373; 20 L. W. 60.
574	Gaya Prasad v. Girja Shankar ..	11 O. L. J. 286.
579	Bika v. Balanda .	*Lahore High Court.
580	Bandappa v. Shankar Rao ...	*Nagpur Judicial Commissioner's Court.
582	Tota Ram v. Gouri Shankar ..	*Allahabad High Court.
583	Hariomal v. Hazarising	*Sind Judicial Commissioner's Court.
586	Beni Prasad v. Sheodin ..	22 A. L. J. 289; 46 A. 361; (1924) A. I. R. (A.) 125.
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588	Kharag Nashin v. Dwarka Prasad Singh	3 Pat. 465.
593	Nand Lal Chaube v. Maharaja Kesho Prasad Singh ...	(1923) Pat. 339; (1924) A. I. R. (Pat.) 245.
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596	Rochaldas Gidoomal & Co. v. The Mercantile Bank of India ...	*Sind Judicial Commissioner's Court.
599	Jagabandhu Kundu v. Rajmohan Pal ..	*Calcutta High Court.
601	Pannalal v. Bhagirathibai ...	20 N. L. R. 11; (1924) A. I. R. (N.) 98.
604	Azim Bibi v. Imtiaz Begam ...	*Lahore High Court.
605	Kamaluddin Ahmad v. Ramanand Singh ...	(1924) Pat. 1; 3 Pat. 120; (1924) A. I. R. (Pat.) 443.
608	Firm Behari Lal Kanhaya Lal v. Official Receiver, Insolvent Estates, Lahore ...	*Lahore High Court.
609	Raghunath Sahai v. Daroga Sahu .	*Patna High Court.
613	Pritam Ram v. Dharu Ram ..	(1924) Pat. 216.
614	Labhu Ram v. Karta Ram .	*Lahore High Court.
614	Dhanwanti Chowdhrani v. Hurgobind Prashad ...	5 P. L. T. 103; 3 Pat. 135; (1924) A. I. R. (Pat.) 484.
617	Piroze Khan v. Kanhiya Ram ...	6 L. L. J. 191; (1924) A. I. R. (L.) 484.
619	Anantoo Kalwar v. Ram Prasad Tivari ...	22 A. L. J. 182; 46 A. 295.
620	Sirdhar Chowdhury v. Mungniram Bangar ...	(1924) Pat. 54; 5 P. L. T. 243; 3 Pat. 357; (1924) A. I. R. (Pat.) 491.
625	Ramaswami Naidu v. Ayyalu Naidu .	46 M. L. J. 196; 19 L. W. 247; 34 M. L. T. 6; (1924) A. I. R. (M.) 611.
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628	Gobind v. Ammar ...	*Allahabad High Court.
630	Badri Narain Singh v. Dwarka Prasad ...	(1924) Pat. 65; (1924) A. I. R. (Pat.) 353; 5. P. L. T. 565.
631	Chiraunji Lal v. Ganga Sahai ..	22 A. L. J. 410; 10 O. & A. L. R. 549.
632	Wilayat Ali Khan v. Maroti ...	*Nagpur Judicial Commissioner's Court.
633	Durga Kunwar v. Chunna Kunwar ...	*Allahabad High Court.
636	Maroti Kunbi v. Bapuji ...	*Nagpur Judicial Commissioner's Court.
637	Balkaran Lal v. Malik Namdar .	*Allahabad High Court.
639	Bani v. Narsoo ...	*Nagpur Judicial Commissioner's Court.
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652	Lakhan Singh v. Lal Singh ...	*Allahabad High Court.
653	Qamar Husain v. Abas Ali ..	3 Pat. 614.
654	Baldeo Prasad v. Fateh Singh ..	22 A. L. J 490; 10 O. & A. L. R. 667.
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668	Glastaun v. Sonatan Pal	*Calcutta High Court.
677	Parbhu Dayal v. Murli Dhar ...	22 A. L. J. 365; 10 O. & A. L. R. 528.
679	Suresh Chandra Mukerji v. Shitikanta Banerjee ...	28 C. W. N. 637; 51 C. 669.
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703	Hirderam v. Ramcharan ..	*Nagpur Judicial Commissioner's Court.
705	Narayan v. Ramkrishnaji ..	*Nagpur Judicial Commissioner's Court.
705	Jay Narain Pandey v. Kishun Dutt Misra . .	3 Pat. 575; 5 P. L. T. 581.
710	Tularam Bhutunia v. Purnendra Narain Rai Deb Verma ...	*Calcutta High Court.
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717	Lal Chand v. Manohri ...	*Lahore High Court.
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727	Debi Prosad Bhakat v. Nagendra Kumar Nag ...	*Calcutta High Court.
730	Nandkishore v. Lalsingh ..	*Nagpur Judicial Commissioner's Court.
731	Dwarkadas v. Jadub Chandra Ganguli ...	28 C. W. N. 704; 39 C. L. J. 439; 51 C. 761.
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736	Rangrao v. Pandurang ...	*Nagpur Judicial Commissioner's Court.
738	Collector Singh v. Madari Lal . .	*Oudh Judicial Commissioner's Court.
742	Abdul Aziz Mia v. Amanmal Bathra ...	*Calcutta High Court.
743	Meghraj v. Ramgopal . .	20 N. L. R. 103.
744	Gour Krishna Sarkar v. Nilmadhab Sha .	*Calcutta High Court.
746	Ramji Patel v. Karkaji ...	*Nagpur Judicial Commissioner's Court.
747	Sarada Sundari Basu v. Akramannessa Khatun	28 C. W. N. 710; 51 C. 737.
749	Ram Pargash Singh v. Dahan Bibi ...	(1924) Pat. 85; 5 P. L. T. 203; 3 Pat. 152; (1924) A. I. R. (Pat.) 420.
763	Ganga Ram v. Duni Chand Bhandari ...	*Lahore High Court.
764	Mohammad Mahdi Ali Khan v. Tawakkul Khan	*Oudh Judicial Commissioner's Court.
766	Bhagwanta Koer v. Zamir Ahmed Khan ...	5 P. L. T. 451; (1924) Pat. 221; 2 P. L. R. 249; 3 Pat. 596.
771	Arjan Das v. Nanak Chand ...	*Lahore High Court.
772	Savitri v. Madhorao ...	*Nagpur Judicial Commissioner's Court.
774	Kishundeo Singh v. Jaglal Sahu ...	*Patna High Court.
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778	Chambeli v. Bishna ...	*Lahore High Court.
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783	Maharajadhiraj of Darbhanga v. Commissioner of Income Tax ...	2 P. L. R. 25 Cr.; (1924) Pat. 69; 3 Pat. 470; 5 P. L. T. 459; (1921) A. I. R. (Pat.) 474.
794	Rewa Mahton v. Dalu Mohto ...	2 P. L. R. 6; (1924) A. I. R. (Pat.) 528; 5 P. L. T. 588.
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796	Rajkeshwar Prashad Narain Singh v. Muhammad Khalil-ul-Rahman ...	5 P. L. T. 223; 3 Pat. 522; (1924) A. I. R. (Pat.) 459.
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802	Satish Chandra De v. Gagan Chandra Rudra ...	*Calcutta High Court.
804	Avantika Prasad Shukul v. Gur Bakhsh ...	10 O. & A. L. R. 29; 27 O. C. 60; 11 O. L. J. 197.
806	Lawrence Phillips & Co. v. Nazareth	*Sind Judicial Commissioner's Court.
807	Masudanlal v. Ram Gulam Sahu ...	3 Pat. 458; 5 P. L. T. 447; (1924) Pat. 240.
811	Deo Baksh v. Kaluram .	7 N. L. J. 16.
814	Khub Chand v Todar Mal ...	*Allahabad High Court.
816	Saradindu Mukerjee v. Girish Chandra Tewari	*Calcutta High Court.
817	Yusif Mahomed v. Abubacker Ibrahim .	*Sind Judicial Commissioner's Court.
828	Saheb Singh v. Indar Kuar .	*Allahabad High Court.
829	Lanka Ramakrishna Naidu v. Lanka Ramakrishna Naidu . .	46 M. L. J. 192; 19 L. W. 235; (1924) M. W. N. 220; (1924) A. I. R. (M.) 527.
831	Mouleswara Rao v. Durgamba	19 L. W. 165; 46 M. L. J. 189; (1924) M. W. N. 266; 17 M. 308.
832	Sabapathy Chetty v. Shanmugappa Chetty .	16 M. L. J. 153, 19 L. W. 582.
834	Ganpat v. Manohar Harbaji ...	7 N. L. J. 105.
836	Umesh Chandra Durbar v. Chowdhury Jamini Nath Mallick . .	*Calcutta High Court.
840	Jageshwar v. Pandurang .	7 N. L. J. 82; (1924) A. I. R. (N.) 73.
844	Narain Das v. Behari Kahar ..	*Allahabad High Court.
846	Jessaram Bhagwandas v. Ratanchand Fatehchand ...	*Sind Judicial Commissioner's Court.
849	Piyare Lal v. Bed Ram .	*Allahabad High Court.
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853	Ganpatrao v. Tulsabai	*Nagpur Judicial Commissioner's Court.
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859	Jaganath Motilal v. Bala Prasad Arjundas . .	*Calcutta High Court.
862	Laxman v. Bhulabai ...	*Nagpur Judicial Commissioner's Court.
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874	Bellow v. Elke ...	51 C. 577.
877	Kanhaiya Lal v. Azmatunnisa ...	*Allahabad High Court.
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881	Mohammad Taqi Khan v. Dori ...	*Allahabad High Court.
881	Sukhdeodas Rekhabdas v. Trikumdas Callianji	*Calcutta High Court.
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887	Saraswatibai v. Yadorao ...	*Nagpur Judicial Commissioner's Court.
889	Nagishwar Bux Rai v. Bisseswar Dayal Singh ...	2 P. L. R. 55; 3 Pat. 236; (1924) A. I. R. (Pat) 446; 5 P. L. T. 576.
893	Gadodia & Co. v. Great Indian Peninsula Railway Company ...	22 A. L. J. 1; 46 A. 161; (1924) A. I. R. (A.) 254.
895	Inderpal Singh v. Thakur Din Singh ...	10 O. L. J. 646; (1924) A. I. R. (O.) 266; 27 O. C. 77.
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904	Dhanraj Misir v. Rameshar Misir ...	21 A. L. J. 928; 46 A. 170; (1924) A. I. R. (A.) 227.
905	Dipchand Dowlat Ram v Parmanand Chimandas	*Sind Judicial Commissioner's Court.

908	Bhola Nath Dutta v. Radhanath Biswas ...	51 C. 789.
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911	Jauri Shanker Singh v. Sheo Nandan Misra .	22 A. L. J. 369; 46 A. 381.
919	Chhaterdhari Mahto v. Nasib Singh ...	5 P. L. T. 551.
921	Ramaswamy Naicker v. Alamelu Ammal .	46 M. L. J. 298; (1924) M. W. N. 204; (1924) A. I. R. (M.) 604.
923	Tilakdhari Singh v. Chaturgun Bind .	(1924) Pat. 4; 3 Pat. 266.
926	Shib Deo Singh v. Uttam Singh ..	*Lahore High Court.
927	Seagoda Goundan v. Muthu Goundan .	46 M. L. J. 404; 19 L. W. 533; (1924) M. W. N. 376; 47 M. 537.
930	Pirimal v. Sanghar	*Sind Judicial Commissioner's Court.
932	Tabi v. Saudagar Singh . .	*Lahore High Court.
934	Kedar Nath v. Shanker Lal .	22 A. L. J. 185; 46 A. 303.
936	John Joseph Brito v. Mrs. S. S. Brito .	46 M. L. J. 357; 19 L. W. 458; 34 M. L. T. 112; (1924) M. W. N. 380.
940	Dayaram Ramdas v. Secretary of State .	*Sind Judicial Commissioner's Court.
943	Mahadeo Lal v. Sri Gobind Lal Sahu . .	*Patna High Court.
946	Janpat Sambaji v. Mahadeo	*Nagpur Judicial Commissioner's Court.
950	Peria Nattamai Malkajigunda v. Thippa Ramaswami Chettiar .	*Madras High Court.
953	Nur Mahomed v. Hassomal ...	*Sind Judicial Commissioner's Court.
955	Kesri Singh v. Channo .	*Allahabad High Court.
956	Nilkanth v. Kesheorao ..	*Nagpur Judicial Commissioner's Court.
958	Satish Chandra Bhattacharjee v. Sri Jogunnessa Bibi	*Calcutta High Court.
959	Ghulam Qutab-ud-Din Khan v. Mian Faiz Bakhsh	*Lahore High Court.
960	Bhuwan Lal v. Manhori .	*Nagpur Judicial Commissioner's Court.
962	Kamal Krishna Kundu Chowdhury v. Chatoorbhuj Dassa	*Calcutta High Court.
963	Kundan Lal v. Qadir Ahmad Ali .	*Nagpur Judicial Commissioner's Court.
968	Sandattikalai Pandia Chinna Thambiar v. Veerappa Goundan	46 M. L. J. 450; 34 M. L. T. 216; 19 L. W. 629; (1924) A. I. R. (M.) 623.
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972	Dharmdas Thawerdas v. The Persian Gulf Steam Navigation Co., Ltd. .	*Sind Judicial Commissioner's Court.
977	Faiz Bibi v. Qudrat Ullah . .	*Allahabad High Court.
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991	Diwan Chand v. Nizam Din . .	*Lahore High Court.
991	Joharmal Rudmal Adtia v. Sunderlal Narayan Das ...	*Nagpur Judicial Commissioner's Court.
993	Saleh Mahomed Umor Dossol v. Nathumal Kissamal ...	*Sind Judicial Commissioner's Court.
995	Pohlo v. Dalip Singh . .	*Lahore High Court.
996	Pandu v. Rajeshwar .	*Nagpur Judicial Commissioner's Court.
1001	Narain Dass Dutt v. Banku Behary Chattopadhya	*Calcutta High Court.
1007	Akkanna Chetti v. Chandu Chetti .	(1924) M. W. N. 92.
1008	Surjan Singh v. Umari Singh .	*Allahabad High Court.
1011	Hemraj v. Trimbak Kunbi . .	*Nagpur Judicial Commissioner's Court.
1012	Venkatalingama Nayanum Bahadur Varu v. Arunachellam Chettiar ...	19 L. W. 132; (1924) M. W. N. 214; (1924) A. I. R. (M.) 511.
1014	Mohammad Jan v. Shiam Lal ..	22 A. L. J. 110; (1924) A. I. R. (A.) 218; 46 A. 328 **F. B.**
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1016	Gupta Nand Bharthi v. Hari Shankar ..	*Allahabad High Court.
1017	Villappa Chettiar v. Ramanathan Chettiar ...	46 M. L. J. 80; 19 L. W. 251; (1924) M. W. N. 163; 47 M. 446; (1924) A. I. R. (M.) 529.
1018	Sarab Sukh Das v. Ram Prasad ...	46 A. 130; (1924) A. I. R. (A.) 357.
1022	Shaikh Mudi v. Mohib Ali ...	*Allahabad High Court.
1023	Dildar v. Shukrullah ...	46 A. 152; (1924) A. I. R. (A.) 444.

1024	Ganesh Lal v. Babu Nobin Chandra Bose ...	*Allahabad High Court.
1026	Naraindas v. Kunjilal ...	*Nagpur Judicial Commissioner's Court.
1026	Bijai Bahadur v. Parmeshwari Ram ...	*Allahabad High Court.
1029	Khanu v. Raja ...	*Lahore High Court.
1030	Bohra Tara Chand v. Murtaza Husain ...	10 O. & A. L. R. 244.
1031	Ramswarup v. Raghunandan ...	*Nagpur Judicial Commissioner's Court.
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MADRAS HIGH COURT.

SECOND APPEAL No. 2084 OF 1920.

November 17, 1922.

Present :—Sir Walter Salis Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

MANAMAL KORU KUTTY (dead) AND HIS LEGAL REPRESENTATIVES, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VALIAKATHODIYIL AHAMMAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 107, O XLI, r. 25 Issues, framing of—Duty of Court—Failure of lower Courts to frame proper issues—Procedure—Remand.

In a suit for redemption of a mortgage, the plaintiff based his title on a legacy under a Will and also on a lease. The defendants denied plaintiff's title under both heads. There was a specific issue as to the genuineness of the Will but none as to the lease, except the general issue as to whether plaintiffs' suit was maintainable. The Court of first instance found the Will to be genuine and decreed the suit but the appellate Court reversed the finding and dismissed the suit. The question of the lease was not gone into in either of the Courts. On second appeal to the High Court:

***Held*, (1) that it was primarily the duty of the Court to frame the necessary issues though in framing issues parties were entitled to be heard; [p. 2, col. 1.]**

(2) that the proper course to follow in the case was not to set aside the decree and remand the whole case including the question of genuineness of the Will to be gone into again *ab initio*, but to frame issues under O. XLI, r. 25 of the Civil Procedure Code and refer the same to the lower appellate Court and direct it to take the additional evidence required on the issues and return the same to the High Court with its findings. [p. 2, col. 2.]

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Ottapalam, in A. S. No. 146 of 1919, preferred against the decree of the Court of the Additional District Munsif of Tirur, in O. S. No. 164 of 1919, (O. S. No. 550 of 1917 Parapanangudi Munsif's Court.)

Mr. *K. P. M. Menon*, for the Appellants.

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

JUDGMENT.

The Chief Justice:—This is a second appeal from the judgment of the Subordinate Judge of Ottapalam, reversing the judgment of District Munsif of Tirur. The plaintiff is suing for the redemption of a mortgage. He and the defendant were at one time joint mortgagees. He puts his right to redeem the mortgage mainly on the ground that he was a purchaser or assignee of the rights of certain legatees under the Will of the mortgagor. It was alleged by the defendant that the Will was not valid, and so in effect he said: "you have no title under the Will. Whoever is in a position to redeem it, you are not." The District Munsif found as a fact that the Will was duly executed and was genuine. The Subordinate Judge found as a fact that the Will was not duly executed. Sitting in Second Appeal, it is not open to us, I regret to say, in this case, to review the judgment of the Subordinate Judge on a question of fact. The plaintiff, however, said: "I have got another ground on which I am entitled to

redeem, and that is, I have taken a fresh lease or a renewal of the lease of the property from the *jenmi*," and he says, that he has raised that in his plaint. The defendant replied to it by saying that this demise was invalid and could not in any way be enforced. In framing issues, there was an issue framed, "Is the suit as brought not maintainable?" but there was no specific issue directed as to whether the plaintiff had a right to redeem under this new demise. I think it was for the Court to frame such an issue although on such application for issues the parties are heard. The result was that this matter was never gone into in either of the Courts below. The first Court, finding the Will genuine, had no particular reason for going into this point at all, even if it had been asked to. The second Court, finding the Will not genuine, apparently had not its attention called to the fact that it left open the question whether or not there was a right under the demise. And it is impossible to blame either Court, because attention was not apparently called to the matter and there was no definite issue on the point before the Court.

Now, under O. XLI, r. 25, which contains the principles on which the Court ought to act when exercising its powers under section 107 of the Code of Civil Procedure, 1908, it is provided that 'where the Court from whose decree the appeal is perferred has omitted to frame or try any issue or to determine any question of fact which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case direct such Court to take the additional evidence required; and such Court shall proceed to try such issues and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor. Now, under that, the Subordinate Judge's Court, if the point had been taken there, could have sent this matter back to be inquired into by the District Munsif, in which case the case would come back to the Subordinate Judge's Court with t, e evidence taken by the Distract Munsif on he issue, but when a case is sent back by thist Court, the practice, no doubt with a view of saving expense, has been to send it to the lower appellate Court and direct that lower appellate Court to try that issue itself. In this case I think that that is the right course to pursue. I had some doubt as to whether we ought not to set aside this decree and leave the whole matter to be gone into again *ab initio* so leaving open the question to be tried again, whether this Will was duly executed or not. But, on the whole, particularly in view of the fact that I think that considerable blame attaches to the plaintiff for not having got this point decided at the same time, and I am convinced that the decision of the two lower Courts who heard the case would have been the same on the question of the validity of the Will, whether this point had been taken or not, I do not think it is right to remand the whole case: and I think the proper course to adopt is that provided for by O. 41, r. 25 to frame an issue and refer the same to the Subordinate Judge's Court at Ottapalam, and direct that Court to take the additional evidence required on the issue and return the evidence to this Court with its findings thereon and the reasons therefor. My learned brother has framed the necessary issue. The findings will be submitted within three months from the receipt of this order and ten days will be allowed for objections.

The question of costs of this appeal and in the lower Courts will be reserved until the final hearing after the receipt of the finding called for.

Wallace, J:—I agree and I frame the following issue:—

Does the plaintiff hold directly from the *jenmi* a new or a renewed demise, and, if so, is he entitled by force of that demise to redeem and eject the defendant from the suit property? And if he is so entitled, on what terms should the redemption be allowed? Each party is entitled to adduce further evidence on this point.

V. N. V. *Case remanded.*

Z. K.

HATHI KHAN *v.* MUSAMMAT ALMO·

LAHORE HIGH COURT.

CIVIL APPEAL No. 1896 OF 1920.

December 19, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

HATHI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat ALMO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) S. 11—Res Judicata, *essential requisites of—Finding in unnecessary suit, whether consittutes* Res Judicata.

The only conditions necessary to constitute a matter *res judicata* are that,—

(1) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;

(2) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(3) the parties as aforesaid must have litigated under the same title in the former suit;

(4) the Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised;

(5) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.
[p. 5, col. 2.]

It is not a necessary condition that the suit must be one which the plaintiff was bound to institute, there is no warrant in law for the proposition that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not operate as *res judicata* in a subsequent suit relating to the same matter if the other requirements of law as laid down in section 11 of the Civil Procedure Code have been fulfilled and a finding given in a suit which the plaintiff need not have instituted, but has in fact instituted is as much *res judicata* as one given in a suit which he was bound to institute.
[p. 5, col. 2.]

Second appeal from the decree of the District Judge, Mianwali, dated the 5th May 1920, affirming that of the Senior Subordinate Judge, Mianwali, dated the 2nd January 1920, dismissing plaintiff's suit.

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

Sheikh *Niaz Muhammad*, for the Respondents.

JUDGMENT.—The subject matter of the litigation which has resulted in this appeal is the estate of one Ibrahim Khan, a *Pathan* of Mianwali *Tahsil*, who is alleged to have died more than 32 years ago, leaving him surviving three widows, *Musammat* Sahibo, *Musammat* Jatti and *Musammat* Nuran, and three daughters, *Musammat* Basso, *Musammat* Alimon and *Musammat* Nuran. It appears that on the death of Ibrahim Khan his property was mutated in four equal shares in the names of two of his widows, *Musammat* Sahibo and *Musammat* Nuran, and two daughters, *Musammat* Nuran and *Musammat* Alimon. The exact reason why *Musammat* Jatti, the third widow, and *Musammat* Basso, the third daughter, were excluded from inheritance is not definitely known, but it seems probable that they were not given a share because *Musammat* Basso had already been married and *Musammat* Jatti had been turned out by her husband during his life time on account of her unchastity. In 1891 two deeds of gift were executed, one by *Musammat* Nuran, widow of Ibrahim Khan, in favour of his daughter *Musammat* Alimon and the other by *Musammat* Nuran, the daughter, in favour of her mother *Musammat* Jatti in respect of some portions of the property to which they had succeeded on Ebrahim's death. These alienations gave rise to two suits by the reversioners of Ibrahim Khan, one of which was instituted on the 16th February 1892 against *Musammat* Nuran, the widow, and her step-daughter *Mussammat* Alimon, and was registered as suit No. 38 of 1892. The other suit against *Musammat* Nuran, the daughter, and her mother *Musammat* Jatti was instituted on the next day the 17th February, and was registered as suit No. 42 of 1892. In both suits the validity of the alienations make by the females was challenged, and the usual declarations that these alienations will not affect the reversionary rights of the plaintiffs after the death or the marriage of the females were prayed for. Both suits were dismissed by the trial Court on the ground that plaintiffs were remote collaterals, and as such not entitled to succeed or to question the alienations in the presence of the daughters. The plaintiffs preferred an appeal against the decree of the trial Court in suit No. 38 of 1892, but no appeal was preferred in the other suit. The appeal in suit No. 38 of 1892 was accepted, and it was held by the Divisional Judge that plaintiffs were reversioners of the fifth degree and as

such had the *locus standi* to maintain the suit. This judgment was confirmed on appeal by the Chief Court on 13th July 1893. The judgment of the trial Court in suit No. 42 of 1892 was allowed to become final, and the result of the findings arrived at in that judgment was that as against daughters, other than *Musammat* Alimon, plaintiffs' right to succeed or to question an alienation remained completely negatived.

In 1919 the widow, *Musammat* Nuran, remarried, and shortly after her remarriage the present suit was instituted by the plaintiffs for possession of the whole of the estate left by Ibrahim Khan on the allegations that by her remarriage the widow's estate enjoyed by *Musammat* Nuran had come to an end, and that the plaintiffs who were near collaterals of the deceased, were entitled to succeed to the exclusion of the daughters. The suit was at first directed only against *Musammat* Alimon and *Musammat* Nuran but subsequently *Musammat* Basso and *Musammat* Nuran were also impleaded as defendants. The defendants repudiated the allegations made in the plaint and contended that the question of the competency of the plaintiffs to maintain the suit and of their right to succeed in the presence of the daughters had already been decided in a previous suit, and that the judgment in that suit operated as *res judicata*. It was denied that plaintiffs were collaterals of the fifth degree, and it was pointed out that the property in suit was the self-acquired property of Ibrahim Khan to which the daughters had a superior right to succeed than the plaintiffs who were remote collaterals of more than six degrees. On these pleadings the following issues were framed and set down for trial :—

(1) Are plaintiffs entitled to succeed to the property in suit by custom in preference to Ibrahim Khan's daughters on *Musammat* Nuran's marriage ?

(2) Is the point *res judicata* ?

(3) To what share, if any, are the plaintiffs entitled ?

The Subordinate Judge found that the question of the plaintiffs' right to succeed to the poperty of Ibrahim Khan in the presence of the daughters was clearly in issue and adjudicated upon in the previous litigation, and that the present suit was consequently barred by the rule of *res judicata*. As to the character of the property in suit the Subordinate Judge held that it was ancestral, but he further found that the plaintiffs were not entitled to succeed as they were distant collaterals of six or more than six degrees. On appeal the learned District Judge differed from the findings of the trial Court on the question of the character of the property in suit, and found on all points in favour of the defendants. The result of these findings was that the plaintiffs' suit was entirely dismissed. The plaintiffs have now preferred a second appeal to this Court.

Mr. Niaz Muhammad on behalf of the respondents raises a preliminary objection that Sarwar Khan, one of the plaintiff-appellants, died on the 7th June 1921, and as no application to have his legal representatives impleaded was made within the time prescribed by law, but was made on the 22nd November 1921, when more than three months prescribed for such an application under the recent amendment of the Indian Limitation Act had expired, the appeal had abated as against Sarwar Khan. It is urged that the time for making such an application could not be extended, and that no sufficient cause had been shown for setting aside the abatement. The appellants have, however, filed an affidavit stating that the delay in making this application was due to the mistake on the part of their local pleader who told them that the period of limitation for applying to implead the legal representatives of a deceased person was six months, and it is prayed that, under these circumstances, the delay should be condoned. No counter-affidavit has been put in by the respondents, and we do not see any valid reason why the statement contained in the plaintiffs' affidavit should not be believed. In our opinion the plaintiffs have succeeded in showing that there was sufficient cause for their not applying within the prescribed period, and we set aside the abatement.

The learned Counsel for the appellants has argued the case before us at considerable length, but there is only one point which we need discuss, *viz.*, the point whether the suit is or is not barred by *res judicata*, as we are clearly of opinion that on this point alone the plaintiffs' suit and appeal must fail.

It will be observed that half of the property left by Ibrahim Khan was admittedly mutated on his death in the names of the daughters without any objection on the part of the plaintiffs. Indeed, the right of the daughters to succeed to the inheritance of their father and to keep possession thereof till death or marriage was most distinctly recognized by the plaintiffs in the previous litigation. In paragraphs 1 and 2 of their plaint in that suit (No. 42 of 1892) it was clearly stated that the daughter of *Musammat* Nuran had *succeeded* to 396 *kanals* of land on the death of her father, that she was entitled to remain in possession of the land till her death or her marriage, and that after her death or her marriage *plaintiffs* would be *entitled to succeed and to take possession*. It was nowhere stated that the daughters had been allowed to take possession by some private arrangement or merely as an act of grace on the part of the widows who, according to the contention of the plaintiffs in this Court, were the only persons entitled to succeed to a life tenure, nor was there any indication given of the fact that on her death or marriage the property would go back to the widows to the exclusion of the plaintiffs. In fact, they could not have said so as the *Riwaj-i-am* of the Mianwali District clearly recognizes the rights of unmarried daughters to succeed to a portion of their father's estate, and to remain in possession thereof till they are, married. It is, therefore, obvious that the daughter was recognized by the plaintiffs as an independent heir, and the contention now raised by their learned Counsel that, during the lifetime of the widow or widows, the plaintiffs had no cause of action to contest the alienation made by the daughter in favour of her own mother, and that if they did contest it, this fact should be completely ignored and the whole litigation from beginning to end treated as *non est* is wholly untenable. The daughter having succeeded to the property in her own independent rights, the plaintiffs had clearly a cause of action to sue if the alienation made by her was unauthorized or prejudicial to their interests; and if the question of their status and *locus standi* was directly and substantially in issue and adjudicated upon in that suit, we do not see why the finding then arrived at should not operate as *res judicata* if the same qestion happens to arise in a subsequent suit. Nor do we see any force in the argument that it was entirely unnecessary to bring the suit as the alienation was made in favour of her own mother who, it is alleged, was in any case entitled to a life estate on Ibrahim Khan's death. In our opinion *Musammat* Jatti, the alienee, was not entitled even to a life estate and had very probably been completely disinherited owing to her unchastity, or for some other reason, which is not apparent on the face of the record. From the plaint, to which reference has already been made, it is clear that the rights of *Musammat* Jatti to succeed were explicity denied by the plaintiffs owing to her unchastity, and it was distinctly asserted that the plaintiffs were the next heirs. It is, therefore, clear that it was not a case of an acceleration, and the argument that the alienation was in favour of the next heir, and, therefore, need not have been objected to is entirely without any force. Further, it appears to us that there is no warrant in law for the proposition that a finding given in a suit which is, perhaps, an entirely useless suit and need not have been instituted at all does not operate as *res judicata* in a subsequent suit relating to the same matter if the other requirements of law as laid down in section 11 of the Civil Procedure Code have been fulfilled. The only conditions necessary to constitute a matter *res judicata* are those given at page 30 of Mullah's Civil Procedure Code, and they are as follows:—

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

(3) The parties as aforesaid must have litigated under the same title in the former suit.

(4) The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

There is nothing in these conditions to support the contention that to constitute *res*

judicata the suit must be one which the plaintiff was bound to institute.

We are, therefore, clearly of opinion that the usefulness or otherwise of a suit is a question which is entirely beside the point, and that a finding given in a suit which plaintiff need not have instituted, but has in fact instituted, is as much a *res judicata* as in a suit which he was bound to institute.

To turn now to the pleadings and the issues in the former case; it appears that the defendant most unequivocally repudiated the plaintiffs' right to sue and pleaded that they were distant reversioners of more than 6 or 7 degrees. Two issues only were raised, one relating to the validity of the alienation and the other relating to the competency of the plaintiffs to maintain the suit. The Court found that the alienation was invalid by custom, but it also found that plaintiffs were collaterals of more than 6 or 7 degrees and consequently not the true heirs of Ibrahim Khan entitled to question the alienation.

The question relating to the plaintiffs' status or of their right to succeed in the presence of the daughters was directly and substantially in issue in the former litigation, and is also directly and substantially in issue in the present suit, and we do not see any reason why the finding given in the previous suit should not be conclusive between the plaintiffs and the daughters of Ibrahim Khan. It is urged that in the other suit against *Musammat* Alimon (suit No. 38 of 1892) plaintiffs were held to be collaterals of the 5th degree, and that this finding operates as *res judicata* not only against *Musammat* Alimon who was a party to that suit but against the other daughters as well who were no parties, as the suit was one of a representative nature and all the daughters of Ibrahim Khan must be held bound by it. We do not see any force in this contention. The suit was clearly personal against *Musammat* Alimon in whose favour a particular alienation had been made, and the other daughters were neither privies to that suit nor in any way interested in the result of that litigation. The finding given in that suit is, therefore, binding only on *Musammat* Alimon, but this alone does not help the plaintiffs in the least, as in order to succeed they must prove a right superior to that of the other daughters as well, which, however, they are unable to do in view of the decision arrived at in suit No. 42 of 1892 from which no appeal was preferred, and which was allowed to become final. *Musammat* Alimon can certainly say that though she may not have the right to succeed in view of the previous decision against her it is not the plaintiff's who can question that right, and that as long as *Musammat* Nuran and *Musammat* Basso or any of their representatives are alive, they have no cause of action to maintain the suit. In our opinion the plaintiffs are clearly estopped by the rule of *res judicata* from denying the rights of the daughters, and their suit must fail.

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

Appeal dismissed.

Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 193 OF 1922.
AND CIVIL MISCELLANEOUS PETITION
No. 848 OF 1922.

April 23, 1923.

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

M. S. DANDAYUDAPANI IYER,
PLEADER, KALLAKURICHI—
PETITIONER IN BOTH

versus

THE DISTRICT MUNSIF (MR. K. BALAJI RAO) OF KALLAKURICHI—
RESPONDENT IN BOTH.

Government of India Act (5 *and* 6, *Geo.* V, *C.* 61) *s.* 107—*Application by stranger to expunge passages in judgment of lower Court—Jurisdiction of High Court.*

The High Court has no power under section 107 of the Government of India Act to order the expunging of passages in the judgment of a Subordinate Court at the instance of a person not a party to the suit.

The High Court in this case refused to grant a petition to expunge certain paragraphs in the judgment of a Subordinate Court on the ground that they contained language misrepresenting the conduct of a Vakil and damaging to him.

In re Krishnaswami Aiyangar, 47 Ind. Cas. 981 ; 35 M. L. J. 368, followed.

C. R. P. No. 1396 of 1916 C. R. P. No. 888 of 1919 and C. M. S. A. Nos. 205 and 206 of 1914 referred to

PROBODH CHANDRA *v*, HARISH CHANDRA.

Civil Revision Petition No. 193 *of* 1922. Petition under Section 107 of the Government of India Act, praying the High Court to revise the order in proceedings in O. S. No. 624 of 1920, on the file of the Court of the District Munsif of Kallakurichi, dated 8th November 1921 and to call for the record of the proceedings and revise the said order of the learned Distirct Munsif by expunging the objectionable passage against the practitioner in the said proceedings.

Civil Miscellaneous Petition No. 848 *of* 1922. Petition praying that, in the circumstances stated in the affiidavit filed therewith, the High Court will be pleased to order the expunging from the records paragraph 10 of the order dated 8th November 1921 of the learned District Munsif on the Memorandum dated 2-11-1921 in O. S. No. 624 of 1920 on the file of the Court of the District Munsif of Kallakurichi.

Messers. *T. R. Ramachandra Iyer*, *A. Krishnaswami Iyer*, *K. Balasubrahmani Iyer*, for the Petitioners.

ORDER.—We are asked in these petitions to direct that a paragraph be expunged from the order of the District Munsif of Kallakurichi on the ground that it contains language misrepresenting the conduct of a Vakil, petitioner before us, and damaging to him. I have already expressed my views on the jurisdiction of this Court to make such an order in *In re Krishnaswami Aiyangar* (1), and I have been shown and now see no reason for changing them. Very little further in the way of authority has now been referred to. In fact, we have been shown no instance in which this power has been exercised by this or any other Court not mentioned in the case just referred to. I observe that Civil Revision Petition No. 1396 of 1916 is not an instance of the exercise of this power and was referred to as such only owing to the unfortunate misdescription of the case in the judicial index of this Court in Civil Revision Petition No. 888 of 1916 and A. A. O. Nos. 205 and 206 of 1914; also neither of the learned Judges in fact expressed any opinion in favour of the use of the power unless in most exceptional cases.

(1) **47 Ind. Cas. 981 ; 35 M. L. J. 868.**

With these observations I again reach the same conclusion as in my previous decision and, for the same reasons. I would therefore dismiss the Civil Miscellaneous Petition No. 848 of 1922 and Civil Revision Petition No, 193 of 1922.

Devadoss, J :—I agree.

V. N. V.

Petitions dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1624 OF 1919.

May 11, 1923.

Present :—Justice. Sir Nalini Ranjan Chatterjee, Kt., and Mr. Justice Surawardy, Judges of this Court.

PROBODH CHANDRA MITTER—PLAINTIFF—APPELLANT

versus

HARISH CHANDRA NASKAR, WHO APPEARED; AND PANCHANAN HAZRA, WHO DID NOT APPEAR IN THIS APPEAL—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VII *of* 1885), *s.* 60—*proprietor* ijaradar—*Entire estate—Rent payable to two Proprietors—Rent payable to third person—Object of section—Land Registration Act* (VII *of* 1876), *ss.* 78, 81, *applicability of.*

Section 60 of the Bengal Tenancy Act deals with cases where rent is due to the proprietor of an estate. An *Ijaradar* is not a proprietor, his case, therefore, is not covered by the section.

Although a proprietor may be the owner of an estate or a part of an estate, section 60 merely speaks of "*proprietor of that estate*," which indicates an entire estate. Therefore, none of the several persons, who are individually registered as proprietors of the fractional share of an estate, is proprietor of the estate.

The case where rent is payable to two or more proprietors, the extent of whose interest is required to be registered under the second part of section 78 of the Land Registration Act, is not dealt with by section 60 of the Bengal Tenancy Act.

The words "that the rent is due to a third person," in the concluding portion of section 60 of the Bengal Tenancy Act, refer to a third person whose name is not registered at all.

PROBODH CHANDRA *v.* HARISH CHANDRA.

The object of section 60 of the Bengal Tenancy Act is to afford indemnity to tenants who pay rent to the person whose name is registered under the Act, and to debar them from pleading in defence to a claim for rent by such person that the rent is due to a third person ; but the section has not provided for cases where the names of all the part proprietors have been registered under the Land Registration Act.

Section 60 of the Bengal Tenancy Act is not concerned with questions of title.

Section 81 of the Land Registration Act has no application to a person who is not himself a proprietor, but who has an interest subordinate to a proprietor.

Section 78 of the Land Registration Act has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act.

Appeal against the decree of the Additional District Judge of Zillah 24 Pargannas, dated the 14th of April 1919, affirming the decree of the Subordinate Judge, 4th Court of that district, dated the 17th of September, 1917.

Babu *Bijan Kumar Mukherjee*, for Appellant.

Babu *Ram Ch. Mozumdar*, *B. Harendra Kumar Sarbadhicary*, for Respondents.

JUDGMENT.—This appeal was heard once before [see the judgment reported in (1)] but as the judgment proceeded partly upon a concession made by the pleader for the appellant, the judgment was set aside on review, and the appeal has been heard again.

The appeal arises out of a suit for rent under the following circumstances : One Purna was the proprietor of an estate in the Sunderbuns. He sold an 8-annas share of the estate to one Chandranath on the 9th August 1897. The latter got his name registered in respect of the 8 annas share under the Land Registration Act. About six years afterwards, on 12th May 1903, the defendant No. 1 took a lease of 400 bighas of land from Purna alone and executed a registered *kabuliat* in his favour agreeing to pay a fixed rent of Rs. 350. He appears to have paid rent for some years to Purna alone. Purna died leaving two sons and the plaintiff is the *Ijara ar* of an 8-annas share of the estate from the sons of Purna, whose names were registered in respect of the 8-annas share. The plaintiff brought a suit against the defendant for the rent reserved in the lease. The defendant pleaded that he had paid an 8-annas share of the rent to the representative of Chandranath who was registered as proprietor of an 8 annas share of the estate under the Land Registration Act and that, therefore, the plaintiff was not entitled to rent in respect of the 16-annas share. The Courts below have given effect to this contention and the plaintiff has appealed to this Court.

(1) 64 Ind. Cas. 58 ; 48 C. 1078.

Now, the name of Purna was registered under the Land Registration Act in respect of 8-annas share; and, although the name of Chandranath was registered in respect of the other 8 annas share, he had nothing to do with the lease which was granted by Purna alone and without reference to his co-sharer Chandranath. It appears that the land was not cultivated at the time when it was let out as it was to be held rent-free for the first few years. The position, therefore, was this : one of the co-sharers alone let out a portion of the land of the estate in order to make a profitable use of it by bringing it under cultivation through his tenant. Whether Chandranath had similarly let out other lands or not, and what the arrangement was between the co-sharers, we do not know. But this much is certain that Chandranath had nothing to do with this lease of 400 bighas.

The first question for consideration is whether the provisions of section 60 of the Bengal Tenancy Act are applicable to the present case. That section lays down that where rent is due to the proprietor, manager, or mortgagee of an estate the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate or of his agent authorised in that behalf, shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. We are of opinion that section 60 does not apply to the present case. In the first place, that section deals with cases where rent is *due to* the *proprietor* of an estate. Here the rent is not due to the prorietor as the plaintiff is not a proprietor, but is an *Ijaradar*, and as *Ijaradar* the plaintiff could not get his name registered under the Land Registration Act In the next place, even assuming that the rent can be said to be due to a proprietor because it was originally payable to Purna who was a

proprietor, the section speaks of the proprietor of *an estate*, and "the receipt of the person who is registered under the Land Registration Act as proprietor of that estate." Purna, to whom the rent was originally due under the *kabuliat*, executed by the defendant, was, and after his death his sons were, the proprietors of an 8-annas share of the estate. Chaudranath, and after his death his representatives to whom the defendant is said to have paid a moiety of the rent and from whom he obtained a receipt therefor, are registered as the proprietors of another 8-annas share of the estate. So that neither Purna s sons, nor the representatives of Chandranath are the proprietors of *an estate*

No doubt, "proprietor" is defined in section 3, clause (2) as a person owning an estate or part of an estate, and it is contended that Chandra nath who was the owner of an 8-annas share of the estate is a "proprietor." But section 60 lays down that the receipt of the person registered under the Land Registration Act "as proprietor of that estate" shall be a sufficient discharge, so that, although a proprietor may be the owner of an estate or a part of an estate, the section merely speaks of *proprietor of that estate* which indicates an entire estate. The same observations apply to the sons of Purna from whom the plaintiff obtained his *ijara*.

The expression "proprietor" is defined in section 3 (8) of the Land Registration Act as every person being in possession of an estate or of *any interest therein*, and section 78 of that Act lays down: "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered or as mortgagee unless the name of such claimant shall have been registered under this Act; and no person being liable to pay rent to two or more such proprietors, managers or mortgagees holding in common tenancy shall be bound to pay to any one such proprietor, manager or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager or mortgagee is registered bears to the entire estate or revenue-free property".

It appears, therefore, that the case where rent is payable to two or more proprietors the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt with in the second part of section 78 of that Act, is not dealt with by section 60 of the Bengal Tenancy Act.

The words "that the rent is due to a third person" in the concluding portion of section 60 of the Bengal Tenancy Act seem to refer to a third person whose name is not registered at all. The object of section 60 of the Bengal Tenancy Act appears to be, to afford indemnity to tenants who pay rent to the person whose name is registered under the Act, and to debar them from pleading in defence to a claim for rent by such person that the rent is due to a third person; but the section does not appear to have provided for cases where the names of all the part proprietors have been registered under the Land Registration Act.

In the case of *Abdul Aziz* v. *Kanthu Mallik* (1), it was held that "an unregistered part proprietor of an estate is not entitled to succeed as against the defendant who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor." In that case the name of the part proprietor (the plaintiff) was not registered, and it was pointed out by the learned Judges that there was no contest between two persons both of whom were registered as proprietors under the Act. What the precise position might have been if there had been a contest between two persons both of whom were registered under the Act was not considered in that case.

As already stated, although the name of Chandra nath was registered in respect of an 8 annas share of the estate he had nothing to do with the lease which was granted by Purna alone, and without reference to him. The land was not cultivated at the time of the lease, Purna as a co-owner could have himself cultivated the land and if, in order to make a profitable use of the lands, a portion (400 bighas) of the estate consisting of 4,000 bighas was let out by him to his tenant,

(2) 88 C. 512; 10 Ind. Cas. 467; 13 C. L. J. 693.

without any denial of Chandranath's right, Chandranath would not necessarily be entitled to a share of the rent merely on the ground of his being a co-sharer. It is true, that section 60 of the Bengal Tenancy Act is not concerned with questions of title, but if the defendant claims a discharge for the rent by reason of his payment to the heirs of Chandranath, he must bring his case strictly within the terms of the section, when he wants to defeat the suit for rent based upon a lease which he obtained from Purna alone, without reference to Chandranath, although the latter at that time had become co-owner of the estate to the extent of 8-annas.

The next question is whether the provisions of the Land Registration Act are applicable to the case. We have already referred to section 78 of that Act, the second paragraph of which lays down that, "no person being liable to payment to two or more such proprietors.....holding in common tenancy shall be bound to pay any one such proprietor.....more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor.....is registered bears to the entire estate....." Section 79 provides that that the receipt of any proprietor.....whose name and the extent of whose interest is registered under this Act shall afford full indemnity to any person paying rent to such proprietor. It is contended on behalf of the respondent that, having regard to the provisions of section 78 (second paragraph), the defendant would not be bound to pay more than an 8 annas share of the rent to the plaintiff, and under section 79 the receipt of the heirsof Chandranath whose names are registered with respect to an 8 annas of the estate, would afford full indemnity in respect to such share.

Section 81, however, provides: "Nothing contained in the three last preceeding sections shall be held to interfere with the conditions of any written contract." In the present case there was a written contract under which the entire rent was due to Purna and his successors. There is some difference of opinion as to the construction to be placed upon section 81 of the Act. See *Iswar Chandra Sera* v. *Kali Charan Santra* (3), and *Surja Kanta Ghatak* v. *Ananda Mohan Chatterjee* (4).

In our judgment before review, we followed the latter case treating the *ijaradar* as being in the same position as a proprietor, on the assumption that he is merely an assignee of the rent from the proprietor. But it is contended on behalf of the respondent that the plaintiff as *ijaradar* is merely a lessee, and that section 81 has no application to a person who is not himself a proprietor but who has an interest subordinate to a proprietor. We think this contention is correct. The plaintiff is a lessee under the proprietor. Section 81 seems to be a rider to sections 78 to 80, and as those sections deal with the case of proprietors, there is no reason to think that section 81 refers to cases of persons other than a proprietor. It is unnecessary, therefore, to consider this question of construction of section 81. But in that view neither section 78 nor 79 applies to the present case, as the plaintiff is an *ijaradar* and not a proprietor. In the case of *Sukurulla Kari* v. *Bama Sundari Dasi*, (5) it was held upon a construction of section 3, clause 1, sections 38 and 78 of Act VII of 1876, that a *patnidar* or an *ijaradar* is not a proprietor of an interest in an estate within the meaning of the Land Registration Act, and it is not necessary, therefore, for a *patnidar* or *ijaradar* to register his name under the Act to entitle him to sue. In the case of *Syed Serapat Hossain* v. *Tarini Prosad Dobey* (6), it was held that section 78 has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act. It may be said that if the proprietor himself was, under the section, under a legal disability to claim the rent, because his name was not registered, he could not, simply by granting a lease confer upon the lessee a right higher than what he possessed. This was considered in that case and the learned Judges (though with some hesitation) observed as follows: "Having regard to the fact that section 78 of Act XII of 1876 is the only provision which prohibits a proprietor from bringing a suit for recovery of rent against a person who is not bound to pay him such rent unless he gets his name registered it seems to us tha

(3) 43 Ind. Cas. 726 ; 27 C. L. J. 474 at p. 476.
(4) 24 Ind. Cas. 866.
(5) 1 C. W. N. xcii.
(6) 11 C. W. N. 141.

the plaintiff, being a person who does not come within this prohibitory section, cannot be said to be under the same legal disability as his assignor was." Having regard to the fact that the section in terms refers only to proprietors and not to lessees who are not required to get, and cannot get their names registered under the Land Registration Act, we agree with the view taken in the above case. On behalf of the respondents we were referred to an unreported decision of this Court in certain suits in which payment of an 8-annas share of the rent to Chandra nath's representatives was held to be a sufficient discharge for the rent. (See Second Appeal 1388 of 1918 and analogous cases decided by Teunon and Newbould, JJ., on 25th June 1920). Those cases, however, did not relate to the rent of the 400 bighas covered by the *kabuliat* in the present case, but related to other lands though of the same estate, and the questions considered by us do not appear to have been considered by the learned Judges in those cases.

We are accordingly of opinion (being the same which we held before review, though on different grounds) that the decrees of the Courts below should be set aside and the case remanded to the Court of first instance for decision of the other questions in the case and disposal of the case according to law. Costs to abide the result.

S. D. *Case remanded.*

LAHORE HIGH COURT.

CIVIL APPEAL CASE No. 2642 OF 1922.

March 15, 1923.

Present:—Mr. Justice Moti Sagar.

DALJIT SINGH, PLAINTIFF—APPELLANT

versus

HARI CHAND AND OTHERS, DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Necessity, proof of—Delay in suing, effect of—Antecedent debt contracted on security of ancestral property, validity of.

Where a plaintiff challenges an alienation after the expiry of a long time, his conduct in instituting the suit after a long delay is an important factor in determining the nature of the transaction and in finding out whether the alienation was or was not for necessity.

Where an alienation is effected to pay off an antecedent debt, it is not the duty of the alienee to make an enquiry into the nature and necessity thereof.

An independent debt, which is neither illegal nor immoral, contracted by a Hindu father on the security of joint family estate, is an antecedent debt.

A Hindu father has power to alienate the joint family property for an antecedent debt where such antecedent debt has been contracted on the security of the family property.

Second appeal from the decree of the District Judge, Ambala, dated the 24th July 1922, affirming that of the Munsif 1st class, Ambala, dated the 15th and 18th April 1922, dismissing the plaintiff's suit with costs.

Lala *Badri Das, R. B.*, for Appellant.

Dr. G.C. *Narang*, for Respondents.

JUDGMENT.—The facts of the case giving rise to this second appeal are very simple and may shortly be stated as follows:—

On the 13th of September 1907 the plaintiff's father Nanak Chand sold the land in dispute to the defendants for a sum of Rs. 700. On the 20th of August 1919 the plaintiff brought the present suit for a declaration that the sale was without consideration and legal necessity and that it shall not affect his reversionary rights after the death of his father. Both the Courts below have concurrently held that the land sold was ancestral *qua* the plaintiff and that the sale was for consideration and legal necessity. As a result of this finding the suit has been dismissed in its entirety, and the plaintiff has now come up in second appeal to this Court.

It appears that, at the time when the sale was made, another plot of land also owned by the plaintiff's father was under mortgage with one Ghasi for a sum of Rs. 614-1-0 and that the present sale was effected in order to pay off this mortgage. It is argued by Mr. Badri Das that the learned District Judge has given no finding as to the area which was under mortgage with Ghasi, that it has not been shown that that mortgage could not have been redeemed by making another mortgage in favour of the defendants in respect of the land in suit, and that it has not been proved that the alienation in question was an act of prudence or of good management on the part of the plaintiff's father. Dr. Gokal Chand, on the other hand, contends, that the finding as to necessity is clearly a finding of fact and

that it cannot be impugned in second appeal. I think there is force in this contention and that it must prevail. The statement of Ghasi clearly shows that he was the mortgagee of a certain plot of land near the village *abadi* and that the land sold to the defendants was of a much inferior quality to that which was under mortgage with him. It is also in evidence that by the sale in favour of the defendants Ghasi had been paid off and that the land under mortgage with him had been redeemed. The mere fact that the area of land which was under mortgage with Ghasi is not known is not sufficient in my opinion to prove that the sale in favour of the defendants was without necessity. It is also clear from the evidence that the defendants had expended a large amount of money in improving the land in suit and that the plaintiff, who is now about 25 years of age and lived in the same vilage, was fully cognisant of those improvements. It should also be noted that the suit was instituted shortly before the period of limitation was going to expire, and though there is no doubt that the suit is within limitation, yet the conduct of the plaintiff in instituting the suit after such a long time is an important factor in determining the nature of the transaction and in finding out whether the alienation was or was not for necessity. It is clear that the alienation was effected to pay off an antecedent debt and, as held in *Jhandu* v. *Niamat Khan* (1), it was not the duty of the alienee to make an inquiry into the nature and necessity thereof. In my opinion the necessity as to this alienation has been fully established and no objection can validly be taken to this finding in this appeal.

Next, it is argued on the authority of *Sahu Ram Chandra* v. *Bhup Singh* (3) that a debt contracted on the security of ancestral property is not an antecedent debt, the discharge of which would constitute a legal necessity within the meaning of the Full Bench ruling *Devi Ditta* v. *Saudagar Singh* (2) with this contention I am unable to agree. The Privy Council case of *Sahu Ram Chandra* v. *Bhup Singh* (3) was explained in a Full Bench decision of the Madras High Court reported as *Arumughan Chetty* v. *Muthu Koundan* (4), and it was there held that an independent debt, which was neither illegal nor immoral, contracted by a father on the security of joint family estate, antecedent to a mortgage sued on, was an antecedent debt so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage. The rule of law is well settled that a Hindu father has power to alienate the joint faimly property for an antecedent debt where such antecedent debt has been contracted on the security of the family property, and this rule is not affected in any way whatever by the observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2). I overrule the objection and am of opinion that the learned District Judge was right in holding that the sale was for valid necessity.

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

Z. K. *Appeal dismissed.*

(1) 54 Ind. Cas 842 ; 1 L. 472.
(2) 65 P. R. 1900 ; P. L. R. 1900, p. 322.
(3) 39 Ind. Cas. 280; 39 A. 487; 21 C. W. N. 698 ; 1 P. L. W. 557 ; 15 A. L. J. 487 ; 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. 218 ; 44 I. A. 126 (P. C.)
(4) 52 Ind. Cas. 525 ; 42 M. 711 ; 9 L. W. 565 ; (1919) M. W. N. 409 ; 37 M. L. J. 166 ; 26 M. L. T. 96 (F. B.).

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 267 OF 1920.
March 16, 1923.

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

NAGAPPA CHETTY—APPELLANT (PETITIONER 2ND DEFENDANT)

versus

M. R. P Z. MUTHURAMAN CHETTY (DEAD) AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908) s. 2 (11), O.XXI, r. 22—Defendant attaining majority, whether "legal representative"—Execution of decree.—Judgment debtor attaining majority - Notice, fresh, whether necessary.

A party who on attaining majority is entitled to appear to the exclusion of the guardian appointed during his minority is not a "legal representative" within the meaning of s. 2 of the Code of Civil Procedure and is not entitled to fresh notice of execution proceedings under O. XXI, r. 22 of the Code.

NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY.

Where such a party is aware of the decree under execution and the execution proceedings, and does not appear and take any objection thereto, he is not, by reason merely of the failure to give him notice thereof afterwards, entitled to question the validity of the execution proceedings and the Court sale following thereon.

Ramachari v. *Duraisami Pillai* (1), *Tanguturai Jagannathan* v. *Seshagiri Rao* (2), *Krishnaswami Aiyangar* v. *Soorikutti Ganapathy Aiyar* (3), *Radhakrishnaswami Naidu* v. *Annamalai Chettiar* (4), *followed.*

Appeal against the order of the Court of the Subordinate Judge of Sivaganga, dated 2nd August 1920, in E. A. No. 231 of 1920 in E. P. R. No. 947 of 1919 in Original Suit No. 60 of 1916.

Messrs. *V. Muthu Krishna Iyer* and *A. Swaminatha Iyer*, for the Appellant.

Mr. *C. V. Ananta Krishnier*, for the Respondents.

JUDGMENT.—We have heard arguments in this case at considerable length, both as to the age of the appellant and also on the law applicable to the case, as it was presented to the lower Court, on the footing that the execution proceedings and the sale went through without his being impleaded as a major, although he had become a major prior to the date on which the sale was held. We, however, need not deal at length with those arguments, because two other considerations, to which apparently the lower Court attached very litttle weight, are in our opinion decisive.

The argument that the appellant ought to have had notice and that the failure to give him notice entitles him to have the sale set aside can only hold good, if he is entitled to notice under some provision of law. The provision relied on is O. XXI, r. 22 of the Code of Civil Procedure. The argument for the appellant proceeded on the footing that either because more than one year had elapsed between the various applications for execution or because his attainment of majority brought him within the provision regarding the making of the application against a legal representative of the judgment-debtor, he was entitled to notice. But in fact, as reference to the B diary shows, that Execution Petition No. 947 of 1919 on which the sale was held, was presented within one year of the previous application, E. P. No. 1142 of 1918, and that was within one year of the decree. The contention that the application was or could be regarded as having been made against the legal representative of the judgment-debtor after the 2nd defendant attained his majority is clearly unsustainable. The second defendant was the judgment-debtor and there was no question of representation in connection with his being entitled to come before the Court, not through a guardian but in his own person. Certainly, a major who is entitled to appear to the exclusion of the guardian appointed during his minority is not within the definition of "legal-representative" under section 2 of the Civil Procedure Code. On this ground alone the appeal might be dismissed.

There is, however, another ground for the same conclusion. It is found by the lower Court that the appellant became aware of the decree under execution and the execution proceedings, certainly in February or March 1920. That is not disputed and it could not be. For on 14th April 1920 he filed a suit for a declaration that the decree was not binding on him. Along with the suit he filed a petition for stay of the sale, that petition being dismissed on the date on which the sale was held, 20th April 1920. All this was done in the Court in which execution was proceeding. It is clear that the petitioner was perfectly aware of the proceedings. Yet he did not think fit to appear in them or to ask the Court to deal with the objections to them. The case is then covered by *Ramachari* v. *Duraiswami Pillai* (1); *Tanguturai Jagannadham* v. *Seshagiri Rao* (2); *Krishnaswamy Aiyangar* v. *Seerikutti Ganapathy Aiyar* (3); and *Radha Krishnaswami Naidu* v. *Annamalai Chettiar* (4). The appeal fails and is dismissed with costs.

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

(1) 21 M. 167 ; 7 Ind. Dec (N. S.) 474.
(2) 37 Ind. Cas. 887 ; 20 M. L. T. 479.
(3) 69 Ind. Cas 903 ; 14 L. W. 688 ; (1921) M. W. N. 394.
(4) 70 Ind. Cas. 865 ; 43 M. L. J. 92 ; 15 L. W. 648 ; 31 M. L. T. 122 : (1922) A. I. R. (M.) 801 : (1922) M. W. N. 655.

SRIMATI HARIDASI DEBI *v.* PRAMATHA BHUSAN

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 2016 OF 1920.
May 16 1923.

Present: -Justice Sir Asutosh Mookerjee, *Kt.*, C.S.I. and Mr. Justice Rankin.

SRIMATI HARIDASI DEBI, WIDOW OF PANCHANON CHAKRABARTY—PLAINTIFF--APPELLANT

versus

PRAMATHA BHUSAN MUKHERJEE AND OTHERS--DEFENDANTS—RESPONDENTS.

Probate Court—Jurisdiction to deal with title to property- Compromise decree passed by Probate Court—Property more than Rs. 100 in value—Title, whether can be destroyed by decree.

A Probate Court has no jurisdiction to deal with title to property covered by a testamentary instrument. Therefore, title to property cannot be abandoned by a compromise decree passed by a Probate Court in accordance with the terms of the compromise, nor can such abandonment, whether stated orally or written in the petition of compromise, destroy title to immoveable property exceeding Rs. 100 in value, unless there is a registered conveyance.

Appeal against the decree of the District Judge of Zillah Jessore, dated the 3rd of May 1920, reversing the decree of the Subordinate Judge of that district, dated the 31st of May 1919.

Dr. *Jadunath Kanjilal*, for the Appellant.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of possession of land upon establishment of title. The disputed property belonged to one Prannath Chakrabarty who left three sons, Bisweswar, Panchanon and Baroda. Baroda died childless with the result that the one-third share which he had taken by right of inheritance became vested in his two brothers. Thereafter Panchanon died, leaving a widow who is the plaintiff in this litigation. The surviving brother, Bisweswar, subsequently died, after he had made a testamentary disposition of his properties. An application was made by the defendant for probate of his Will. The application was opposed by the plaintiff. On the 24th August, 1912 the parties to the probate proceedings came to terms and a week later the probate was granted, inasmuch as the lady withdrew her opposition. On the 7th June 1918, the lady instituted the present suit to recover possession of the one-half share of the property which belonged to her husband. *Prima facie*, there is no answer to the claim. The husband of the plaintiff was unquestionably entitled to one-half share which upon his death was taken by his widow by right of inheritance. The defendant, who claims under the Will of Bisweswar, resists the action on the ground that, by reason of events which had happened in the probate proceedings, the lady was not competent to maintain her claim. The Subordinate Judge overruled this contention and decreed the suit. Upon appeal, the District Judge has taken a different view and has dismissed the suit. We are of opinion that the view taken by the District Judge cannot be supported.

The appellant has urged that as the property in dispute exceeds Rs. 100 in value, the undoubted title of the plaintiff could have been transferred by her only in accordance with the provisions of the Transfer of Property Act, namely, by means of a registered conveyance. In support of this view reference has been made to the decision of the Judicial Committee in *Maung Shew Goa* v. *Maung Inn* (1), which was applied in *Gangaram Rama* v. *Sakharam* (2). As there is no registered conveyance in this case, the title, *prima facie*, continues in the plaintiff.

There is no further allegation that the plaintiff agreed, at any time, to convey to the defendant her interest in the estate of her husband. No question can thus arise as to a possible right of the defendant to claim specific performance of an agreement to sell. There is, consequently, no room for the application of the doctrine of *Walsh* v. *Lonsdale* (3), as explained in *Hari Pada Ghose* v. *Nirod Krishna Ghose* (4), and *Aminullah Choudhury* v. *Mahabat Ali* (5). That principle is that when, in pursuance of an agreement to transfer property, the intended transferee has

(1) 38 Ind. Cas. 938 ; 44 I. A. 45 ; 44 C. 542 ; 21 M. L. T. 18 ; 15 A. L. J. 82 ; (1917) M. W. N. 117 ; 32 M. L J. 6 ; 25 C. L. J. 108 ; 19 Bom. L. R. 179 ; 21C. W. N. 500; 5 L. W. 582; 10 Bur. L. T. 69 (P.C).
(2) 59 Ind. Cas. 796 ; 22 Bom. L. R. 1196.
(3) (1882) 21 Ch. D. 9 ; 52 L. J. Ch. 2 ; 46 L. T. 858 ; 31 W. R. 109.
(4) 61 Ind. Cas. 687 ; 33 C. L. J. 437.
(5) 60 Ind. Cas. 457 ; 25 C. W. N. 715.

taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined.

As a last resort, the defendant has invoked the aid of the doctrine of estoppel. Our attention has been drawn to the petition of compromise filed in the probate proceedings on the 28th August, 1912. The terms of that petition are as follows:

"(1) Having come to know that the Will is a genuine one, the opposite party has given up the objection she previously filed against the Will; (2) the opposite party or her husband had no interest in respect of the property described in the Will, and, in future, she will not be entitled to lay any claim thereto; if she prefers any such claim, it will not be accepted; (3) the opposite party will be entitled to occupy half the homestead described in the Will during her lifetime, but she will not be entitled to make a gift of it or to sell it or to transfer it otherwise. Neither the petitioner nor his heirs or representatives shall be entitled to exercise any acts of possession during the life-time of the opposite party, but after the death of the opposite party, that property will revert to the possession of the petitioner. The heirs or representatives of the opposite party shall not be entitled to raise any objection to such a course; (4) no costs remain due by any of the parties to the other."

We have been informed that the decree was made in the probate proceedings in accordance with these terms; but the decree could not possibly decide any question of title to the property covered by the Will. It was ruled by this Court in the case of *Behary Lal* v. *Juggomohan* (6), which was followed in *Jagadindra* v. *Madhusudan* (7), that a Probate Court has no jurisdiction to deal with title to property covered by a testamentary instrument. Sir Richard Garth, C. J., stated that upon a *bona fide* application for probate of a Will it is not the province of the Court to which the application is made to go into questions of title with reference to the property which the Will purports to dispose. The position, consequently, is that at the worst the plaintiff abandoned her claim to the estate of her husband. But the abandonment, whether orally stated or recited in the petition, could not destroy her title and we have not been able to discover how the principle of estoppel can assist the respondent. We are of opinion that the defendant has no answer to the suit and the Subordinate Judge rightly decreed the claim.

The result is that the decree of the District Judge is set aside and that of the Subordinate Judge restored with costs in all the Courts.

S. D. *Appeal allowed.*

(6) 4 C. 1; 2 C. L. R. 422; 1 Shome L. R. 185; 2 Ind. Dec. (N. S.) 1.

(7) 27 Ind. Cas. 24; 20 C. L. J. 307.

LAHORE HIGH COURT.

CIVIL REVISION NO. 909 OF 1922.

March 20, 1923.

Present:—Mr. Justice Moti Sagar.

ISHAR SINGH—PLAINTIFF—PETITIONER

versus

SHARAF AND KHADIM HUSAIN, SONS AND LEGAL REPRESENTATIVES OF FAZAL, DECEASED—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. V, r. 1, O. IX, r. 8—Date fixed for plaintiff to attend and find out date of hearing—Absence of plaintiff—Dismissal for default, legality of—Procedure.

Where no date has been fixed for the appearance of the defendant within the meaning of O. V, r. 1 of the Civil Procedure Code, the Court has no power to dismiss the suit in default under O. IX, r. 8 of the Code.

When a date is fixed for the plaintiff to attend and find out what date has been fixed for the appearance of the defendant, and the plaintiff fails to attend on that date, the Court ought to fix a date for the appearance of the defendant, and to proceed with the suit under O. IX, r. 8 of the Code, if on the date so fixed the plaintiff fails to put in an appearance.

Petition under section 115, Civil Procedure Code, and section 44, Act VI of 1918, as amended by Act IV of 1919, for revision of the order of the Munsif 1st Class, Gujar Khan, District Rawalpindi, dated the 19th January 1922.

Lala *Anant Ram Khosla*, for the Petitioner.

Nemo, for the Respondents.

JUDGMENT.—The facts of the case out of which this application for revision has arisen are briefly as follows :—

On the 16th January 1922 the plaintiff instituted a suit for the recovery of Rs. 740 on a *bahi* account in the Court of the Senior Subordinate Judge of Rawalpindi. The Senior Subordinate Judge made over the case to the Munsif at Gujar Khan for disposal, and ordered that the plaintiff should appear in his Court on the 18th January 1922. On the 17th January 1922 the plaintiff filed an application before the District Judge for the transfer of the said case from the Court of the Munsif at Gujar Khan to some other Court. This application was set down for hearing for the 18th January 1922 and rejected by the District Judge on that very date. On the 18th January 1922 the plaintiff failed to appear in the Court of the Munsif with the result that his suit was dismissed under Order IX, rule 3 of the Civil Procedure Code. On the 19th January 1922 the plaintiff applied under Order IX, rule 4 to the Munsif that his suit should be restored to the pending file. This petition was rejected by the Munsif on the same day on the ground that sufficient cause for plaintiffs' non-appearance on the 18th of January 1922 had not been made out.

An appeal against this order was preferred before the District Judge but rejected, as no appeal lay. The plaintiff has now filed an application for revision against the order of the Munsif at Gujar Khan rejecting his application to readmit the suit which was dismissed in default under Order IX, rule 3 of the Civil Procedure Code.

It is contended on his behalf that the procedure of the Munsif was wrong and that he had no jurisdiction to dismiss the case in default on the 18th January 1922. This contention, in my opinion, is well founded and must prevail. It has been held in *Indar Singh* v. *Sheru* (1), a case directly in point, that where no date has been fixed for the appearance of the defendant within the meaning of Order V, rule I, Civil Procedure Code, the Court has no power to dismiss the suit in default under Order IX, rule 3. It is clear that the 18th of January was not a date fixed for hearing in the case but was a date fixed for the plaintiff to attend and find out what date had been fixed for the appearance of the defendant. As held in *Indar Singh* v. *Sheru* (1), it was quite unnecessary for the plaintiff to appear on this date, and what the Court ought to have done was to fix a date for the appearance of the defendant, and to proceed with the suit under Order IX, rule 3, if on the date so fixed the plaintiff failed to put in appearance.

I accept the revision and, setting aside the order of the trial Court, direct that the suit be restored to the pending file and that it should be proceeded with in accordance with law. I make no order as to costs.

Z. K. *Revision allowed.*

(1) 60 Ind. Cas. 475; 22 P. W. R. 1921.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 66 OF 1922.
April 25, 1923.

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

JANAKI RAM VILAS NIDHI, LTD., BY ITS SECRETARY RANGAPPA NAICKER—APPELLANT—RESPONDENT

versus

THE OFFICIAL RECEIVER, COIMBATORE—RESPONDENT—PETITIONER.

Provincial Insolvency Act (III *of* 1907), *ss.* 16 (6), 36, 37—*Fraudulent preference—Burden of proof—Intention to prefer—Mortgage executed to pay off creditors, validity of—Debt due to insolvent paid to his creditors—Discharge of liability.*

Under section 37 of the Provincial Insolvency Act of 1907, the onus is upon the Official Receiver to show that the intention of the insolvent was to prefer one creditor to others and there must be some evidence of intention to prefer other than the mere fact that he was insolvent.

Nripendranath v. *Asutosh*, 21 C. L. J. 167, relied on.

If money is raised by an insolvent by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying the creditors, if the mortgagee acts *bona fide*, the transaction would be valid against the Official Receiver.

By virtue of section 16 (6) of the Provincial Insolvency Act of 1907, the property of the insolvent, by reason of the principle of relation back, on the date the

insolvency petition is presented, becomes the property of the Official Receiver, and a payment made by a debtor of the insolvent to his creditors after that date would not relieve him from liability to pay the amount to the Official Receiver.

Case, law discussed.

Appeal against the order, dated 24th September 1921, of the District Court of Coimbatore in I. A. No. 6 of 1921.

Mr. *S. Subrahmanya Iyer*, for the Appellant.

Messers. *S. Muthiah Mudaliar* and M. *Krishna Bhardi*. for the Respondent.

JUDGMENT.

Oldfield, J :—I agree with the judgment my learned brother is about to deliver.

Devadoss, J :—This appeal is against the order of the District Judge of Coimbatore setting aside, under section 54 of the Provincial Insolvency Act, a mortgage in favour of the appellant by the insolvent.

The facts of the case are :—One Sama Naicken who was a trader become involved in debt. On the 7th November 1918 he executed an hypothecation deed in favour of the appellant which is a Bank called Sri Janaki Rama Vilasa Nidhi for Rs. 6,000, the consideration for the document being Rs. 2,000 due to the Bank itself, Rs. 2,000 for paying Rama Vilas Nidhi of Pappanaickenpalayam, Puthur, and Rs. 1,000 to Idigarai Devalaya Paripalana Nidhi and Rs. 973-8-0 principal and interest due to one Kasturi Naicken, and Rs. 26 8-0 received by the mortgagor in cash. Sama Naicken, the insolvent, according to the Schedule filed by him, was indebted to the extent of Rs. 38,000 at the time of the execution of the mortgage-deed Ex. A. On 19th November 1918, Rama Vilasa Nidhi presented a petition for adjudication of Sama Naicken as insolvent and he himself presented a petition for adjudication on 28th November 1918 and he was subsequently adjudicated. The Official Receiver of Coimbatore moved the District Court to set aside the mortgage either as a voluntary transfer under section 36 or as a fraudulent preference under section 37 of the Provincial Insolvency Act. The appellant contended that it was a *bona fide* transaction entered into for the purpose of discharging the debt of Sama Naicken. It is urged in appeal that the onus is upon the Official Receiver to show that the intention of the insolvent was to prefer the appellant to other creditors, and *Nripendro Nath* v. *Asutosh Ghose* (1) is relied on by Mr. Govindaraghava Aiyar who appears for the appellant. The law as to the burden of proof is stated clearly in Williams on Bankruptcy, 10th Edition, p. 303; "The balance of authority would seem, therefore, to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor other than the mere fact that he was insolvent." In this case it is proved that the insolvent was in embarrassed circumstances, that he had debts to the extent of Rs. 38,000 at the time of insolvency and that, according to his own showing, his assets amounted to Rs. 25,000 of which Rs. 16,000 was in the shape of cotton with one Kuppusami Naidu, and it has not been proved that that quantity of cotton was property in the order and disposition of the insolvent, or that the Official Receiver was able to get the cotton or its value from Kuppusami Naidu. There is no evidence that the appellant Bank either pressed for payment of his debt or that there was any strong motive which could influence the insolvent to give a mortgage in favour of the appellant and which could not be attributable to his intention to prefer. The question whether the rest of the consideration, namely Rs. 4,000, was paid by the Bank *bona fide*, in order to sustain the transaction entered into with a person who was on the brink of insolvency is not free from doubt. It was contended, and I think rightly, that though the evidence may be taken to establish that the insolvent had an intention to prefer Rama Vilas Bank, the Idigarai Bank and Kasturi Naicken, his maternal uncle, that would not vitiate the transaction in favour of the appellant. If money is raised by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying the creditors, if the mortgagee acts *bona fide* the transaction would be valid against the Official Receiver. So far as Rs. 4,000 is concerned, the transaction cannot be impeached as a fraudulent preference because it was not a debt due to the mortgagee, but it was cash got from the mortgagee for paying certain

(1) 29 Id. Cas. 128; 21 C. L. J. 167; 19 C. W. N. 157.

creditors of the insolvent, it may be with a view to prefer them. Therefore, so far as that amount is concerned, section 54 of the present Provincial Insolvency Act can have no application. But the question is whether the transaction offends against section 53 of the present Act or section 36 of the previous Act. In this connection, a few facts have to be considered. As I have said, Exhibit A was executed on 7th November 1918. Application for loan was made on 3th November 1918 and the report as regards the sufficiency of the security was made on the same day by the Secretary of the Bank. The insolvent's father was one of the directors of the appellant Bank and, according to the appellant's first witness, "Rama Naicken, the Director who has sanctioned the loan in Exhibit II, is insolvent's father." Exhibit II is the application by the insolvent to the appellant-Bank for the loan of Rs. 6,000. One Narayana Naicken filed a suit, O. S. No. 97 of 1918, against the insolvent and presented an application on 11th November 1918 for a temporary injunction restraining the appellant-Bank from paying the mortgage amount of Rs. 6,000 to Sama Naicken's creditors till the disposal of the suit. The appellant-Bank objected to the injunction on the ground that the appellant was not a party to the suit and that no injunction could, therefore, issue against one who was not a party to the suit. The District Munsif cancelled the temporary injunction on 3rd December 1918. The Rama Vilas Bank presented a petition on 19th November 1918 for the adjudication of Sama Naicken as insolvent and he himself presented a petition for the same purpose on 28th November 1918. The appellant-Bank paid through its Vakil by insured post Rama Vilas Bank Rs. 2,000 on 18th December 1918 and Idigarai Bank Rs. 1,000 on 16th February 1918. Under section 16 (6) of the Provincial Insolvency Act "an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made." The payments by the appellant-Bank to the creditors of Sama Naiken after the presentation of the Insolvency Petition upon which an order of adjudication is made would not be valid against the Official Receiver. The property of the insolvent, by reason of the principle of relation back, on the date the insolvency petition was presented, became the property of the Official Receiver, and a payment made by the appellant-Bank to the creditors would not relieve it from its liability to pay the amount to the Official Receiver. It is not suggested that the appellant-Bank was unaware of the presentation of the insolvency petition. On the other hand, there is a statement of the 1st witness for the appellant-"We sent the money by insured post of our own accord. Before we remitted money, Rama Vilas Bank had applied to declare the debtor an insolvent." It is also in evidence that the appellant-Bank was aware that the insolvent had other debts to discharge and that he would not give security to the Rama Vilas Bank as he had a large number of debts to pay. It is not suggested that the appellant-Bank had undertaken to pay the three creditors to whom the amount of Rs. 4,000 was due and that the appellant-Bank could not, after undertaking to pay, withdraw that undertaking on hearing that Sama Naicken had presented a petition for adjudication. From the evidence it is clear that the appellant-Bank paid these sums voluntarily to the creditors of Sama Naicken. From a reading of Ex. A it is clear that the mortgage amount was to be paid to the mortgagor himself, and there is no undertaking in Ex. A that the appellant-Bank to pay directly any of the creditors of the insolvent.

Taking all these circumstances into consideration, I hold that the mortgage under Ex. A is not a *bona fide* transaction and is, therefore, void against the Official Receiver under section 30 of the Provincial Insolvency Act.

Mr. Govindaraghava Iyer on behalf of the appellant suggested that if that was the view that would be taken, he should be given an opportunity to meet the case and that such a case was not put forward in the lower Court. The Official Receiver made his application under sections 53 and 54 of the present Act, corresponding to sections 36 and 37 of the old Act, and it cannot be said that the appellant had not an opportunity of meeting the case put forward by the Official Receiver.

The next question is, what is the order to pass. So far as Rs. 2,000 a portion of the consideration of the mortgage under Ex. A is concerned, it was with the view to prefer the appellant-Bank that security under Ex. A

was given. As regards Rs. 4,000 the appellant-Bank paid the creditors knowing the circumstances evidently with the object of screening the property from the creditors and, in the circumstances, it cannot be said to be acting *bona fide* in paying the creditors of the insolvent after an application for adjudication was made. The order of the learned District Judge is confirmed with the variation that the transaction is void under section 30 of the Provincial Insolvency Act. The appeal fails and is dismissed with costs. The Official Receiver may take any action he thinks proper against the Rama Vilas Bank, Idigarai Bank and Kasturi Naicken who have been paid in full by the insolvent. The attention of the Official Receiver is drawn to *In re Payne, Ex-parte Read* (2) and *In re Blackpool Motor Car Co., Ltd., Hamilton* v. *Blackpool Motor Car Company Limited* (3).

V. N. V.

Z. K. *Appeal dismissed.*

(2) (1897) 1 Q. B. D. 122; 66 L. J Q. B. 71; 45 W. R. 190 ; 45 L. J. 816 ; 3 Manson 309.

(3) (1901) 1 Ch. 77; 70 L. J. Ch. 61; 49 W. R. 124; 8 Manson 193,

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PATNA HIGH COURT.

CIVIL APPEAL No. 1008 OF 1921.

June 7, 1923.

Present :—Mr. Justice Foster.

HUKUM MAHTO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SANT SAHO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Suit by father to recover possession of family land, nature of—Co-parceners, whether bound by result of suit.

The question whether a Hindu father represents his co-parceners in a particular litigation is a question to be decided with reference to the circumstances of each case. [p. 20, col. 2.]

There is a great difference between the case of a Hindu father suing in respect of contracts which the Mitakshara law empowers him as manager to make on behalf of the family and a father suing in respect of rights in immoveable property, rights which he can only hold equally with his co-parceners. At the same time, the right of the father and of the Manager to represent the joint family in the latter class of suits has been recognised traditionally in the Courts. Where the interest of a joint undivided family is in issue and one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, that decree *may* afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. [p. 20, col. 2, p. 21, Col. 1.]

A suit by a Hindu father for recovery of possession of land alleged to belong to the joint family must be deemed to be a representative suit on behalf of all the co-parceners and the latter are bound by the result of the suit. [p. 21, col. 1.]

Appeal from a decision of the Officiating Subordinate Judge of Muzaffurpur, dated the 21st March 1921, affirming a decision of the Additional Munsif of Motihari, dated the 3rd September 1920.

Messrs. *Rai T. N. Sahai* and *Anand Prasad*, for the Appellants.

Messrs. *Syed Mohammad Tahir* and *Ragho Prasad*, for the Respondents.

JUDGMENT.

Foster, J.—The facts of this case are as follows :—Hukum Mahto is the father of four sons and they form a joint Mitakhara family. In the course of a revisional record of rights in their village the defendants were recorded as the *raiyats* in possesssion of 10 *kathas* 2 *dhurs*, the property now in dispute. That property had admittedly once belonged to the uncle of Hukum Mahto and it is the defendants' case that they acquired the same by purchase. In the course of the Settlement operations a larger area, including this 10 *kathas*, 2 *dhurs*, had been at first recorded in the name of Hukum Mahto's son Makhoo Mahto. When the ultimate decision of the Settlement authorities was against the plaintiff, Hukum Mahto and his son Makhoo Mahto brought a suit for the following reliefs, stated briefly :—

A declaration that the record of rights is incorrect, recovery of possession and mesne profits.

The plaint is not on the record of this present case but it appears to be agreed between the parties that this is a correct statement of what happened. For some reason or other, in the course of that suit Hukum Mahto and Makhoo Mahto as plaintiffs applied for leave to withdraw the suit with permission to bring a fresh suit. The order on this application

was passed on the 1st November 1919 to the following effect :—

> "The plaintiffs are to pay the defendant "his costs within one month from this "date. On failure the suit will stand "dismissed".

The plaintiffs did not deposit the costs in Court within the appointed period, nor were the costs in fact paid till about eight months subsequently. On the 10th November 1919, that is, nine days after the order I have quoted, the present suit was instituted for the same reliefs as those of the previous suit and on the same cause of action; the only distinction in the form of the suit being that the plaintiffs were no longer only Hukum Mahto and his eldest son, but were Hukum Mahto and all his four sons. The defendant resisted the suit on the ground that the costs not having been paid within one month in the previous suit and that suit having in consequence been dismissed, the plaintiffs were debarred from bringing a fresh suit on the same cause of action. On the other hand, the plaintiffs stated that whatever may be the effect of the order as against Hukum Mahto and Makhoo Mahto, the right of the other plaintiffs who sued remained unaffected by the dismissal of the previous suit. The Munsif dismissed the present suit. In appeal to the Subordinate Judge this decision was upheld on the ground that in the previous suit Hukum Mahto sued not only for himself but in a representative capacity as manager on behalf of his three younger sons. This is the decision upon the correctness of which I have to pass judgment.

The provisions of the Civil Procedure Code that are pertinent to the question are sections 10 to 12 and Order XXIII, rule 1. Section 10 has only an unimportant bearing upon the question because it only affects the position of Hukum Mahto during the period between the 10th November 1919 when he filed the present suit and the 1st December 1919 when his suit became dismissed; during that period the previous suit must be considered to have been pending. Under clause (3) of Order XXIII, rule 1 it is provided that, where the plaintiff withdraws from a suit without permission to bring a fresh suit he shall.....be precluded from instituting any fresh suit in respect of such subject-matter. Section 11 provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.....litigating under the same title in a Court competent to try such subsequent suit and has been heard and finally decided by such Court; and section 12 provides that, where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which the Code applies.

The principal question in deciding this appeal appears to me to be whether Hukum Mahto in the previous suit represented his three younger sons. If he did represent them then they would undoubtedly have reaped the benefit of any decree obtained by him and it would be irrational to suppose that in those circumstances they would not also suffer the ill effects of the representative's failure in the suit. So, if Hukum Mahto was their representative and if he was precluded by the order of the Court from bringing a fresh suit, that order must debar the three younger sons just as much as their father. Against the contention that he was a representative it may be argued that there is nothing on the record that expressly shows that he sued as a representative and it may be argued that if he was suing as manager of the joint family, where was the necessity to join Makhoo, the eldest son, as co-plaintiff? In respect of the latter contention, a ready answer suggests itself, namely, that Makhoo's name stood in the record of rights before the dispute in the course of Settlement which resulted in the present cause of action. The question whether a Hindu father represents his co parceners is a question to be decided with reference to the circumstance of each case. There is a great difference between the case of a Hindu father suing in respect of contracts which the Mitakshara Law empowers him as manager to make on behalf of the family and a father suing in respect of rights in immoveable property, rights which he can only hold equally with his coparceners. At the same time, the right of the father and of the manager to repre-

sent the joint family in the latter class of suits has been recognised traditionally in the Courts. Where the interest of a joint undivided family is in issue and one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, that decree may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. This practice of the Courts has been referred to in *Jogendra Deb Roy* v *Funindro Deb Roy* (1). The question whether a manager of a joint Hindu family is competent to bring a suit under the Bengal Tenancy Act was raised in the case of *Muhammad Sadiq* v. *Khedan Lal* (2), but not decided. It was, however, decided that there was nothing to prevent such a manager from bringing a suit to recover possession of proprietor's private land. The present suit in regard to this first relief is obviously one which the plaintiff is empowered to make by virtue of section 111 A of the Bengal Tenancy Act. Such a relief can, of course, be claimed by any member of a joint Mitakshara family. But the second relief is for recovery of possession of land alleged to belong to the joint family and it follows that any coparcener who sues for such a relief as that, must be taken to be claiming to recover possession on behalf of the other members of the joint family. Therefore, from the very nature of the suit it appears to me that Hukum Mahto in the previous suit must be deemed to have been suing in a representative capacity; for, otherwise, I do not see how he could claim recovery of land from a person who alleges that he has purchased from a deceased member of the plaintiffs' family. Where a manager or the head of a family sued for such a relief as this, it is always open to the defendant under Order I, rule 13 of the Code to raise a plea of defect of parties, but if the plea is not raised at the earliest opportunity it will not affect the progress of the suit. I do not see how I can hold otherwise than that Hukum Mahto in the previous suit not only sued on his own behalf but also on behalf of those members of the joint family who had a title coincident with his own. It is noticeable that in the plaint of the present suit there is no repudiation by the younger sons of the acts done on their behalf by their father.

It is urged that the dismissal in the previous suit should be taken to be valid only against Hukum Mahto and his son Makhoo and that the three younger sons should be allowed to proceed with the suit after making Hukum Mahto and Makhoo Mahto defendants, for such relief as they are entitled to. In support of this the learned Vakil for the appellants has cited the case *Gopi Lal* v. *Lala Naggu Lal* (3). In my opinion there is no real resemblance between that case and this. In that case Gopi Lal first sued alone for a debt. It does not appear that he was a manager of the joint family to which he belonged. The other members of the joint family did not appear to have been his sons or even his younger brothers so far as we can see from the judgment. In the first suit the defendant raised a plea of non-joinder of plaintiffs and Gopi Lal obtained permission to withdraw the suit on condition that he must pay the defendants' costs before bringing a fresh suit, or else the suit would stand dismissed with costs. Gopi Lal joined these other two persons as plaintiffs, namely, Mewa Lal and Shamraj, and filed a fresh suit before paying the costs. It was held that Gopi Lal could no longer sue and should be joined as defendant, but the rights of the other two plaintiffs were not affected by the previous decision.

There was no question of representation in the case.

For these reasons I hold that Hukum Mahto and Makhoo Mahto are precluded from bringing the present suit and that the three younger sons are equally precluded inasmuch as their father and their representative is debarred. For these reasons I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 14 M. I. A. 367 at page 376; 17 W. R. 104; 11 B. L. R. 244; 2 Suth., P. C. J. 517; 3 Sar. P. C. J. 82; 20 E. R. 824.

(2) 36 Ind. Cas. 197; 1 P. L. J. 154; 2 P. L. W. 865.

(3) 10 Inders 6; 14 Cr. L. J 105 15 C. W. N. 998.

LAHORE HIGH COURT.

CIVIL APPEAL No. 2355 OF 1921.

March 26, 1923.

Present:—Mr. Justice Moti Sagar.

THE GENERAL TRADING COMPANY, KAHUTA, IN LIQUIDATION THROUGH THE OFFICIAL LIQUIDATOR —APPLICANT—APPELLANT

versus

NIHAL SINGH AND OTHERS—CONTRIBUTORIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXII r. 9, applicability of—Death of one of several defendants—Abatement in toto—Application to set aside abatement, maintainability of—Appeal, whether lies.

Order XXII, rule 9 (2), of the Civil Procedure Code is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representatives of the deceased party, and has no application to cases in which the suit abates on account of some other cause, *e. g.*, when the Court holds that the right to sue does not survive or that the death of one of several defendants causes an abatement *in toto*. In the latter case the order of the Court is a decree and as such is appealable. [p. 22, col. 2.]

Niranjan Nath v. *Afzal Hussain*, 128 P. R. 1916, followed.

Miscellaneous first appeal from the order of the District Judge, Rawalpindi, dated the 21st June 1919.

Lala *Daulat Ram*, for the Appellant.

Mr. *Aziz Ahmad*, for the Respondents.

JUDGMENT.—These two appeals, Nos. 2355 and 2356 of 1921, arise out of the liquidation of the General Trading Company, Kahuta, and will be disposed of by one judgment. The Company which was not a limited liability company, contracted a large number of debts and went into liquidation. A Liquidator was appointed, and he called upon the shareholders to pay a certain proportion of their unpaid share money to liquidate the debts of the Company. The shareholders raised certain objections to the calls made which were disallowed. An appeal was made to the Chief Court which was accepted and the case remanded to the Court below with a direction that the total liabilities of the Company should be determined and an inqury made into the objections raised by the contributories to their liabilities as such. It appears that Tehl Singh, one of the contributories, died before the appeal was preferred to the Chief Court. No application to bring his legal representatives on the record was made within the time prescribed by law. Tehl Singh left four sons. Two of them joined with the appellants in preferring the appeal but the others were impleaded neither as appellants nor as respondents to the appeal. In December 1918, when the case came back from the Chief Court, it was discovered that Tehl Singh had died and that no application had been made to bring his legal representatives on the record. On this defect being discovered the District Judge passed an order on the 21st of June 1918 to the effect that the proceedings against the contributories whose liability was joint, had abated *in toto* and that the case be consigned to the record-room. On the 7th of August 1919 the Official Liquidator applied under Order XXII, rule 9, Civil Procedure Code, for an order setting aside the abatement. This application was dismissed by the learned District Judge on the 10th of May 1921 on the ground that no such application was entertainable and that an appeal ought to have been preferred against the order of the 21st of June 1919 which was tantamount to a decree. Two appeals have been filed in this Court, one against the order of the 10th of May 1921 rejecting the application for setting aside the abatement, and the other against the order of the 21st of June 1919 holding that the proceeding had abated.

As to appeal No. 2356, which is an appeal against the order rejecting the application for setting aside the abatement, I have no hesitation in holding that the order of the learned District Judge is correct. It has been held in *Niranjan Nath* v. *Afzal Hussain* (1), that Order XXII, rule 9 (2), Civil Procedure Code, is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representatives of the deceased party and that it has no application to cases in which the suit has abated on account of some other cause, *e. g.*, when the Court holds that the right to sue does not survive or that the death of one of several plaintiffs causes an abatement *in toto*. It has further been held that in the latter cases the orders of

(1) 84 Ind. Cas. 822; 128 P. R. 1916; 146 P. L. R. 1916; 111, 176 P. W. R. 1916.

USMAN *v.* ASAT

the Court are decrees and as such are appealable. In the present case it is clear that the learned District Judge intended to hold that the proceedings abated not only as regards Tehl Singh and his representatives but as regards the other share-holders as well. This was obviously an adjudication on the rights of the parties with respect to a matter in controversy which should have been appealed against and which clearly does not fall within the purview of Order XXII, rule 9. I agree with the learned District Judge that an application for setting aside the abatement was not competent under Order XXII, rule 9, and this appeal is, therefore, dismissed.

With regard to appeal No. 2355 a preliminary objection has been taken that the appeal is barred by limitation. For the appellant it is contended that he is entitled to the benefit of section 14 of the Indian Limitation Act inasmuch as he was prosecuting in good faith another civil proceeding in a Court which from defect of jurisdiction was unable to entertain it. I am unable to agree with this contention and am of opinion that the appeal is clearly barred by limitation. It appears from certain applications made by the Official Liquidator to the District Judge after the order of the 21st of June 1919 was pronounced that he was fully cognisant that the order was tantamount to a decree and that an appeal lay from that order to the Chief Court, he asked for permission to file an appeal and a certain amount of money was sanctioned by the District Judge for prosecuting the appeal. It is wholly inexplicable why an appeal was not filed but an application only made for setting aside the abatement under Order XXII, rule 9. I do not think that it has been made out that the appellant was prosecuting another proceeding in another Court in good faith, and I, therefore, hold that he is not entitled to the extension of time prayed for. The appeal is clearly barred by limitation and is dismissed.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST APPEAL No. 26 of 1917.

July 11, 1923.

Present:—Mr. B. C. Kennedy, J. C., and Mr. E. Raymond, A. J. C.

USMAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus.

ASAT, WIFE OF JUMA—DEFENDANT—RESPONDENT.

Muhammadan Law—Custom—Marwari Silawata community—Succession—Exclusion of females from inheritance—Evidence—Instances—Opinion—Burden of proof—Essentials of valid custom.

There is no custom amongst members of the *Marwari Silawata* community by which, in derogation of the rules of Muhammadan Law, females are excluded from inheritance.

To establish the exclusion of females from inheritance it is of vital importance to prove that some of the females asserted their rights as heirs and that their rights were denied. Mere passive acceptance of their position by females in cases where their male relations accord to them all that is necessary for their daily sustenance and their refraining from actively asserting their rights to any share in property is not enough to prove that they are excluded from inheritance.

Where females are dependent upon their male relations and subservient to their control, to establish their exclusion from inheritance, it must be satisfactorily proved that they were aware that they were excluded by reason of a custom having the force of law. [p. 26, col 2.]

The party relying on a custom which is to have the effect of overriding the ordinary law, must prove it by clear unambiguous evidence. [p. 27, col. 1.]

A custom to be valid must be (1) immemorial, (2) reasonable, (3) continued without interruption, (4) certain. [p. 27, col. 2.]

In questions of custom evidence merely of the opinion of leading members of caste is not enough, instances must be proved in which the alleged custom has been established and proved. When the oral evidence emanates from a class of highly interested witnesses, it is of infinitesimally small value. [p. 27, col. 2.]

Per Kennedy, J. C.—Numerous instances of non-taking of inheritance by women would not be sufficient to establish the custom of their exclusion from inheritance unless it were shown that the women wished to take their share of inheritance and were refused on the ground of the custom and unless it were also shown that there were no instances to the contrary. [p. 32, col. 1.]

Mr. *Kalumal Pahlumal*, for the Appellants.

Mr. *Dipchand Chandumal*, for the Respondents.

JUDGMENT.

Raymond, A. J. C.—The suit out of which this appeal arises was originally filed by Usman Imambux by this next friend Haji Khaju against Asat, the daughter, and Rupli, the widow, of one Pira who died in 1897, for a declaration that he was the adopted son of Pira, for recovery of Pira's' property both moveable and immoveable, valued at Rs. 50,000 which was in possession of Rupli, and for mutation of names. The parties belong to the Marwari community and are known as the Marwari Silawatas and evidence has been led to show that their ancestors were Hindus and residents of Jessulmer in Rajputana and were converted to Muhammadanism about 200 years ago, and after the conquest of Sind some of them migrated to Karachi and some to Hyderabad in search of employment and have settled in these places ever since. It is contended on behalf of the plaintiffs that, even after the conversion of the Marwari Silawatas to Muhammadanism, they retained several Hindu usages, amongst them being the practice of adoption. The father of Usman is one Imambux, the son of Mubarak, who was the brother of Pira, and it is alleged that in 1907, as Imambux claimed a share in the estate of Pira under the Muhammadan Law and differences had arisen between Imambux and Rupli, they were settled on the intervention of the Marwari Panchayat by the adoption by Rupli of Usman as a son of Pira. In 1913 Rupli died and Imambux applied that he should be brought on the record as her legal representative, this application was opposed by Asat, the daughter of Rupli, but the Trial Judge directed that Imambux should be placed on the record as a defendant, leaving the determination of the question as to the legal representative of Rupli for future consideration. Imambux filed a written statement wherein he took up the position that, in the event of the adoption of Usman not being proved, he should be awarded the whole of Pira's estate as his nephew inasmuch as, according to long established usage in the Marwari Silawata community, females are excluded from inheritance, and, in the alternative if this relief be not accorded to him, he should be allotted his share in Pira's estate according to Muhammadan Law. In October 1915 the Trial Court of its own motion directed that Imambux should be made a co-plaintiff with his son Usman on the ground that "the broad question involved in the suit" is who is entitled to the property left by Pira, and that, in the event of Usman not being proved to have been adopted by Rupli, further litigation would ensue to establish the right of Imambux to the estate Counsel for Asat strenuously objected to the introduction of Imambux as a co-plaintiff but he was overruled. The result was that, though the substantial issues so far as the claim by Usman was concerned were with regard to the factum of his adoption and the custom prevalent as to adoption in derogation of the rules of Muhammadan Law, the introduction of Imambux as a co-plaintiff necessarily rendered imperative the consideration of the further questions as to the exclusion from inheritance of females by the custom that was set up, and whether the share of Imambux in the estate of Pira was not barred by limitation. It need hardly be said that these additional points for decision considerably protracted the proceedings in the lower Court.

Now, in the appeal before us the pleader for the appellant has confined his arguments to the four issues that have been decided by the Trial Court adverse to him. They are,—

1. Whether Usman was adopted by Rupli?

2. Whether there is a custom of adoption having the force of Law among the Marwari Silawata community in derogation of the ordinary rules of Muhammadan Law?

3. Whether there is a custom excluding women from inheritance and restricting widows to maintenance and inheritance, having the force of Law among the Marwari Silawata community in derogation of the ordinary rules of Muhammadan I aw?

4. Whether the claim of Imambux is barred by limitation?

I propose to first discuss the question of the adoption of Usman by Rupli.

[*After discussing the evidence on the question of adoption the learned A. J. C. concluded*]:—

I have discussed the factum of the adoption

at some length as it forms the crux of the case. For the reasons given above, I feel quite satisfied that plaintiffs have not proved that Usman was adopted by Rupli. This finding renders it unnecessary to consider the question as to the custom of adoption prevailing in the Marwari community to which the parties belong. The result, therefore, is that, so far as Usman is concerned, his appeal must be dismissed and the finding of the lower Court confirmed.

I now proceed to discuss the claim set up by Imambux to the estate of Pira. This claim is based on an alleged custom prevailing, it is contended, amongst members of the Marwari Silawata community by which, in derogation of the rules of Muhammadan Law, females are excluded from inheritance. It is urged that this community after its conversion to Muhammadanism retained several Hindu usages and practices, and the position which it seeks to assign to the women in the community has no parallel either in Hindu or Muhammadan Law as I shall presently point out. It is essential in the first instance to formulate accurately the custom that is set forth. After Imambux was brought on the record as a co plaintiff an amended plaint was filed and it would be useful to reproduce paras. 1, 2, 3 of this plaint.

1. That the Marwari Silawatas were originally Hindus and after their conversion to Muhammadanism, they have retained several Hindu customs which have the force of law.

2. That according to the said customary Law, a Marwari Silawata widow is entitled only to maintenance and residence in her husband's property till her death or remarriage.

3. That according to the said customary Law all female relatives of the deceased including his daughters are altogether excluded from inheritance.

Now Pira at his death left him surviving his widow Rupli and two daughters, Asat, the wife of Jumo, and Rahimati who died before this suit was filed, also plaintiff Imambux, the son of his deceased brother Mubarak. Plaintiff's contention, therefore, is that on the death of Pira, the whole of his estate vested in him subject to Rupli's right of residence and maintenance, and Asat as a female was entirely excluded from inheritance.

Has the exclusion of females from inheritance by custom been established?

According to the custom that is sought to be established, a father would not be bound to maintain his unmarried daughter or even an infant female child nor would he be bound to provide them with residence as it is only a widow that is entitled to residence and maintenance. In fact, a widow of a member of this community takes no estate at all whether restricted or absolute for on her husband's death the estate is immediately vested in the next male relation of her husband, however remote the relationship may be, and she can only claim a right of residence and maintenance, and the other female relations, however close they may be, are rigidly excluded from all right to inheritance. The custom, therefore, that is set up in the present case does not place females of the Marwari community even on a level with females under the Hindu Law. I may further remark at this stage, in view of the custom of adoption set up in this case, that the exclusion of females from inheritance would lead to a most incongruous position as if, by reason of the alleged custom, Imambux succeeds to Pira's estate on his death, Rupli, who had the right of exercising the power of adoption without authorisation, could by adopting, divest Imambux of the estate which would then vest in the adopted son.

Substantially the same witnesses that have deposed to the adoption of Usman and to the custom of adoption prevalent have also given evidence to the exclusion of females from inheritance in this community. The oral evidence must be judged in the light of the remarks that I have made on the evidence as to adoption. The existence of the two factions in the community must not be overlooked as also the acute feeling prevailing. True, that wealth and apparent respectability have been arrayed on the side of the plaintiff's but in my opinion the oral evidence is a negligible factor and something more is required in the circumstances to establish the custom that is set forth.

Evidence has been led by the plaintiffs of a large number of instances of exclusion of females from inheritance and we have been taken by the pleader for the appellants

through all of them. Several of them he himself has not ventured to press.

They are:—E. F. 25 of 871, E. F. 49 of 889, E. F. 50 of 1898, E. F. 32 of 873, E. F. 26 of 1875, E. F. 24 of 1914, E. F. 53 of 887, E. F. 29 of 1885, E. F. 28 of 1900, E. F. 34 of 1885, E. F. 35 of 1895, E. F. 45 of 1887, E. F. 15 of 1884, E. F. 5 of 1890, E. F. 75 of 1895, E. F. 58 of 1895, E. F. 8 of 1898, E. F. 10 of 1898, E. F. 77 of 1898.

Though these were pressed and considered by the Lower Court.

We did not call upon the pleader for the respondents to offer any comments on several of the remaining instances, except those to which I shall advert in detail, as we were of the same opinion as the Trial Judge. As they were of no value as instances to prove the exclusion of females from inheritance, it is unnecessary to refer to each of them in detail and give my reasons for rejecting it. They refer to instances where the property was of very little value, consisting of one or two small houses and some paltry ornaments, or where the females in the family had at their marriage received some allowance. The learned Judge of the lower Court had considered each instance in detail and given good reasons for not holding them as instances which could be of any use to establish the exclusion of females from inheritance. It is not only that the property capable of division amongst the descendants is of little value but no evidence is given which would be of vital importance that any of the females concerned did assert their right to any portion of the property left by their ancestor and that their right was denied.

[*After discussing the instances the learned A. J. C. proceeded to observe.*]

The instances to which I have referred in some detail appear to me the only instances which may offer some ground for the contention that females are excluded from inheritance. Excluding from consideration those intances which have not been pressed by the pleader for the appellants the remaining instances which I have perused appear to me thoroughly inadequate as evidence of custom and I am entirely in agreement with the Judge of the Trial Court in rejecting them as instances of the custom sought to be established. They are instances where, as I have observed, the property susceptible of division is insignificant, or where the daughters have already received their share in the shape of marriage expenses or marriage presents, or where the evidence in support of the exclusion rests on the oral testimony of one person and is not of convincing character. What is of great importance is, that there is no instance forthcoming of a female having demanded her share and being resisted on the ground of her exclusion from inheritance. In *Mirabivi* v. *Vellayana* (1), the contention was that females were excluded from inheritance if sons or son's sons exist, by a special custom obtaining among the Ravuthans of Palgat who though Muhammadans had adopted the custom from the Hindu Law, it was held that the custom had not been established by the evidence and the following observations in the judgment are worthy of consideration. "In many parts of this country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer to being maintained by their brothers to taking a separate share for themselves and when they are married the marriage expenses and presents are often by express or implied agreement, taken as equivalent to the share which they could claim. Moreover Muhammadan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much." The last remark was accepted with approval in *Bibi Sona* v. *Mir Hussain Khan* (2). It is true that the women of the Marwari class with whom I am dealing are not strictly *pardanashin* but there can be little doubt that they are so dependent upon their male relations and subservient to their control that there must be satisfactory evidence on the record that females excluded from inheritance should be aware that they are excluded by reason of a custom having the force of law.

The party relying on a custom which is to have the effect of overriding the ordinary

(1) 8 M. 464 ; 9 Ind. Jur. 267 ; 8 Ind. Dec. (N. S.) 317.

(2) 16 Ind. Cas. 641 ; 6 S. L. R. 1.

law, must prove it by clear and unambiguous evidence, as remarked by the Privy Council in *Mir Abdul Hussain* v. *Bibi Sona* (3). Any special usage modifying the ordinary law of succession should be ancient and invariable, and certain. In this particular case we have what I may term an insignificant community consisting of about 300 families setting up a custom which, in the first place, can certainly not be described as ancient and equally not invariable for an appreciable number of this small community strenuously assail the existence of any such custom as is set out by the plaintiffs, and there is documentary evidence on the record to which I now advert which certainly throws grave doubts on the existence of the custom as set forth by the plaintiffs, apart from the instances which defendants have adduced to prove that the alleged custom is a myth.

[*After dicussing the instances the learned A. J. C. proceeded to observe.*]

I shall stop here, the instances that I have cited do by no means exhaust all the cases wherein females of this community have asserted their title to the property left by their relatives but I think these instances will suffice to show that the plaintiff's allegation as to the custom of excluding females from inheritance rests on a very slender basis. And what is most significant is that a considerable number of the plaintiff's witnesses, particularly those of the wealthy and apparently respectable set who in their evidence have solemnly proclaimed that according to the custom in their community females are excluded from inheritance, have been the very persons to support the declaration of females to their title to inherit proproperty. But the documentary evidence that shatters the custom does not rest here.

[*After discussing the documentary evidence the learned A. J. C. went on to say as follows.*]

It has been shown above that the instances produced by the appellants as to the exclusion of females from inheritance are so meagre as to exclude the possibility of founding a custom upon them. No doubt, there is a quantity of oral evidence adduced by the appellants, particularly of the leading men of the Marwari Silawata community who depose to the custom of the exclusion of females, but, as was observed in the case of *Rahimatbai* v. *Hirbai* (4), in questions of custom evidence merely of the opinion of the leading members of the caste is not enough, instances must be proved in which the alleged custom has been established and proved. And in *Lachman Rai* v. *Akkar Rijan* (5) it was observed that the best proof of custom is instances in which it has been acted on and documentary evidence that it has been enforced. Besides, when the oral evidence, as in this case, emanates from a class of highly interested witnesses it is of infinitesimally small value. Now, there is a fair amount of evidence on the record brought by the respondents for the purpose of establishing that females in the Marwari Silawata community have owned property and the evidence is not purely oral but in some cases has been supported by documentary evidence. The lower Court has set out these instances in detail showing daughters, son's daughters, sisters, mothers, widows and son's widows holding property. It is unnecessary in this judgment to travel over the same ground and specify the instances as they have been discussed at some length by the Trial Court. It will suffice to remark that they nullify the existence of the custom.

In *Mahamay a Debi* v. *Haridas Haldar* (6) it was observed that "for a custom to be valid it must have four essential requisites, (1) it must be immemorial, (2) it must be reasonable, (3) it must be continued without interruption since its immemorial origin, and (4) it must be certain in respect of its nature generally as well in respect of the locality where it is alleged to obtain and the persons whom it is alleged to effect. What have we here? A comparatively insignificant community consisting of about 300 to 400 families attempting to set up a custom, the earliest instance of which they can give is not beyond 1880. It is a custom which is not only in derogation of the rules of Muhammadan Law by which the parties are ordinarily

(3) 8 Ind. Cas. 897 ; 4 S. L. R. 88.

(4) 2 B. 34 ; 2 Ind. Dec. (N. S.) 23.
(5) 1 A. 440 ; 1 Ind. Dec. (N. S) 327.
(6) 27 Ind. Cas. 400 ; 42 C. 455 ; 19 C. W. N. 208; 20 C. L. J. 183.

governed, but is not in accordance with the Hindu Law though they profess that after their conversion to Muhammadanism they retained certain Hindu rites and usages. It would be a travesty of language to say that the custom has been uninterrupted, for the various applications to the Revenue authorities and the instances of the possession of property by females are overwhelming enough to show that the members of this very community refused to adhere to any such custom. An attempt was made in the lower Court to explain the possession and ownership of property by females on the allegation that the community in which females were permitted to hold property was the "Mazurs" as distinguished from the community of the plaintiffs and their witnesses who are pure Silawatas. This contention was not pressed in this Court by the appellant's pleader and on evidence it seems to me that it was a desperate endeavour to formulate some explanation for the evidence which went a great way to shatter the custom set up by the plaintiffs.

In my opinion, it is impossible to hold on such evidence as has been produced that the custom of the exclusion of females has been proved and I entirely agree with the elaborate and exhaustive judgmsnt of the lower Court on this point. There remains the question of limitation. It is contended that the claims of Imambux either for the whole property left by Pira either on the basis of the alleged custom of the exclusion of females from inheritance or for a share under the Muhammadan Law is barred by limitation. Pira as is proved died in 1897 and the suit was filed in 1912. Art. 144 of the Limitation Act applies which provides a period of 12 years from the date of the possession of the defendant becoming adverse to the plaintiff. Now if, according to the alleged custom, Imambux succeeded to the estate of Pira at his death, then the latter's estate vested in him subject only to the burden of providing residence and maintenance for Rupli, the widow; so also on the death of Pira Imambux became entitled to his share in his estate under Muhammadan Law. Admittedly, Imambux was never in possession of any part of Pira's estate which has all along continued in the possession of Rupli. I am not satisfied on the evidence that Imambux took his residence with Rupli on Pira's death in 1897 and in my opinion Rupli held the estate of Pira ever since his death to the exclusion of Imambux. It was in February 1900 that Rupli applied to the City Deputy Collector and the Karachi Municipality for the transfer of the property standing in the name of Pira to her name alone, and it was in 1901 that Rupli applied for a certificate of heirship to Pira's estate which was opposed by Imambux who applied for the grant of the certificate to himself alone.

Now, the suit filed in 1912 was by Usman alone and it was after Rupli's death that Imambux applied on the 6th August 1913 to be brought on the record as her legal representative, and he was placed on the record though the Court did not expressly find that he was the legal representative of Rupli, and Imambux filed his written statement wherein he claimed either the whole of Pira's estate to the exclusion of Rupli and Asat or his share according to Muhammadan Law. It was on the 21st October 1915 that the Court directed that Imambux should be brought on the record as a co-plaintiff and the plaint amended accordingly.

Now, the contention of the pleader for the appellant Imambux is that, though Rupli may have adopted an hostile attitude towards Pira when she applied for the transfer to her name of the property standing in Pira's name, she could only be deemed to have claimed adversely to the appellant Imambux when, on the 22nd August 1901, she first challenged his right to Pira's estate and as Imambux should be deemed to have asserted his claim on the 6th August 1913, the suit by him is in time.

Now, even if it be accepted that after Pira's death in 1897 Imambux went to live with Rupli, yet on his own showing he was driven out of the house by her in 1900 as a dispute arose between them over the property of Pira and the allegation of Imambux himself is that the dispute was settled by the adoption of Usman, therefore, in 1900 at least limitation would begin to run, and when once limitation has begun to run no subsequent disability or inability to sue stops it. Therefore, the claim of Imambux would be barred at the end of 1912. Even if a reconciliation had been

effected in 1907 by the adoption of Usman the most that could be said is that the claim of Usman was recognised and not that of Imambux.

Further, I do not agree with the contention of the pleader for the appellant that Imambux should be deemed as having asserted his claim on the 6th August 1913. Mr. Kalumal relied on the case of *Narsingh* v. *Vaman Venkatrao* (7) where it was held that a party transferred to the side of the plaintiff from the side of the defendant is not a new party to whom the provisions of section 22 of the Limitation Act would apply but it must not be overlooked that the transposition of Imambux from the category of a defendant to that of a plaintiff was to bring on the record a new plaintiff with a cause of action and a relief entirely distinct from that of the original Plaintiff Usman. In fact, Imambux should never have been on the record as a co-defendant, he was not the legal representative of Rupli nor was he placed on the record in that capacity. He was placed on the record in some unaccountable way as a defendant and as by his written statement he asserted a right to Pira's property independently of Usman he was transposed as a plaintiff. The amended plaint in which Imambux claims the property of Pira as his to the exclusion of the females or in the alternative asserts his right to a share in it under the Muhammadan Law is dated the 21st October 1915 and in my opinion this should be regarded as the date when he first seeks for a declaration of his title to the property of Pira. Whether we take the date when Imam Baksh filed his written statement or the date when the amended plaint was filed the suit is in either event time barred.

The appeal should therefore be dismissed with costs.

KENNEDY, J. C. —In the year 1897 died one Pira leaving him surviving a wife Rupli and a daughter Asat and another daughter Rahmat The second daughter died *s. p.* but Asat married one Juma

Pira had a brother named Imam Baksh and Imam Baksh had a son named Usman.

(7) 4 Ind. Cas. 249, 34 B. 91 ; 11 Bom. L. R. 1102.

In 1913 Usman brought, through his next friend Haji Khaju Mithu, a suit to recover from Rupli and Asat the estate of Pira on the ground that he (Usman) was the adopted son of Pira, such adoption having been effected in compliance with a caste custom by Rupli in 1906.

The Court raised issues as to the factum of the adoption, and the validity and existence of the custom and proceeded to trial. Rupli died, and on the application of the plaintiff (who was the son of Imam Baksh) proceedings were taken to join Imam Baksh as legal representative of Rupli. In that capacity he put in a written statement supporting the claim of the plaintiff (his son) to succeed as adopted son of Pira, but averring that if the adoption or its validity was found not proved, he himself was entitled to succeed on the ground that there was a custom in the caste, whereby females were excluded from inheritance and that he was the nearest male heir. Further, he said that in any case he was entitled to his share under Muhammadan Law to the property of Pira.

The claims of Imam Baksh to be considered the legal representative of Rupli were not admitted by the defendant Asat and the Court reserved that question, putting him on the record as a party neceessary for the decision of the suit. Ultimately, he was made a plaintiff and the Court raised further issues arising from the pleadings as to the existence of the custom excluding women, and as to limitation.

The trial Court, Hayward, A. J. C., found against the assertions of this double-headed claim. That is to say, it found as regards the adoption that it had not taken place, and that there was no custom of adoption in the caste. It found also that there was no custom of exclusion of females in this caste. It found also that the claim of Imam Baksh as heir under the ordinary law was barred by limitation, and on the whole dismissed the conjoined suits with costs as between attorney and client. Both plaintiffs appeal here.

It is to be regretted in some ways that the litigation has taken the course it has, because in my view of the case the question was really decidible on the question of the factum of

adoption. The finding as to the custom is thus obiter und though the opinion of a judge like Hayward, A. J. C. after a minute and painstaking enquiry cannot but posses considerable authority his finding is still merely an opinion. Even admitting, moreover, (which is a considerable admission) that the claims of Imam Baksh were rightly agitated in this case, yet there again the finding being that the claim is barred by limitation the finding of the lower Court and of this Court also as to the alleged custom of exclusion of women is nothing more than an opinion, though I trust that all the members of this caste will accept that opinion as conclusive. The result of the agitation and decision of these questions has been that there has been a sad delay in disposal of this matter and that the parties have been put to very heavy expense.

In view of the lucid, thorough and painstaking judgment of Hayward, A. J. C., (with which in so far as we have thought it necessary to consider the points at issue I thoroughly agree) and in view of the fact that the judgment of my colleague Raymond, A J. C., covers the whole field of enquiry, it would perhaps not be necessary for me to say more than that I agree with the latter judgment, but in a matter of this importance, one, moreover, on which the legal advisers of the parties have bestowed so much pains, it would not be improper to express my views shortly and concisely.

The first point is as to the factum of adoption. I cannot find that any such adoption took place. There was I believe some sort of reconciliation between Rupli and Imam Baksh in the year 1906-07. Rupli I think contributed to the circumcision ceremonies of Usman and shortly thereafter to the expenses of his marriage. I am by no means convinced that the 'Bara Dari' ceremonies of Pira took place in 1096-07, and am inclined to think that they took place earlier.

It is easy enough to assert that an adoption took place, but as there is apparently no ritual in the custom as set up, not even giving and taking or seating the adoptive child in the lap of its mother, but the adoption is said to be capable of being affected by a sort of *arrogation castrensis* by mere words spoken by the adoptive parent in the absence of the adopted child, it is obvious that it is very difficult to get, and still more to check, any evidence as to the actual adoption. Very few and interested persons say they were present at the actual adoption. A great number say that they were shortly afterwards informed of the adoption having taken place, but they do not speak to anything being done which might not equally well have been done in the case of a reconciliation and the circumcision. On the other hand, one would assuredly suppose that such a definite settlement would have been recorded in writing, and that the writing would have been registered, that there would be some entry in the books of the *jamait*, that the boy would have been known by the name of his adoptive father, that he would have lived in the house of his adoptive mother, that the property which was the origin of the dispute would have been transferred to his name, and that any attempt on the part of Rupli whether, supontaneously or under the influence of Asat and Jumo to treat the adoption as nugatory, would have lead to immediate litigation. None of these things happened. Therefore, I think that no adoption took place.

Adoption is not permissible among Muhammadans. This is not a matter of deduction or doubtful tradition but explicitly laid down in the Koran. Nor am I aware that any tribe permits itself this liberty to dispense with the obligation of the sacred law in respect of ordinary property. A slave whose *peculium* theoretically reverts to his master on the death of the holder, or a *feoffe* of military lands whose interest therein theoretically ceases with his death, may properly adopt and thus indicate to his superior the person to whom he wishes that superior to exercise his beneficence; but this community is not one of Mamelukes or *talukdars* and their property is their own. The custom, therefore, if it exists, is distinctly worthy of reprobation, and it would need very strong and cogent evidence to induce the Court to find that it exists. We are relieved from the necessity of finding on the existence of this custom in the present case because, in view of our finding on the factum, no finding on the validity would be more than an opinion.

This disposes of the case of the original plaintiff. The case of the second plaintiff is

more difficult. I am of the opinion that his claim as heir under the custom is barred and if that is really so, then there would be no necessity of considering the custom. But perhaps it would be better to find also on the question of custom as the facts necessary for the establishment of the limitation bar, are not altogether beyond dispute.

The tribe was originally seated in Marwar, particularly in Jessulmir, and their hereditary profession is that of masons and stone-cutters. They were originally Hindus of the *gaundi* caste, and were very likely excommunicated by reason of their employment in building Muhammadan shrines. In recent years they have migrated into Sind and are to be found both in Hyderabad and Karachi Many of them have obtained much wealth by contract and judicious purchases of lands and their names seem to show that they have received a certain amount of religious teaching, still it would be likely enough that a tribe of that origin would be inclined to keep to its Hindu customs. It is to be noted that a custom which shuts out women from the rights of inheritance given to them by the religious law is not so grievous a departure from the ordinances of religion as a custom of adoption, because if there is joint family then the deceased has no property in the sense attached to that word by the Muhammadan Law and therefore there is no question of inheritance. Moreover, the women get an equivalent which is often more valuable than the right denied. In any case, it is well established that a custom excluding women is valid and many tribes have such a custom.

In the present instance, however, I think the alleged custom is not made out. Indeed, it is not very easy to ascertain what the alleged custom is. The original claim was that the position of the widow and daughter was precisely that of a Hindu widow and daughter. But this might present a difficulty. In the case of self-acquisition the widow would be entitled to a life estate and so might the daughter be entitled. In that case the claim of Imam Baksh might be premature. He would come in, if at all, as a reversioner. The allegation now is that females are absolutely excluded from the succession whatever may have been the condition of the family in respect of jointness before death of the propositus. Next agnate immediately on the death of the propositus succeeds, but his title is encumbered with an equitable obligation to support the widow or other female heirs, and where the property is small he often allows the female heir to retain it in her own hands. There is, however, obviously a great difficulty in reconciling this scheme with the custom of adoption otherwise set up. For in that case the widow by adopting could divest the heir of an estate already matured.

The custom if it exists therefore, is neither Hindu nor Muhammadan. It works particularly hardly on women. The Mussalman woman gets her share in the inheritance of her kin. The Hindu woman is married into some other family and her rights to maintenance and support are protected by the indissolubility of marriage and by the legal rights given to widows by that system. The Silawata woman is to get nothing from the estate of her father or husband, and (in spite of assertions to the contrary) may be divorced and relegated for maintenance to her dowry.

Nevertheless, grievous as this custom is, the Silavatas may have the benefit of it if they can prove it. I am of opinion, however, that this custom is not proved to exist.

There is not a particle of evidence given that the custom exists in the extended form set up by Imam Baksh, proof of which form is necessary if he is to succeed. There is no instance given of exclusion of a wife or daughter by a nephew or cousin of the deceased. There are a great many instances where wives and daughters have not received shares in the estate of their husbands and fathers and a few where uncles or brothers-in-law have taken the entire estate. The evidence, therefore, would in no case prove anything more than the custom of exclusion of wives and daughters by sons or brothers which is not sufficient for the purposes of the plaintiff 2. But I do not think that even this custom is made out. That a woman does not take a share in the inheritance may be attributed to many causes. Very often the estate is not worth division. A mason has a few tools, a house, some vessels and furniture, and his woman a few jewels. The family must look for its support not to the division of this paltry estate but to the diligence and

affection of the adult male members. That is the real inheritance of the family and that cannot be partitioned. Moreover, there is indubitably a feeling in India and not in India alone that it is inadvisable to trust women with property. I never, for instance, knew any middle class Hindu who approved of the position given to the sister by Balambhat. And women share this mistrust of their own capacity. They think it, on the whole, better to trust their affairs to the loyalty and competence of their male kindred. And the minute and fractional sub division of the paternal estate prescribed by the Muhammadan Law is naturally felt to be deleterious to the position of the family, and competent estate being frittered away among a crowd of claimants with the result that all are reduced to poverty. Thus, women heirs are not inclined to press their legal claims, preferring to trust to their brothers and sons to treat them properly, that is to say, to maintain their mothers and to find suitable husbands for their sisters and to provide those sisters on marriage with becoming paraphernalia. Instances, therefore, where mothers and sisters have not received their legal dues do not amount to conclusive proof that they have no legal rights. I do not say that such instances are not to be considered. I do say that they are not conclusive.

On this question of proof an example may be drawn from analogy. I have a bag containing fifty balls of unknown colour. I draw out a ball. It is a white ball. I replace it and draw again. If I repeat this process ten times and in each case draw a white ball there is a suspicion that all the balls in the bag are white. If I do so a thousand times and in each case there comes out a white ball the probability that all the balls are white is very high. If I do so a million times with the same result the probability is very high indeed, but it is never conclusive. The appearance of one black ball on the million and first occasion is enough to destroy the whole of the probability. So here these numerous instances would not be sufficient even if they stood by by themselves to establish the custom unless it were shown that the women wished to take their share of inheritance and were refused on the ground of the custom and unless it were also shown that there were not instances to the contrary.

But there are numerous instances to the contrary The very people who are now setting up the custom have over and over again caused the names of females to be entered in the Government registers as heirs to deceased males. It is true that such entry is no proof of title and that the names of such persons entered may not in all cases be the names of persons entitled to the inheritance of the estate under Mnhammadan Law, but surely this action amounts to an admission by the males of the community (who, if any one knows about the custom, ought to know it) that inheritance is not confined to males.

The custom has never been judicially noticed- In one case in Hyderabad it was set up but was disallowed. In another case it was used to defeat a decree-holder who without bringing the matter to trial abandoned his claim. In another case it might have been set up but was not. Nothing can, therefore, be deduced from this evidence. Nor do I think the response of the Jessulmir Durbar can be considered as evidence of the custom. The community is in Jessulmir so small and insignificant (about fifty houses of poor masons) that their affairs are not likely to be well known in exalted circles.

A very curious assertion is made by those interested in setting up the custom. They admit that instances have occurred where the custom has not been followed, but they account for this by saying that there are in the community two sections. One is the more opulent representing the masons and the other the poor who represent the labourers (the mazurs). Oddly enough, the latter are said to be the fewer in number. But the strange thing is that it is allegedthat the mazurs keep the Muhammadan custom whereas the superior and wealthy classes keep this same Hindu custom. But this is surely preposterous. It is among the poor and ignorant nominal converts that one expects the ordinances of religion to be neglected and the customs of Hinduism which they had learned and which had not been effaced by any religious teaching in their new faith to be maintained. I think the story of the mazurs is very significant. I have no doubt that with their new faith the Silawatas adop-

the religious law. It made little difference to them at first because they were poor and the women did not desire to be awarded their lawful share. Afterwards, they became rich, and were seized with the natural desire to found families and did not like the idea of their estates being frittered away among numerous heirs, many of them women married into strange families. This would be particularly the case with the Silawatas, if it be true that they do not marry their cousins. In such a case any share awarded to a daughter would pass out of the family for ever. Therefore, they are I think now trying to set up that the custom that women did not, as a matter of fact, generally receive a share in the property of their fathers or husbands to the prejudice of the interests of their brothers or sons was a custom of legal exclusion of women from inheritance altogether. This custom they have I think failed to make out.

The question of limitation is next to be considered, because this affects also the claim of Imam Baksh to recover his share under the Muhammadan Law, namely, five-twenty-fourths of the estate of Pira, deceased.

The first thing to do is to decide when Imam made his claim.

On the 13th July 1913, Rupli having died, the plaintiff Usman asked that Imam should be added as her legal representative. The Judge ordered that "the legal representative of Rupli should be joined;" on the 6th August summons was issued to Imam and he appeared in Court on the 27th August 1913. There was a dispute and doubt as to whether Imam was the legal representative of Rupli and the Judge thought that this could not well be decided without trying all the matters at issue in the case as a preliminary to deciding that point. The Judge, therefore, by his order of 13th November 1913 made Imam a defendant. Inam filed his written statement on 16th December 1913 where, for the first time, his claim is legally asserted, either to the whole property on the ground that the male excludes the female heir, or to his share as a Muhammadan heir. On 2nd October 1915 he was made a plaintiff.

I am rather of the opinion that the *terminus ad quem* in this case is the 13th November 1913 when the appellant Imam was made a defendant. The date 2nd October 1915 would not be the true date in view of section 22 of the Limitation Act. I am inclined to think that the dates 6th or 27th August are too early, because it was not Imam in his personal capacity who was then made a party but Imam in his alleged capacity as representative of Rupli. The character he was then filling was incompatible with the character he afterwards assumed. He is now claiming not as representing Rupli but as representing, or as heir to, Pira. I doubt whether Imam can be said at the date of his first appearance on 6th or 27th August to have been a defendant within the meaning of section 22, Limitation Act.

The next question is the *terminus a quo*. Immediately on the death of Pira the widow entered on the estate. Her doing so was clearly adverse to the claim of Imam to exclude her from the inheritance of Pira. And as regards this claim, therefore, in my opinion, limitation ran from 97. Imam's claim is, therefore, in any case barred as regards his rights under the special custom.

As regards the rights as Muhammadan heir, true it is, that mere possession by one co-sharer is not by itself notice to the other co-sharers that the co-sharer in possession claims to hold adversely because it is presumed that every man is doing what he ought to do, and it is the duty of the co-sharer in possession to hold for the benefit of all persons entitled.

But, at any rate, the plaintiff Imam ought to have been put on enquiry by his total exclusion from the inheritance, for it is not usual for women to manage an undivided estate wher there is a male of full age competent and ready to manage, and Rupli and Imam early begar to dispute as to the transfer of the names in the Revenue and Municipal records. But, on the whole, I think the notification to Imam that Rupli was holding adversely to his entire claims must be assigned to some date between 24th November 1900 and 22nd January 1901 when Imam got information of the heirship application. This application was made by Rupli on the earlier of those dates, and Imam filed his objection on the latter date. This application by Rupli does not, it is true, specifically deny that Imam was entitled to a share under Muhammadan Law, but

it is inconsistent with his having any claim at all and, coupled with his total exclusion from the estate between the death of Pira and that application, ought to have given him clear notice that the exclusive possession by Rupli was adverse to him. He ought, therefore, at the latest to have brought his suit by 22nd January 1913. As I have said, the earliest date claimed is 6th August 1913. In this view of the matter, then, the claim of the plaintiff Imam is barred, and still more so if I am right in assigning the *terminus ad quem* to the date 13th November 1913. It is claimed that the true *terminus a quo* is, on the most unfavourable view of the matter, 22nd August 1901. Rupli in answer to an application by Imam for heirship certificate specifically denied that the plaintiff Imam had any claim at all to any part of the property. If that date be the correct *terminus a quo* then the suit would still be barred, if I am correct in supposing that the *terminus ad quem* is the 13th November 1913, or if the true *terminus* is the 27th August 1913 when Imam filed his written statement. The suit would be in time from that date only if the *terminus ad quem* be the 6th August, the date of the order directing the legal representative of Rupli to be put on the record. But, in the first place, I doubt if that order gives the date of the true *terminus ad quem* and, in the next place, I do not think that the date of the objections of Rupli is the true starting point of limitation. There could be no doubt in the mind of Imam that she was holding adversely to the plaintiff Imam long before that, at least as early as the date when her application in the heirship matter was made.

It should be noted that the date of the order of Mr. Boyd allowing alteration of the plaint at page 120 is incorrect and should be 29th October 1915 not 1913 On the whole, therefore, I am of the opinion that the claim of Imam to succeed either to the whole of the property of Pira or to five-twenty-fourths of that property is barred by limitation. Nothing is shown to have happened in 1906 which would revive it.

The appeal is dismissed with costs

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 282 OF 1922.
July 23, 1923.

Present :—Mr. Baker, J. C.

THE ROHILKHUND AND KUMAON RY. CO., HEAD OFFICE, BAREILLY—DEFENDANT 3—APPLICANT

versus

ZIHRUS SYED ALVI AND ANOTHER—PLAINTIFF AND DEFENDANT 1—NON-APPLICANTS.

Evidence—Admissibility—Objection not taken in first Court—Appeal—Railways Act (IX of 1890) s. 72—Responsibility of Railway.—Bailee.

If no objection is taken in the first Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. [p. 85, col. 1].

Dalchand v. *Ganga Singh*, 15 C. P. L. 123 ; *Akbar Ali* v. *Bhya Lal Jha*, 6 C. 666; 7 C. L. R 497; 8 Shome L. R. 260; 3 Ind. Dec. (N. S.) 492 ; *Chimnaji Govind Godbole* v. *Dinkar Dhondadev Godbole*, 11. B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209; *Hridoy Krishna Das* v. *Prasanna Kumari Chowdhurani*, 28 C. 142 ; *Kishori Lal* v. *Rakhal Das*, 31 C. 155 ; *Lakshman Govind* v. *Amrit Gopal*, 24 B. 591; 2 Bom. L. R. 386 ; 12 Ind. Dec. (N. S.) 924; *and Shahzadi Begam* v. *Secretary of State for India* 34 C. 1059 at p. 1074 ; 9 Bom. L. R. 1192 ; 6 C. L. J. 678 ; 2 M. L. T. 439 ; 34 I. A. 194 (P. C.) followed.

A gun is not an explosive or dangerous when unloaded and a Railway Company is under no obligation to open a package containing an unloaded gun. [p. 85, col. 2.]

The liability of a Railway Company under section 72 of the Railways Act is that of a *bailee* under sections 151, 152 and 161 of the Indian Contract Act. The Company is bound to take as much care of the goods bailed to them as a man of ordinary prudence would of his own goods and, in the absence of any special contract, they are not responsible for damage to goods. [p. 85, col. 2.]

Revision of the decree of the Small Cause Court, Sohagpur, District Hoshangabad, in Civil Suit No. 191 1922, decided on 12th September 1922.

Mr. *J. C. Ghosh*, for the Applicant.

Mr. *M. R. Dixit*, for the Non-applicant 1.

ORDER.—The facts of this case are that the plaintiff Zihrus Syed Alvi of Sehagpur advertised a rifle for sale and his advertisement was answered by the defendant Kirwan, who was a Police Officer resident at Kathgodam in the United Provinces, on the R. and K. Railway. The plaintiff sent the rifle to defendant 1 on approval. The defendant 1

found it had certain defects, among them that the screw fastening the stock to the barrel was broken, and, after a somewhat acrimonious correspondence, the defendant 1 returned the rifle by Railway parcel to the plaintiff at Sohagpur On arrival the stock was found to be broken, and the plaintiff, therefore, sued the defendant 1, the Rohilkhund and Kumaon Railway and the Great Indian Peninsula Railway on whose lines the parcel had travelled, for damages in the Small Cause Court at Sohagpur. The Judge of the Small Cause Court at Sohagpur passed a decree for Rs. 100 against defendant 2, the Rohilkhund and Kumaon Railway Co., and dismissed the suit as against the other defendants.

The Rohilkhund and Kumaon Railway Co. apply in revision to have the decree set aside. This suit has been disposed of in a very peculiar manner. The defendant 1 was not served and did not appear. There is no proof of any of the letters put in by plaintiff purporting to be from defendant 1. The Judge of the Court below has relied on this correspondence and in particular on a copy of a certificate given by two residents of Kathgodam on 6th February 1922 stating that they had examined the rifle and found certain defects in it and that it was carefully packed in its case and sown in gunny and one of them undertakes to send it to the Railway Station and book it to the plaintiff. The certificate is not in original and neither of the persons signing it has been examined, so it is inadmissible in evidence as not being proved.

No objection was taken to its admissibility in the lower Court and, under the ruling in *Dalchand* v. *Ganga Singh* (1), if no objection be taken in the first Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. This case follows *Akbar Ali* v. *Bhyea Lal Jha* (2) *Chimnaji Govind, Godbole* v. *Dinkar Dhonddev Godbole* (3) and *Hridoy Krishna Das* v. *Prasanna Kumari Chowdhurani* (4). Later cases on the same point are *Kishori Lal* v. *Rakhal Das* (5), *Lakshman Govind* v. *Amrit Gopal* (6) and *Shahzadi Begum* v. *Secretary of State for India* (7).

There is, however, no evidence to show that the stock was not broken when the parcel was delivered to the Railway Company, as the certificate was written at a period prior to the delivery to the Railway Company, and expressly mentions that the parcel was to be conveyed to the Railway Station in the Motor of one of the signatories to the certificate, and he has not been examined to prove that he delivered the parcel undamaged to the Railway Company at Kathgodam Station.

The parcel was booked the same day and on delivery at Sohagpur the box was found to be undamaged and the seals intact, but the stock of the rifle was broken.

The Judge of the lower Court has referred to the rules of the Railway Company regarding explosives and dangerous goods. I do not find the Railway rules he refers to, but a gun is not explosive or dangerous when unloaded and though it appears from the certificate that the parcel contained nine cartridges, there is no evidence that any intimation was given to the Company that the parcel contained explosives, and the Railway Receipt, which must have been filled up from the information supplied by the consignor, merely mentions "a gun." The Railway Company are, therefore, under no obligation to open the package. The liability of a Railway Company under section 72 of the Railways Act is that of a *bailee* under sections 151, 152 and 161 of the Indian Contract Act. The Company is bound to take as much care of the goods bailed to them as a man of ordinary prudence would of his own goods, and in the absence of any special contract (which does not exist here) they are not responsible for damage to the parcel. The evidence of the plaintiff on this point is of importance. He admits that he could not suspect anything from the appearance of the box, the screw connecting the barrel to the stock was broken. There was no grass or cloth put in the box to prevent the gun from sliding up and down in course of carriage. Unless something like grass or cloth was put in to fill up the vacant space in the case the gun would remain loose in the box.

(1) 15 C. P. L. R. 123.
(2) 6 C. 666 ; 7 C. L. R. 497 ; 3 Shome L. R. 260 ; 3 Ind. Dec. (N. S.) 432.
(3) 11 B. 320 ; 11 Ind. Jur. 342 ; 6 Ind. Dec. (N. S.) 209.
(4) 28 C. 142.
(5) 31 C. 155.
(6) 24 B. 591; 2 Bom. L. R. 386 ; 12 Ind. Dec. (N. S) 924.
(7) 34 C. 1059 at p. 1074; 9 Bom. L. R. 1192 ; 6 C. L J. 678 ; 2 M. L. T. 469 ; 34 I. A. 194 (P. C.).

SHANKAR DAS *v.* MANSA RAM

On the plaintiff's own showing, therefore, the rifle was not securely packed in the box and the shaking in transit may have broken the stock. No evidence has been led as to the manner in which the rifle was packed by the consignor. The certificate only says it was packed carefully, which is contradicted by the plaintiff. The certificate shows the screw connecting the barrels to the stock was broken before the gun was despatched from Kathgodam. This would render the stock loose and the shaking in transit might break it, but the Railway Company were not aware of this defect and are not responsible for it, and no liability attaches to them. *Prima facie*, the parcel contained only a gun and they were under no obligation to open it. In these circumstances, the decree of the Small Cause Court against the Rohilkhund and Kumaon Railway Co. must be set aside and the plaintiff's suit dismissed with costs.

The non applicant plaintiff will bear the costs of the Railway Company in this application. Defendant 1 did not appear.

G. R. D *Application dismissed*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1978 OF 1922.
March 22, 1923.
Present.—Mr. Justice Moti Sagar.
SHANKAR DAS AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
MANSA RAM AND OTHERS—
DEFENDANTS—RESPONDENTS.

Appeal, second—Questions of fact and law—Construction of document—Finding of fact.

The expression "construction" as applied to a document includes two things, first, the meaning of the words, and, secondly, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases, but the effect of the words is a question of law.

Chatenay v. *Brazilian Submarine Telegraph Co. Ltd.*, (1891) 1 Q. B. 79 ; 60 L. J. 295 ; 63 L. T. 739 ; 39 W. R. 63 ; **relied on.**

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Durga Chowdhurani v. *Jewahir Singh*, 18 C. 23, 17 I. A. 122 ; 5 Sar P. C. J. 560 ; 9 Ind. Dec. (N. S.) 16 **followed.**

Second appeal from the decree of the District Judge, Mianwali, dated the 25th May 1922, reversing that of the Munsif, First Class, Mianwali, dated the 23rd January 1922.

Mr. *Nanak Chand*, for the Appellants.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the learned District Judge and need not be recapitulated. The dispute relates to a small strip of land in the town of Mianwali to the north of the plaintiffs' property measuring about 3 *marlas* ; and the sole question for determination is whether the learned District Judge was right in holding that the plaintiffs had failed to prove that they were the owners thereof. The learned Counsel for the appellants has taken me very carefully through the whole facts of the case, and has argued that the construction put by the learned District Judge on the document (p. 8) and other documents on which the suit was based was erroneous, and that they fully established the plaintiffs' claim. I confess I am not satisfied that the appeal can succeed in face of the findings of fact. With regard to the conclusion drawn by the learned District Judge from the documents in question, it is necessary to distinguish carefully between his conclusions of fact and conclusions of law. The distinction as to how far a decision upon the contents of a document is a question of fact and how far it is a question of law, has been very forcibly expressed by Lindley, L. J., in *Chatenay* v. *Brazilian Submarine Telegraph Co. Ltd.*, (1) where the learned Judge observes:—"The expression 'construction,' as applied to a document, at all events as used by English lawyers, includes two things: First, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

In the present case the learned District Judge has carefully read the documents and has simply decided to what extent the entries in those documents indicate the plaintiffs'

(1) (1891) 1 Q. B. 79 ; 60 L. J. 295 ; 63 L. T. 739 ; 39 W. R. 65.

ownership of the plot in question. He has in no way interpreted the entries in the documents to indicate any legal point, and his decision on the basis of these documents that the plaintiffs have failed to establish their ownership is clearly a decision of fact and not of law. In *Durga Chowdhurani* v. *Jewahir Singh* (2) their Lordships of the Privy Council have laid down that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and that where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. No error or defect in the procedure is pointed out in the present case, and the lower Appellate Court was fully justified to construe the documents in the way in which it has done in support of its finding.

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

Z. K. *Appeal dismissed.*

(2) 18 C. 23, 17 I. A. 122, 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16.

MADRAS HIGH COURT.

SECOND APPEAL NO. 73 OF 1920.

April 27, 1923.

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

VENKATARAMA IYER—APPELLANT—(117TH DEFENDANT)

versus

SUBRAMANIA SASTRY AND OTHERS—RESPONDENTS

*Adverse Possession—Co-owners—Transferee from one co-owner—Possession when adverse to other co-owners—*Samudayam *tenure—*Karaiyedu *tenure.*

The possession of one owner is not ordinarily adverse to the other co owners. Not only possession by one co-owner but also an exclusion of the others or a denial of their title to their knowledge is essential to render such possession adverse. The same principle is applicable to the case of a transferee from one of several co-owners. Where he prescribes as a co-sharer, he must prove exclusion or denial of title as against the other co-sharers. But in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee with an independent or invalid title or none.

Bhavrao v. *Rukhmin*, 23 B. 137; 12 Ind. Dec. (N. S.) 91; *Ganesh Mahadeo* v. *Ramachandra*, 20 B. 557; 10 Ind Dec. (N. S.) 937; *Watson & Co.*, v. *Ramchand Dutt*, 18 C. W; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.); *Lachmaneswar Singh* v. *Manowar Hossein*, 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind Dec. (N. S.) 614 (P. C.); *Varada Pillai* v. *Jeevarathnammal*, 53 Ind Cas. 901; 43 M. 244; (1919) M. W. N 724; 10 L. W, 679; 24 C W. N. 346; 28 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L R. (P. C.) 64; 22 Bom. L. R. 444; 46 I A. 285 (P. C.), relied on. *Bhaiji Shamrao* v. *Hajimiya Mahomed*, 15 Ind. Cas. 500; 14 Bom. L. R. 314 considered.

Nature and incidents of *Samudayam* and *Karaiyedu* tenure in Tanjore District explained.

Second appeal against the decree of the Court of the Temporary Subordinate Judge at Tanjore, in Appeal Suit No. 14 of 1916, preferred against the decree of the Court of the District Munsif of Shiyali, in Original Suit No. 180 of 1912 (Original Suit No. 416 of 1905 on the file of the Court of the District Munsif of Valangiman).

Messrs. *T. Narasimha Ayyangar* and *K. R. Narayanaswamy Ayyar*, for the Appellant.

Messrs. Dr. *S. Swaminadhan*, *S. Varadachariar*, *S. Rangaswami*, *K. V. Krishnaswamy Ayyar*, *N. Kunjithapatham Ayyar* and *M. S. Venkatrama Ayyar*, for the Respondents.

JUDGMENT.—This appeal is by the 117th defendant and it is opposed mainly by the 22nd defendant. The hearing has taken a considerable time, but the issues, now that the facts are ascertained, are clear.

The suit was brought for the partition of the *Samudayam* land of a village in the Tanjore district, the *Samudayam* tenure, as explained in the District Manual, being a holding in common by the village community known as the *mirasidars*. It is not disputed that the land, of which partition is claimed, was and is *Samudayam* land; nor has any serious attempt been made to dispute here that it has never been divided and that it is now partible. On this point it may be observed that the 22nd defendant no doubt set up a previous partition in his written statement; but

it is clear that the matter is *res judicata* against him in consequence of Exhibits T. A. and R, the judgments in O.S. No. 367 of 1900. The lower Appellate Court held that the parties before it had established their rights to a certain number of shares in the *Samudayam*, of $30\frac{59}{64}$ shares, and, in a portion of its judgment which has formed the principal subject of discussion, it allowed the 22nd defendant to retain as his share the plots in item No. 1, of which he is already in possession, item No. 1 being $4\frac{1}{2}$ velis in extent and the most valuable plot of the property in dispute and consisting in *padugai* land. The question argued first has accordingly been whether the 22nd defendant has a right to retain, in a division, the plots in item No. 1, of which he is in possession.

Prima facie, of course, the finding, which has already been referred to, in favour of the partible character of the land, entails that no share has been localized so far, since localization could only take place on the ascertainment of shares on partition. The lower Appellate Court has, however, supported the claim of the 22nd defendant in two ways; firstly, on the ground that he has prescribed for the ownership of the plots he is in possession of and, secondly, on certain equitable considerations. It has no doubt not distinguished these two grounds very carefully in its judgment but we think that its decision is based on both of them.

Before dealing with the law regarding the question of prescription, we may observe that something has been said as to the *Karaiyedu* tenure of the village. This tenure was not referred to at all in the pleadings and it appears to have attracted very little, if any, attention before the District Munsif. More, however, was said of it in the lower Appellate Court, though it is not clear that any finding was reached as to the existence in the village of the tenure. The tenure, we may observe, as the District Manual defines it, consists in a system of shifting severalty of ownership, the village lands being re-distributed among the *mirasidars* at intervals. It is clear that, when a suit is brought for the partition of the village lands for change to individual ownership, it cannot affect directly the sustainability of such a suit, whether the tenure of the village is ownership by the community, that is, ordinary *Samudayam* tenure, or whether it is the shifting severalty of the ownership of which the *Karaiyedu* tenure consists; and accordingly the only importance for our present purpose of the allegations as to *Karaiyedu* is that they may, if they are established, afford an explanation of the origin and character of the separate possession, on which the 22nd defendant would establish his prescription.

To turn to the direct consideration of that plea we find the District Munsif dealing at some length with the 22nd defendant's title to the different portions of item No. 1 and with his enjoyment; but the lower Appellate Court has not considered the evidence relating to that part of the case in any detail. It has contented itself with a general statement that it thinks that the prescription is made out. Even if the plea of prescription could be accepted at once with direct reference to the evidence as to the 22nd defendant's possession, the lower Appellate Court's consideration of that evidence would be inadequate.

The next material objection to the lower Appellate Court's judgment is, that it has dealt with the 22nd defendant's possession on the basis that it was the possession of a stranger to the co-tenancy, to which the other parties at least belong. It has done this, because there are in various places in the pleadings and evidence general statements that the 22nd defendant is not a *mirasidar*. The exact meaning of such statements is not clear. It is no doubt shown that the 22nd defendant does not claim his *mirasi* right in virtue of any lineal descent from a previous holder of *mirasi* right; but that is probably the case with very few of the *msrasidars* of the present day. Certainly, it is not the case with all the others who are accepted by the lower Appellate Court as co-sharers in the suit village. The 22nd defendant, however, acquired his *mirasi* right in virtue of his acquisition of particular properties, which were in fact part of the *Samudayam*, but are not described with regard to shares in it. It is, of course, conceivable that such acquisitions of *Samudayam* properties may import an implied denial that they were part of the common property; but it will be for the lower Appellate Court to consider whether

that is so, or whether the terms of the sale-deeds simply correspond with the current methods of expression regarding the common property and are consistent with the acquisition of the lands specified in them as parts of the common property and with the 22nd defendant's acqusition of the character of a co-owner or *mirasidar*.

The importance of this is that a very different measure of proof of prescription will be required according as the 22nd defendant claims to have prescribed as a stranger to the co-tenancy or as a *mirasidar* or co-tenant. It is possible, although we express no final opinion on the point, that the facts found proved by the District Munsif might be sufficient to justify a plea of prescription by a stranger; but, if prescription by a *mirasidar* or co-tenant were in question, it might then be necessary for us to consider, and the lower Appellate Court will have to consider, whether those facts included such evidence of exclusion of other co-sharers from possession or of assertion of an exclusive title as would be necessary under the strict rule to which co-owners are subject. We must accordingly call on the Additional Subordinate Judge, Tanjore, to whom the jurisdiction of the lower Appellate Court has now been tansferred, to submit findings on the following issues:—

Firstly.—Has the 22nd defendant acquired the character of a *mirasidar* in virtue of the purchases relied upon by him, or is he for the purpose of his plea of prescription to be regarded as not one of the co-tenants against whom he is prescribing?

Secondly.—Whether the 22nd defendant has completed any prescription for ownership appropriate to the character which he is found to possess?

As we are calling for a finding with reference to adverse possession, we do not at this stage deal with the lower Appellate Court's alternative ground of decision, *viz.*, the claim of the 22nd defendant, on equitable considerations. For the moment we would only observe that such considerations will be relevant in connection with the distribution of the shares as ascertained in a proper scheme after the preliminary decree has been passed and in order to and before the passing of the final decree. We shall, if necessary, point out, in eventually remanding the case for the passing of a final decree, one or two aspects, in which we think that the lower Appellate Court's statement of law is open to question. When findings on remand are received we shall also deal with the claim to reduction of the 22nd defendant's share on the ground that no reduction from it has already been made to correspond with the increases allowed to the shares of other parties.

At this stage, the only remaining matters for consideration are certain claims relating to particular items or cases of particular parties, which have been put forward in the appeal and the Memo. of Cross-objections. In the appeal there is, firstly, a claim based on the words alleged to be a proper interpretation of Exhibits 83 and 49. Before us that claim has not been disputed and we must, therefore, modify the lower Appellate Court's judgment by adding a $\frac{1}{3}$ to the $1\frac{15}{16}$th share already allowed by the Subordinate Judge to the 117th defendant.

Next, the 22nd defendant, in his Memo. of Cross-objections, has claimed an addition of $\frac{1}{32}$ to his share on the ground that Exhibit N has been misread. This is not disputed. His share will be increased by $\frac{1}{3\,2}$.

The other ground in the Memo. which is argued relates to the share of the 6th plaintiff. This has eventually not been pressed before us.

The other claim made by the 117th defendant is that the $\frac{3}{3}$ share awarded by the lower Appellate Court to the 65th defendant should have been deducted from the share given to the 22nd defendant. The only facts which it is necessary to mention at this stage are that the 65th defendant's title is based on a sale-deed, Exhibit 103, to his father by Namasivaya Pillai in 1875, whereas the 22nd defendant's title is based on the sale-deed, Exhibit 150 (*b*), by Namasivaya in 1883. *Prima facie* the sale-deed of 1875 would take precedence over that of 1883, though it is of course possible that Namasivaya Pillai may have had properties sufficient to satisfy the claims of both the purchasers. The lower Appellate Court has not dealt with this aspect of the case and has not mentioned the dates of the two sale-deeds, and in the absence of

such mention, we cannot consider its discussion satisfactory.

There are no doubt arguments which Mr. Krishnaswami Ayyar on behalf of the 22nd defendant has placed before us, and in particular the plea of *res judicata*, which may be decisive; but in the absence of any consideration given to the relative dates of the sale-deeds, on which the titles rest, we cannot accept the lower Appellate Court's judgment regarding this matter. We must, therefore, ask the lower Appellate Court to submit a finding on the issue :—

What are the shares which the 22nd and the 65th defendants are respectively entitled to in respect of the purchase from Namasivaya Pillai ?

The findings are to be submitted on the evidence already on record and are due in this Court on or before the 30th August, and seven days will be allowed for objections.

In accordance with the order contained in the above judgment the Additional Subordinate Judge of Tanjore submitted the following

FINDINGS.—In obedience to the order of the High Court, dated 3rd May 1921, in S. A. No. 73 of 1920, I beg to submit the following findings on the three issues remitted for the purpose :—

2. *Issue* 1.—" Has the 22nd defendant acquired the character of a *mirasidar* in virtue of the purchase relied upon by him or is he for the purpose of his plea of prescription to be regarded as not one of the co-tenants against whom he is prescribing ?"

* * * * *

I find that the 22nd defendant acquired the character of a co-owner or *mirasidar* in virtue of the purchases relied upon by him.

Issue 2.—"Whether the 22nd defendant has completed any prescription for ownership appropriate to the character which he is found to possess ?"

* * * * *

The law on the point may be stated as follows, in the language of the decisions : " Uninterrupted sole possession of property by one joint owner by itself is no evidence of exclusion of other interested joint owners," vide *Hardit Singh* v. *Gurmukh Singh* (1). "Acts of ownership are not, in tenancies-in-common, necessarily acts of disseison. It depends upon the intent with which they are done and their notoriety. The law will not presume that one tenant-in-common intends to oust another. The entry and possession of land of one co-owner will ordinarily be held to be for the benefit of all," vide *Balaram Guria* v. *Syama Charan Mandal* (2). " A co-sharer in possession can convert his possession into adverse possession. This adverse possession so begun cannot be stopped by the other co-sharers merely by affirmations that they are co-sharers," vide *Akbar* v. *Tabu* (3). " To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster," vide *Gangadhar* v. *Parashram* (4).

On a consideration of the law applicable to the case of possession by one co-owner of particular plots in the *Samudayam* property, which requires unequivocal and open acts of adverseness necessary for the said co-owner to prescribe ownership in himself, I am of opinion that facts have been proved in this suit, as shown by my statement of them in the preceding paragraphs, which would entitle the 22nd defendant to claim prescriptive title over the properties in question, namely, his acquisitions in item No. 1 in the present suit, known as Muttadi Padugai. I find accordingly.

* * * *

This Second Appeal and the Memo. of Cross-Objections filed by the 13th respondent coming on for hearing on Friday and Thusday, the 16th and 22nd days of December 1921, after the return of the findings by the Additional Subordinate Judge of Tanjore, in pursuance of the order of this Court, dated 3rd May 1921, and the case having stood over for consideration till Thursday the 12th day of January 1922, the Court (OLDFIELD and RAMESAM, JJ.) delivered the following

(1) 47 Ind. Cas. 626 ; (1919) M. W. N. 1 ; 68 P. W. R. 1918 ; 64 P. R. 1918 ; 24 M. L. T. 389 ; 28 C. L. J 437 ; 20 Bom L R. 1064 ; 9 L. W. 128 ; 1 U. P L. R. (P. C.) 8 (P C.).

(2) 60 Ind. Cas. 298 ; 38 C. L. J. 344; 24 C. W. N. 1057.

(3) 22 Ind. Cas. 805 ; 105 P. L. R. 1914 ; 61 P. W. R. 1914 ; 45 P. R. 1914.

(4) 29 B. 600 ; 7 Bom. L. R. 252.

JUDGMENT.—The finding of the lower Appellate Court on the first question remanded, that 22nd defendant acquired the character of a *mirasidar* or co-owner in virtue of the purchases relied on by him, must be accepted, since no objection is taken to it. To the correctness of the argument based on it by the lower Appellate Court further reference will be made.

The second finding of the lower Appellate Court is that 22nd defendant has completed a prescription for ownership appropriate to his legal character; and this cannot be accepted, if only because it is based on five considerations, of which three possess no substance. For the issue by the *melwaramdars* of *pattas* to 22nd defendant alone, the making of improvements by him on the land in his occupation and the language used by 1st and 2nd defendants in their written statement as to their possession of land, with which he is not concerned, afford no evidence of the nature of his enjoyment or that it has been adverse to his co-owners, since the latter would not be bound by the conduct of the *melwaramdars* or of 1st and 2nd defendants and had no reason for objecting to improvements, which would pass with the land and, if it ever had to be surrendered, would have to be surrendered with it. The two other grounds on which this finding is based, the attitude of 22nd defendant's father in his litigations with all or some of the *mirasidars* and that of 22nd defendant and his vendor, Velayudha Chetti, to them in respect of part of item No. 1 of the suit property, no doubt might legitimately have been considered by the lower Appellate Court. But they are not conclusive; and, although it could have reached its finding with regard to them alone, there is nothing to show that it would have done so. For these reasons, therefore, the finding cannot be accepted.

In remanding the case a second time for a finding in the light of the foregoing we take the opportunity to deal with two other points, on which argument has been based. Firstly, the lower Appellate Court has observed that the documents evidencing enjoyment under *Karaiyedu* tenure range down to 1894 and its further statements suggest that it held in favour of the cessation of that tenure in that year. But, firstly, the documents in fact range down to only 1884 and, next, it is a question whether the tenure ceased with them or later; for, secondly, it does not follow that it ceased, when they were executed. The date of its cessation is clearly most important, since, if the tenure was in force at the date of 22nd defendant's entry or his vendees, that fact would be material to the decision as to the character of his possession, as supporting the plea of prescription.

Lastly, it is urged that the special rule as to the evidence necessary to establish prescription between co-owners is not applicable to 22nd defendant, who is not a co-owner, but only a transferee of some co-owners' interests and that it is unnecessary for such a transferee to establish the exclusion or denial of title to the knowledge of his opponents, which would as between co-owners ordinarily be essential. This is supported by reference to *Bhavrao* v. *Rakhmin* (5), and the conclusion that the possession of a purchaser from a co-sharer of only the qualified right to an assignment of the land in his vendor's possession, if that be possible at a partition, will prescribe in virtue of his bare possession, "adverse possession depending on the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested, whether in a single person or in many jointly;" and the opinion was expressed later that it did not matter whether the transferees in possession, who were before the Court, knew of the property being held in co-ownership or not, although the fact that they were transferees had been regarded in the judgment as important with reference to their knowledge of their real rights. This is no doubt stated generally, but it is possible that it was influenced by the local considerations, which also are referred to. Certainly, it goes beyond the earlier authority relied on *Ganesh* v. *Ramchandra* (6), since there the entry into possession was under a purchase in a Court sale of which the other co-sharers were presumably aware and the impossibility of harmonious relations between the parties is expressly referred to. *Bhavrao* v. *Rakhmin* was accepted as good law by BEAMAN, J., in *Bhaiji Shamrao* v. *Hajimiya Mahamad* (7). But it

(5) 23 B. 187; 12 Ind. Dec. (N. S.) 91.
(6) 20 B. 557; 10 Ind. Dec. (N. S.) 937.
(7) 15 Ind. Cas. 500; 14 Bom. L. R. 814.

was construed by HAYWARD, J., as deciding only that a transferee's knowledge of the defect in his title did not prevent his prescribing for the right conveyed by his transfer and as raising no question as to the necessity for knowledge on the part of the true owner that his right was denied or interfered with. That, however, is not enough to explain the case or the statement in connection with an assumption that the transferees knew of the coparcenary character of the property that "a person coming in under a title, which he knows to be defective, is not by a reason of his knowledge deprived of the benefit of the law of prescription," the general rule requiring twelve years' possession of the ordinary character being apparently in question. For that statement, if it is to be understood as generally as its wording involves, is clearly opposed to decisions of the Judicial Committee, which are not referred to in any of the Bombay cases, *Watson & Co* v. *Ramchund* (8) and *Lachmeswar Sing* v. *Monowar Hussain* (9), as well as *Varada Pillai* v. *Jeevaratnammal* (10), the two first defining the point at which the Court will restrain the enjoyment of one co-sharer as interfering with the rights of the others and the last dealing directly with prescription. It is to be observed that in each of these cases the prescribing party was the transferee of a co sharer, not a co-sharer or his descendant, being in the first a lessee, in the second a purchaser and in the third a beneficiary under a Will, and that, although this was not stated expressly, his knowledge of his rights and those of the other co-sharers was assumed. But the material fact, and it is irreconcilable with the decision in *Bhavrao* v. *Rakhmin* (5), is that not only a possession by one co-sharer, but also an exclusion of the others or a denial of their title to their knowledge, was held essential before such possession could be restrained or regarded as adverse. There is, accordingly, no justification for the general statement that a tranferee in possession of common property is subject to no special restriction in prescribing against co-sharers other than his transferor. It can be said only that, if he prescribes as a co-sharer, a matter to be decided with reference to the terms of his transfer and the circumstances, he must prove exclusion or denial of title; but that, in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee with an independent, but invalid, title or with none? It will be for the lower Appellate Court in dealing with 22nd defendant's case of prescription to decide to which of these alternatives it is subject.

We accordingly remand the case for a rehearing and submission of revised findings in the light of the foregoing. Findings will be submitted in six weeks. Seven days will be allowed for filing objections.

In pursuance of the order contained in the above judgment the Additional Subordinate Judge of Tanjore submitted the following

FINDING :—In obedience to the order of the High Court, dated 12th January 1922, in S. A. No. 73 of 1920, I beg to submit the following revised finding on issue 2, namely, whether the 22nd defendant has completed any prescription for ownership appropriate to the character which he is found to possess?

2. The 22nd defendant was found by me under issue 1 to possess the character of a co-owner or a *mirasidar* in respect of his purchase of the item and that finding has been accepted by the High Court.

* * * *

9. I find that the Karaiyedu tenure in the village had certainly ceased before the date of the 22nd defendant's father's earliest sale-deed. Such a tenure was not known to have existed after 1879 according to the evidence of Mr. K. Kaliyanasundaram Ayyar (Exhibit LV) already referred to. Such a tenure could not have existed after 1848 (the date of Exhibits M and C-3). With reference to the terms contained in the sale-deeds obtained by the 22nd defendant's father and by the the 22nd defendant himself, and with reference to the litigations in O. S. Nos. 435 of 1890, 126 of 1891 and 456 of 1892 and in consideration of the large number of *mirasidars* who contested the plaintiffs in these suits and of a large number of other *mirasidars* who had taken part in the sale-deeds of the 22nd defendant's father and who must have known

(8) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 585; 9 Ind. Dec. (N. S.) 7 (P. C).

(9) 19 C. 253; 19 I A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S) 614 (P. C.)

(10) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 846; 38 M. L. J. 813; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R 444; 46 I. A. 285 (P. C.).

of the purchase and the possession of the plots by the 22nd defendant's father in the village, I find that the 22nd defendant has completed prescription for ownership against all *mirasidars*, directly as against those who were parties to the litigations and constructively against the other *mirasidars*. I also find that the 22nd defendant's father and the 22nd defendant had nothing to indicate to them at the time of their purchase that the properties were in common holding.

This Second Appeal and the Memo. of Cross-objections filed by the 13th respondent coming on for hearing on Friday, Tuesday, Wednesday and Wednesday the 17th, 21st, 22nd and 29th days of November 1922, respectively, after the return of the revised findings from the Additional Subordinate Judge of Tanjore, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Oldfield, J.—The lower Appellate Court's finding is in 22nd defendant's favour, and in accepting it, we need deal in detail with one question only, that of *res judicata*, since no objection of any weight has been taken to it on other grounds.

The previous adjudication relied on is evidenced by Exhibits T., A. and R., the judgments in O. S. No. 367 of 1900 and in first appeal therein and the decree in second appeal; and no doubt in our first order of remand we said that the plea of a previous partition was concluded by them against 22nd defendant. We did not, however, refer to the plea of prescription, which is now in question. That plea is, it is said, now inadmissible, because 22nd defendant's prescription according to the finding before us was complete in 1883 and could have been, but was not, relied on by him in the previous proceedings. The answer is that, whatever the effect of Exhibits T., A. and R. on 22nd defendant's right to plead a title acquired before the beginning of that litigation, they do not affect his right to rely now on a subsequent period of adverse possession, which was then incomplete or debar him from proving what happened before that period, as explaining the nature of his connection with the property during it.

The remaining argument for consideration should have been advanced, before the finding was called for, and can be considered now only with reference to the facts found and as raising a question of law. It is that 22nd defendant cannot, as a co-owner, claim part of the estate in co-ownership in virtue of prescription for that part alone. This is argued on the strength of the decision in *Kumarappa Chettiar* v. *Saminatha Chettiar* (11) and particularly the dictum of SESHAGIRI AYYAR, J., therein, that "possession of part of the property" by some of its co-owners "would save limitation as regards the rest of the property" as against the others, that of course stating the law from the stand-point of the then defendants, who correspond with the present appellants. As this dictum is the sole support of the argument attempted, it is necessary to ascertain its exact scope by reference to its context. The plaintiffs in *Kumarappa Chettiar* v. *Saminatha Chettiar* (11) claimed in the alternative (1) possession of certain items on the ground that their vendors, 1st and 2nd defendants, had either obtained them in partition or been in exclusive and adverse possession of them for more than twelve years, or (2) partition and delivery of their vendors' share in them. In appeal, however, nothing was said of 1 and 2 defendants' title under the partition. The other defendants, representing other branches of 1 and 2 defendants' family, admitted plaintiffs' right to division and delivery of shares in the items, but on the remaining question as to plaintiffs' or 1 and 2 defendants' prescription for the whole of those items they pleaded Art. No. 127, Sch. I of the Limitation Act. It was in discussion of this plea that the dictum of SESHAGIRI AYYAR, J., now relied on, occurred and that WALLIS, C.J., said: "If the property was undivided and Art. No. 127 is applicable to bar the plaintiff, there must be exclusion from the whole of the joint family property and exclusion from the suit property only will not do." With that part of the decision, however, we are not concerned, and it is unnecessary for us to express an opinion regarding its correctness or the extent to which it is really entailed by the authorities relied on by the learned Judges. For, in the present

(11) 52 Ind. Cas. 470; 42 M. 491; 36 M. L. J. 612; 1 (1919) M. W. N. 328.

case, the suit property is not and never was the joint family property, to which alone Article No. 127 statedly applies. In fact in *Kumarappa Chetty* v. *Saminatha Chetty* (11) the argument was conducted on the assumption that the joint family in question had become divided in status and the judgments dealt also with the alternative that, although the property had belonged to a joint family, the defendants' interest in it was at the date of suit that of tenants-in-common. On that alternative the learned Judges did not decide whether Art. No. 127 would apply, holding that, even if (as 22nd Defendant now contends) the proper Art. was No. 144, the plaintiff's claim to possession of the whole items must fail. But, and this is the important point for our present purpose, WALLIS, C.J., reached that conclusion, not on the short ground, which would have been open to him, if appellants' contention here were sustainable, that prescription for a part only of the common property was useless, but because "there was no sufficient evidence of ouster," meaning evidently no evidence of such aggravated exclusion as is required between co-tenants; and, although SESHAGIRI AYYAR, J., referred directly only to the effect of the decisions he had considered, not to any finding of fact to which he applied them, this part also of his judgment is reconcilable with the interpretation now suggested of the case. Shortly, the learned Judges, so far as their dicta support the present appellants, were dealing with what is not at present in question, property which was or had been that of a joint family; and there is nothing in their judgments to impair the application to the common property in dispute before us of the principle, on which the leading cases of *Watson* v. *Ramchand* and *Lachmeswar Singh* v. *Monowar Hussain* (9) were decided, that prescription for part of such property is not impossible, but must be established by evidence, not only of adverse possession, in the ordinary sense of that term, but further of assertion of title and exclusion, irreconcilable with the existence of any tenancy-in common. We are accepting the finding that such denial of title and exclusion is proved in the present case. The appellant's objections failing, the conclusion must be in 22nd defendant's favour.

(11) 52 Ind. Cas. 470; 42 M. 431; 36 M. L. J. 612; 1 (1919) M. W. N 328.

Ramesam, J.—The appellant has filed objections to the finding recorded by the Subordinate Judge (on 25th August 1921) on the third of the issues sent down by him. He says the Subordinate Judge omitted, by a slip, to deduct half a *pangu* out of Namasivayam Pillai's share. This is not admitted by the other side and it is not clear that any slip was made by the Subordinate Judge. The finding is one of fact and is accepted.

* * * * *

The decree of the lower Appellate Court will, therefore, be modified as follows :—

1. The appellants will be entitled to $\frac{1}{2}$ *pangu* in addition to the *pangus* allotted in the lower Appellate Court.

2. That the 22nd defendant be and hereby is, allowed to retain the lands (1 *veli* 16 *mahs.*, and 44 *kulis*) decreed in O. S. No. 388 of 1884, O. S. No. 456 of 1892 and O. S. No. 126 of 1891 in satisfaction of $11\ \frac{1}{1}\frac{3}{6}$ *pangus*.

3. That the 22nd defendant is entitled to $1\frac{1}{3}\frac{1}{2}$ *pangus* in addition, to be allotted to him in general partition.

4. That the remaining lands (the lands other than the 1 *veli*, 16 *mahs.*, and 44 *kulis*) should be divided into $19\ \frac{9}{1}\frac{1}{9}\frac{}{2}$ shares and the shares to which the parties are found entitled are to be allotted to the respective parties.

In the Second Appeal, the appellants will pay the costs of the 22nd defendant. In the Memorandum of Objections, each party will bear its own costs except that the 22nd defendant will pay the costs of the 8th respondent.

* * * * *

V N. V. *Decree modified.*

DAMODAR PROSHAD *v.* SURENDRA NATH

CALCUTTA HIGH COURT.

CIVIL APPEALS NOS. 390 AND 393 OF 1921.

May 10, 1923.

Present:—Mr. Justice Walmsley, and Mr. Justice Suhrawardy.

In No. 390 *of* 1921.

DAMODAR PROSHAD PANDEY, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES BISSESWAR PANDEY, DURGAPADA PANDEY AND KRISHNAPADA PANDEY, MINORS, REPRESENTED BY THEIR MOTHER AND GUARDIAN TARANGINI DEBY, AND BIRENDRA NATH PANDEY, AND NISTARINI DEBYA—DEFENDANTS—APPELLANTS

In No. 393 *of* 1921.

SURENDRA NATH PANDEY, AND ANOTHER —DEFENDANTS—APPELLANTS

versus

BRINDAVAN CHANDRA GHOSE—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Alienation—Family property—Mortgage—Antecedent debt—Necessity—Proof.

In a family governed by the Mitakshara school of law the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, *first*, that it must have been incurred antecedently to the transaction in suit and, *secondly*, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate. [p. 46, col. 1]

To establish "necessity" it is not enough to prove that a debt raised by a father on the security of the family property was used in discharging a prior mortgage by him. It must be further proved that the prior mortgage had been effected for necessity. [p. 46, col. 2]

Appeals against the decrees of the District Judge of Zillah Rajshahye, dated the 15th of September 1920, affirming the decrees of the Additional Subordinate Judge of Rajshahye, dated the 29th of July 1918.

Babu *Amarendra Nath Bose*, and Babu *Dwijendra Krishna Dutta*, for the Appellants.

Babu *Surendra Nath Guha*, and Babu *Nirode Bandhu Roy*, for the Respondent.

JUDGMENT.

Walmsley, J.—These two appeals are preferred by the defendants and they arise out of two suits, each brought by the mortgagees on a bond of Rs. 2,000. One of these bonds was executed by Dwija Prasad Pandey, predecessor in interest of the defendants in Appeal No. 390, and the other by Brojo Kishore Pandey, predecessor in interest of the defendants in Appeal No. 393.

The defendants are admittedly governed by the Mitakshara School of Law, and it was urged on their behalf that the executants of the bonds could not bind the joint ancestral property. The learned Judge held that the bonds were executed to pay off the sums due to one Madan Mohan on earlier mortgages by the same executants and that those sums were actually paid off and that these debts to Madan Mohan constituted antecedent debt to the extent of Rs. 1,750 in each case. And he accordingly decreed each suit for Rs. 1,750 with interest and dismissed each suit to the extent of Rs. 250. Incidentally he mentioned that the rate of interest payable to Madan Mohan was 10½ per cent. while the plaintiff's lent at 7½ per centum.

Both sides preferred appeals and the learned Judge dismissed all the appeals.

For the defendants the pleas are again taken that the debts due to Madan Mohan on the earlier bonds did not constitute antecedent debts and that necessity has not been proved.

There are many judgments as to the true meaning of the words "*antecedent debt*" but it is not necessary now to allude to decisions earlier than that of *Sahu Ram Chandra* v. *Bhup Singh* (1), dated March 9th, 1917, the decision to which both the lower Courts refer. That was a decision by the Privy Council, and Lord Shaw, in delivering judgment, quoted a passage from the case of *Nanomi Babuasin* v. *Modhun Mohan* (2), in which it was said that the decisions had established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, he then went on to say: "These expressions.....do not give any countenance to the idea that the joint family estate can be effectively sold or charged" in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C.W.N. 698; 1 P. L. W. 557; 15 A. L. J. 487; 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.).

(2) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 632; 6 Ind. Dec. (N. S.) 515 (P. C.).

the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply and to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property."

The view thus expressed seems in some quarters to have been regarded as upsetting accepted ideas, and our attention has been drawn in particular to a decision by a Full Bench of the Madras High Court, *Arumugam Chetty* v. *Muthu Koundan* (3). We need not, however, discuss that case, for since then there has been another decision by the Privy Council. The case of *Ram Singh* v. *Chet Ram* (4) was decided by a Division Bench of the Allahabad Court shortly before the Madras case. The learned Judges quoted the passage that I have just quoted, and held that the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, *first*, that it must have been incurred antecedently to the transaction in suit and, *secondly*, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate. Accordingly, they held that a mortgage by the father in 1904 could not be regarded as an antecedent debt which would make a sale of the mortgaged property in 1907 binding on the sons. The mortgagee purchasers appealed to the Privy Council, and the decision delivered on April 10, 1922 is reported in *Chet Ram* v. *Ram Singh* (5). Lord Shaw again delivered the judgment and he repeated what he had said in *Sahu Ram's case*, and affirmed the view taken of the earlier decision by the Allahabad Judges. It is clear, therefore, that the plaintiffs cannot rely upon the previous mortgage to Madan Mohan as antecedent debt.

(3) 52 Ind. Cas. 525 ; 42 M. 711 ; 9 L. W. 566 ; (1919) M. W. N. 409 ; 37 M. L. J. 166 ; 26 M. L. T. 96 (P.C.).

(4) 51 Ind. Cas. 119 ; 41 A. 529 ; 1 U. P. L.R. (A) 52 ; 17 A. L. J. 706.

(5) 67 Ind. Cas. 569 ; 44 A. 368; 8 P. L. T. 363; 31 M. L. T. 50 ; 43 M. L. J. 98 ; 16 L. W. 89 ; (1922) M. W. N. 455 ; 4 U. P. L. R. (P. C.) 64 ; (1922) A. I. R. (P.C.) 247 ; 8 P. L. R. 1922 ; 24 Bom. L. R. 1281 ; 27 C. W. N. 150 ; 49 I. A. 228 ; 21 A. L. J. 114 ; 37 C. L. J. 79 (P. C.).

The position in the present case is that the learned Judge has followed the decision in *Sahu Ram's case* correctly, so far as he has refused to treat the debts due to Madan Mohan on the prior mortgages as antecedent debts. He is correct, too, in thinking that the other ground on which the mortgages could be supported as against the sons is the ground of necessity, but when he deals with the question whether there was necessity I think he makes a mistake. He says that the plaintiffs cannot be asked to do more than prove the representations made to them on the strength of which they made the loans, and when they have proved that they were told of the mortgages to Madan Mohan, that their money was used in discharging the sums due to Madan Mohan and that they lent at a lower rate of interest than Madan Mohan, he holds that they are entitled to claim that necessity has been proved. It appears to me that such a line of reasoning reduces to nothing the principle enunciated by the Privy Council; for it amounts practically to saying that although the prior mortgages are not "antecedent debts" within the technical meaning of those words, they are by themselves almost complete evidence of the other independent ground on which the alienation can be supported.

In my opinion the ground of necessity requires proof from additional sources. The prior mortgages are evidence of indebtedness and to that extent of necessity, and the lower rate of interest is evidence of expediency but more is required, and, hard as it may seem, I think it was the duty of the plaintiffs to carry their case further back and prove that the original indebtedness sprang from necessity. It is conceded, however, that they have not tried to go beyond their own mortgages, except so far as vague statements are made about arrears of putni rent: consequently, I hold that they have failed to prove the alternative ground of necessity.

The result is that the appeals must be allowed and the suit dismissed.

With regard to costs, I think that the dates of the decisions which I have mentioned warrant us in showing some consideration to the plaintiffs, and that they should be directed to pay only half the defendants' costs in all Courts.

Suhrawardy, J. —I agree.

S. D. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 393 OF 1922.

July 21, 1923.

Present :—Mr. Prideaux, A. J. C.

SITARAM—PLAINTIFF—APPELLANT

versus

ASARAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908) Sch. I, Art. 166.—Application to set aside execution sale—Limitation, commencement of.

Under Art. 166 of Sch. I to the Limitation Act, time for an application to set aside a sale in execution of a decree begins to run from the date of the sale and not from the date on which the deposit of 25 per cent. is made by the decree-holder, or the date on which the sale is confirmed.

Appeal against the order in Civil Appeal No. 28 of 1922 of the Court of the Additional District Judge, Wardha, dated 27th April 1922.

Mr. *D. T. Mangalmurti*, for the Appellant.

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

JUDGMENT.—In this case the respondent obtained a decree in Civil Suit No. 314 of 1916 on the file of the Munsif, Wardha, against the original mortgagor and Sitaram, the present appellant, a subsequent purchaser. There was an appeal against this decree but it was dismissed. The suit was filed on a mortgage of a house and site. The decree-holder applied for execution of the decree and the house was attached and sold on 21st November 1921. On 22nd December 1921 the present appellant applied to get the sale set aside for various reasons. That application has been rejected as time-barred and the rejection is confirmed on appeal.

It is here argued that time begins to run from the date on which the 25 per cent. deposit mentioned in O. XXI, r. 84, of the Civil Procedure Code, is made and not from the date of sale. *Munshi Lal* v. *Ram Narain*

(1) is quoted in support of this view. It is further contended that if time does not run from the date of deposit of 25 per cent. it runs from the date of confirmation of the sale. It seems to me that the proposition that time commences to run from the date of the deposit of 25 per cent. is wrong and as regards the second argument advanced it seems to me, in the words of Sir Henry Stanyon in his judgment in *Wasudeo* v. *Hiralal* (M. A. 31 of 1911, dated 16th July 1912), that the contention that under Art. 166 of the Limitation Act time begins to run from the date of confirmation of the sale is repelled by the language of the Article itself. Art. 166 of the Limitation Act states that an application to set aside a sale in execution of a decree has to be presented within thirty days counting from the date of the sale and, in this view of the law, the orders of the Courts below are correct. This second appeal fails and is dismissed with costs. The appellant will pay the respondent's costs

Z. K. *Appeal dismissed.*

(1) 17 Ind. Cas. 783 ; 35 A. 65; 10 A. L. J. 475.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 295 of 1922.

September 17, 1923.

Present :—Mr. B. J. Dalal, J. C.

B. KALU SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HANSRAJ UPADHIYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) s. 91 (a), (b)—Civil Procedure Code (Act V of 1908) O. XXXIV, r. 1—Mortgage — Redemption—Tenant from year to year whether can redeem—Construction of document—Lease **bila miad**, *whether perpetual—Ejectment on non-payment of rent, absence of stipulation as to—Independent documents, whether can be read together.*

KALU SINGH *v.* HANSRAJ UPADHIYA

Mere silence in a lease on the subject that the lessee would be liable to ejectment on non-payment of rent does not imply that the lessee cannot be so ejected. [p. 48, col. 2]

Plaintiffs were granted a lease *bila miad* to cultivate the land, and were enjoined to pay the rent, and the lessors were given the right of recovering the rent by suit or by distraint:

***Held*, that the lease was one from year to year and not perpetual. [p. 48, col. 2]**

Two independent documents which contain no reference to each other cannot be combined to constitute a *Zar-i-peshgi* lease. [p. 48, col. 2]

A tenant or a year to year lessee is not a person who has such an interest in the property given to him for cultivation as is contemplated in clauses (a) and (b) of section 91 of the Transfer of Property Act, so as to enable him to redeem the property. [p. 49, col. 1]

***Rajendra Prasad* v. *Ramjatan Rai*, 39 A. 589 ; 39 Ind. Cas. 785 ; 15 A. L. J. 544 ; relied on.**

Appeal against a decree of the Addl. Sub. Judge, Fyzabad, dated 11th July 1922, reversing a decree of the Munsif, Akbarpur, dated 7th November 1921.

Messrs. *A. P. Sen*, and *H. K. Ghosh*, for the Appellant.

Mr. *Niamatullah*, for the Respondents Nos. 1 and 2. Respondents 3 and 4 (B. Nagarsen Singh and Pateshwari Singh) duly served —absent. Trial *ex parte* as against them.

JUDGMENT.—The lessees from a mortgagor sued for the redemption of a mortgage executed by the mortgagor prior to the date of the lease. Their suit was decreed by the first Court of the Munsif of Akbarpur but the decree was set aside and the suit dismissed by the Appellate Court of the Additional Subordinate Judge of Fyzabad. The question at issue is whether the plaintiffs had any such interest in the land as is described in section 91 (*a*) and (*b*) of the Transfer of Property Act so as to entitle them to redeem. Those provisions of the Law give a right to redemption to any person having any interest in or charge upon the property or upon the right to redeem the property. First, it has to be determined whether the plaintiffs are perpetual lessees or lessees only from year to year. According to the terms of the lease, the lease is granted *bila miad* to cultivate the land. The lessees are enjoined to pay the rent and the lessors are given the right of recovering the rent by a suit for the recovery of rent or by distraint. The words '*patta bila miad*' are also quoted at the end of the document to describe the nature of the document executed by the mortgagors. The learned Judges of the two Subordinate Courts were both Indians and acquainted with the Vernacular. The first Court held that '*bila miad*' meant in perpetuity, while the Appellate Court disagreed and held the terms to indicate a lease for which no period was fixed. According to the interpretation of the lower Appellate Court the lease was one from year to year according to the terms of section 106 of the Transfer of Property Act. Personally, I think that the terms of the document should be examined to interpret the word which, in its common acceptance, may mean either undetermined or perpetual. In the present case the interpretation put on the bond by the lower Appellate Court appears to me to be better justified according to the terms of the document. There are no words in the document to indicate the perpetual nature of the transfer. It was pointed out that the lessor on non-payment by the lessee could not eject under the terms of the contract. Mere silence on the subject that lessee would be liable to ejectment on non-payment of rent does not imply that the lessee could not be so ejected. In a ruling of the Board of Revenue referred to by the learned Counsel for the appellant (Unpublished decision, Vol. 2, p. 479) the term *bila miad* was taken to mean perpetual lease, but in that case one of the terms of the document was that the lessees were not to be ejected so long as they paid their rent. I hold that the lease is one from year to year and not perpetual.

My attention was drawn to a bond executed by the mortgagor for Rs. 4,000 in favour of the lessee in which Rs. 2,200 was left with the lessee to redeem the present mortgage in suit. This, however, was an independent transaction and the money was not made recoverable by the sale of the property in suit or by the creation of any charge on the property. The terms of the recovery were the usual ones "from the person and property of the borrower."

The two independent documents which contain no reference to each other cannot be combined to constitute a *zar-i-peshgi* lease.

The next argument of the learned Counsel was that even if the lease was given from year to year he was entitled to redeem. This

argument is not sound. Interest in property cannot mean the interest of a tenant, because in that case when *zemindari* property is the subject of mortgage all the tenants of the land would have to be made parties to the suit in a suit for sale or redemption under O. XXXIV, r. 1. It was the opinion of a learned Judge of the Allahabad High Court in *Rajendra Prasad* v. *Ramjatan Rai* (1), that a mere tenant or an ordinary lessee had no right to redeem though a perpetual lessee had. The mortgagor who had given a usufructuary mortgage put the mortgagee in possession and had no such possession of the land which he could make over to a lessee from year to year and thus there was no such interest in the property in the mortgaaor which he could pass to the lessee. The mortgagor was owner of the equity of redemption. He had not made any transfer thereof. I am opinion that a tenant or a year to year lessee is not a person who has a right to redeem the property given to him for cultivation.

The appeal fails and I dismiss it whith costs. Costs will be paid to the respondents mortgagees.

Z. K. *Appeal dismissed.*

(1) 29 Ind. Cas. 785 ; 39 A. 589 ; 15 A. L. J. 544.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND MIS. APPEAL NO. 25 OF 1921.
August 27, 1923.

Present : -Mr. Raymond, A. J. C. and Mr. Madgowkar, A. J. C.

MURAD -APPELLANT

versus

DAYARAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII and O. XXXVI r. 14—Mortgage suit—Consent decree for instalments, whether final decree—Charge created on mortgaged property—Execution—Charged property, whether can be sold in execution—Right of legal representative to claim property in individual capacity in execution proceedings—Sind Encumbered Estates Act (XX of 1896), s. 19, cl. 3, whether applies to execution proceedings.

In a suit based on a mortgage-bond a consent decree was passed against the heirs of the deceased mortgagor, the decretal amount being made payable by instalments with a charge on the mortgaged property, the personal liability of the judgment-debtors being excluded and property other than the mortgaged property being exempted from liability. It was contended in execution proceedings that this was not a final decree and, further, that it was only a declaratory decree and as such was not capable of execution:

Held, that the decree was a final decree; that the judgment creditor had the right to bring the property charged to sale in execution proceedings, and that no separate suit for the sale of the property was necessary. [p. 50, col. 2]

Ambala Bapubhai v. *Narayen Satyaba*, 51 Ind. Cas. 929 , 21 Bom. L. R. 698, 43 B. 631, relied upon.

Section. 19, cl. 3 of the Sind Encumbered Estates Act applies to execution proceedings as well as to suits. [p. 51, col. 1]

Pinia Shah v. *Abdulla* 30 Ind. Cas. 25, 9 S. L R., 45, relied upon.

A party to execution proceedings as a legal representative cannot have a claim in his individual capacity inquired into under the provisions of section 47, Civil Procedure Code, but must file a separate suit in respect thereof, for it is only as a third party that such a claim can be preferred by him. [p. 51, col. 2; p. 52 col. 1]

The object of O. XXXIV, r. 14 of the Civil Procedure Code is to prevent mortgagees from suing their mortgagors on the mortgage debt as such, and in execution selling the bare equity of redemption, thereby depriving the mortgagor of the right of redemption that would be given to him by the decree for sale. [p. 50, col. 2]

Appeals from judgments and decrees, dated the 31st October 1919, of the District Judge, Hyderabad.

Mr. *Issardas Udharam*, for the Appellant.

Mr. *Kimatrai Bhojraj* for the Respondent.

JUDGMENT.—This is a second appeal arising out of execution proceedings. Respondents who had filed a suit on a mortgage-deed, obtained a consent decree against the heirs of one Gulam, deceased, the mortgagor, the decretal amount being payable by instalments with a charge on the mortgaged property. There was a failure in payment of three instalments and the respondents applied for sale of the mortgaged land.

Objections were taken to the grant of the execution application by one of the judgment-debtors Murad, a nephew of Gulam, deceased, on behalf of himself and the wife and daughter of the said Gulam, and as the same objections have been urged before us, I shall formulate them as follows :—

(1) The decree is merely a declaratory decree and, therefore, the execution application is not maintainable.

(2) The execution application is time-barred.

(3) No final decree has been passed and, therefore, again the execution application is unentertainable.

(4) It is denied that Murad, the appellant, and his father, Mubarak, were the heirs of the deceased Gulam and the property mortgaged by Gulam and now sought to be sold had been purchased by Murad and belonged to him. The executing Court after consideration of the objections directed execution to issue, and its order was on appeal confirmed by the District Court Hyderabad.

The decree was the result of a compromise between the parties and to this compromise appellant Murad was undoubtedly a party It is obvious that the decree was not intended to be a preliminary decree, it was made in terms of the compromise between the parties, the decretal amount being payable by instalments and provision was made for the failure in payment of any instalment. The parties clearly intended it to be a final decree regulating their rights and liabilities.

Was it, however, merely a declaratory decree as contended by the appellants ? This argument is based on the following terms of the decree. The mortgage lien of the plaintiff will remain intact on Survey Nos. 19 and 20 out of the above specified mortgaged property to the extent of 9-annas share on Survey No. 19 and 10-annas share on Survey No. 20, as it stands in the name of Gulam but the right over the other immoveable property specified in the plaint will continue in mortgage till the satisfaction of the whole amount as far as is shown in the mortgage-deed sued on. Later on the decree provides, "the defendants will not be considered to be personally responsible for the payment of the above amount nor will any property of theirs other than the above-mentioned property remain liable therefor."

The question turns upon the construction of the decree. It will be observed that by the terms of the decree the personal liability of the judgment-debtors has been expressly excluded and equally their property other than that mortgaged has been exempted from liability. The suit was based on the mortgage-deed. Could it then possibly have been the intention of the parties, when they entered into a compromise in terms of which a consent decree was to be passed, that in the event of the judgment-debtors failing to pay any of the instalments the judgment-creditor was to be driven to the necessity of filing a separate suit to realise the amount due out of his security ? It would have been a most inequitable compromise if this were to be the result. What the parties evidently contemplated was that the decretal amount should be paid by instalments and the decretal amount was declared a charge on the property mortgaged, which meant, particularly as the person and other property of the judgement-debtors were declared exempt from arrest or attachment, that the property on which a charge had been declared could be proceeded against by sale in execution proceedings. The case of *Ambulal Bapubhai* v. *Narayan Satyaba* (1) has several marks of analogy with the present case. There also a lien was declared on certain immoveable property of the defendant to secure repayment of the decretal amount and it was held that the plaintiffs had the right to bring the property charged to sale in execution proceedings,and that no separate suit for the sale of the property was necessary. The object of O. XXXIV, r. 14 is to prevent mortgagees from suing their mortgagors on the mortgage-debt as such and in execution selling the bare equity of redemption depriving the mortgagor of the right of redemption that would be given to him by the decree for sale : *Khiarajmal* v. *Daim* (2) In the present case, however, by the consent decree, the decretal amount was payable by instalments, which, if regularly paid, would extend over a period of 8 years; there was a clear stipulation that the judgment-debtors would not be personally responsible for the payment of the decretal amount nor any other property besides the property mortgaged would be liable. It appears to me that with this express stipulation the parties agreed that, in the event of the failure of the payment of any instalment, the judgment-creditors could proceed to sale of the mortgaged property in execution proceedings.

(1) 51 Ind. Cas. 929, 43 B. 651; 21 Bom. L. R, 698.
(2) 92 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. L; 2 C. L. J. 584; 8 Sar. P. C. J. 784; 32 I. A. 23 (P. C.).

(2) With regard to the second objection as to the execution application being time-barred, it appears that the application was made owing to the failure to pay the first three instalments on the 3rd November 1917 ; the time for executing the decree in respect of these three instalments expired on the 1st January 1915, 1st January 1916, and 1st January 1917, respectively. But, admittedly, the respondents were under the protection of the Manager, Sind Encumbered Estates, from 15th May 1913 to 30th July 1917, and the respondents contend that this period should be excluded in computing the period of limitation. Appellants rely on section 19, cl. (3) of the Sind Encumbered Estates Act as showing that it excludes only the period of time applicable to *suits* and not to execution procedings. Section 5 of the said Act provides that the Commissioner, when he has ordered an inquiry under section 4, has the power to grant an interim order of protection in respect of all *proceedings* in any Civil or Revenue Court pertaining to the debts and liabilities to which the debtor is subject, and cl. B of section 5 lays down that no fresh proceedings, processes, executions or attachments shall be instituted in any Civil or Revenue Court in respect of such debts or liabilities. Section 9 of the Act lays down that, on the publication of the order of management, all *proceedings* pending in any Civil or Revenue Court in respect to debts and liabilities shall be stayed. Now, though clause (3) to section 19 of the Sind Encumbered Estates Act refers to suits alone, yet it is well established that applications in execution are proceedings in suits : Mulla's Civil Procedure Code p. 308, and the object of the Encumbered Estates Act is to stay all proceedings in respect of all debts or liabilities to which the debtor is subject : *Pirial Shah* v. *Abdulla* (3). The respondents could not have proceeded with the execution application during the time the estate of the appellants was under management and therefore this time should be excluded in computing the period of limitation.

(3) It was next urged that a portion of property mortgaged by Gulam, deceased, and now sought to be sold was the property of the appellant Murad and that this contention could be raised only in execution proceedings and not by separate suit, and that both the lower Courts refused to entertain it. The suit in respect of which the compromise decree had been entered into was filed against the legal representatives of Gulam, deceased, including Murad, he consented to his description as such, and did not raise any contention that the property in respect of which the mortgage-decree was sought was his property. Further, and it is of importance to note, he was a party to the compromise-decree which represented the mortgaged property as that of Gulam, deceased, and consented to the property being subject to the mortgage claim. It was argued that as Murad was on the record as one of the legal representatives of Gulam, it was not possible for him to urge in the suit his right to the property in his individual capacity. I cannot conceive any bar to his protesting against being on the record as a legal representative of Gulam, for if he was the real owner of the property, his individual interests were in conflict with those as a legal representative of Gulam. Besides, I am unable to imagine any difficulty to prevent him from filing a suit for declaration only, (as he contends that the property mortgaged is in his possession) that Gulam had no authority to mortgage the property. But he goes the length, without a word of protest, of compromising the suit with the respondents and consenting to the mortgaged property being liable for the mortgage claim. It cannot be overlooked that what is sought to be sold is the right, title and interest of the deceased Gulam in the property under mortgage, and, so far as I can conceive, there is nothing to prevent the claim of the appellant Murad being notified at the time of the sale, but beyond that it would be outside the province of this Court at this stage to consider whether the appellant Murad has any, and if so what, interest in the mortgaged property. Several cases were cited by Counsel for the appellant based on section 47, Civil Procedure Code, and he attempted to show that the question between the parties was one relating to the execution, discharge or satisfaction of the decree, and that this fell within the province of the executing Court and a separate suit was not maintainable. But the question that the appellant Murad seeks to raise is not as the legal representative of the deceased Gulam but in his own individual capacity. Property directed to be sold under a mortgage-decree does not require

(3) 80 Ind. Cas. 25 ; 9 S. L. R. 48.

to be attached by way of execution and if the property is claimed by a third party, for it is in that capacity that Murad is to be regarded, as he does not claim it as the legal representative of Gulam but in his own individual right, he must file a suit for a declaration that the property belonged to him.

This disposes of all the contentions raised in this appeal which we must dismiss with costs on the appellants.

In Appeal No. 24 of 1921 between the same parties the same Counsel for the appellant relied on the same contentions as in the former appeal. The decree in this case expressly provides for the sale of the mortgaged property if the decretal amount is not paid within the time fixed. For reasons given in the previous appeal we dismiss this appeal likewise with costs.

P. B. A. *Appeals dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 290 OF 1920.

July 18, 1923.

Present:—Mr. Justice Phillips and Mr Justice Venkatasubba Rao

VISWANATHA AIYAR—PLAINTIFF—APPELLANT,

versus

VENGAMA NAIDU AND OTHERS—DEFENDANTS.—RESPONDENTS.

Trustee, office of, whether transferable—Property not dissociable from office of trustee—Alienation of such property, validity of—Transfer of Property Act (IV of 1882), ss 56, 82—Properties subject to common mortgage Alienation of one property with covenant against encumbrances—Mortgagor's right to claim contribution from purchaser—Benamidar's admission of ownership—Effect on real owner—Alienation by benamidar, validity of.

The office of trustee is incapable of transfer. Therefore, where it is impossible to dissociate the office of trustee from the possession of property, the transfer of property virtually amounts to parting with the office, and such an alienation cannot be recognised. [p. 54, Col. 1]

An assignee of a part of the mortgage security is not liable to contribute as against the mortgagor to the payment of the mortgage-debt. Therefore, if a mortgagor sells a part of an encumbered estate with a covenant against encumbrances, he cannot claim contribution from the purchaser because he is himself liable for the whole debt. [p. 54, Col. 2]

***In re Darling's Estate: Rendall* v. *Darby*, (1907) 2 Ch. 465 J ; 76 J. Ch. 689 : 97 L. T. 900, relied upon.**

Per Venkatasubba Rao, J. **The general rule enacted in section 82 of the Transfer of Property Act as to contribution between properties subject to a common mortgage is subject to the exception in section 56 of the same Act that a mortgagor who sells a part of an encumbered estate with a covenant against encumbrances cannot claim contribution from the purchaser** [p 56, Col. 1]

An admission by a *benamidar* that some third person is the beneficial owner cannot have the effect of conveying to such person either the beneficial or the legal interest in the properties and an alienation by the *benamidar* of the legal interest is invalid and cannot affect the title of the real owner more especially if the alienee is aware of the *benami* title of the vendor. [p. 54, Col. 2]

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in O.S. No. 64 of 1918.

Messrs. *A. Krishnaswamy Aiyar* and *C. Sankararama Sastri*, for the Appellant.

Messrs. *C. V. Anantha Krishna Aiyar* and *K. V. Sesha Aiyangar*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—The plaintiff alleges that in pursuance of a mortgage-decree his properties were sold; that a certain amount was realised and credited towards the decree; that the first defendant was the owner of some of the other properties also included in the mortgage, and that the amount paid towards the mortgage by the 1st defendant was less than what he would be made liable to pay having regard to the value of those items. The plaintiff, therefore, claims in the present suit contribution from the 1st defendant, being the difference between the amount rateably due in respect of the latter properties and the amount actually paid by him.

The plaintiff's right to maintain the suit is questioned, and to deal with this objection it is necessary to set forth a few facts.

One Krishnaswamy Aiyar had two sons, Seshasayi and Lakshmikantham, and they formed members of a joint Hindu family. On the 11th of September 1890, they mortgaged the properties described in Schedules A to F of the plaint to certain persons for a sum of Rs. 17,000 (Ex. K). On 15th December 1894 the amount due on the mortgage was Rs. 21,000 and Krishnasamy having died, his sons sold F Schedule properties to one Sundaracharlu for a sum of Rs. 12,500 (Ex. I.) and mortgaged the properties in Schedules A to E to the

same person for Rs. 8,500 (Ex. II). Sundara charlu was directed to pay the two sums of Rs. 12,500 and Rs. 8,500, which made a total of Rs. 21,000, in discharge of the original mortgage (Ex. K). On the 8th May 1899, there was a partition between Seshasayi and Lakshmikantham. The properties described in Schedules A and E fell to the share of Seshasayi and those in Schedules B, C and D to the share of Lakshmikantham. On 6th November 1899, Seshasayi sold to the 1st defendant the properties in Schedules A and E (Ex. B). On the 15th September 1902, Sundaracharlu executed a reconveyance in respect of the properties in Schedule F in favour of Seshasayi (Ex. IV). On the 11th October 1902 Seshasayi sold the properties in Sch. F to the plaintiff (Ex. A). On the 1st July 1905, the properties in Schedule E were conveyed by the 1st defendant in favour of the 12th defendant. On the 2nd September, 1909, the plaintiff sold back the properties in F Schedule to Seshasayi (Ex. A. 2). On the 13th September 1909 a suit was instituted on the footing of the original mortgage, Ex. K., which will be referred to as 49 of 1909. On the 20th September Seshasayi sold the F Schedule properties to one Pichandi who is said to be a servant of the plaintiff, and on the 27th September 1909, Pichandi in turn sold the said properties to one Venkatachalapathy Naidu. In 1913 the final decree was passed in the mortgage suit 49 of 1909 and on the 9th February 1917 the properties described in B, C and D Schedules were sold by the representatives in interest of Lakshmikantham to the 1st defendant.

From the facts stated above it will be seen that the owners of the various properties with which we are concerned were as follows :

A to D properties were owned by the 1st defendant.

E properties were owned by the 12th defendant.

F properties were owned by Venkatachalapathy Naidu. But in this connection it is necessary to notice certain facts having a bearing upon the ownership of the properties in F Schedule Subsequent to the passing of the final decree in 49 of 1909, the present plaintiff filed a suit for a declaration that, although the properties in F Schedule ostensibly belonged to Venkatachelapathy, he was in truth the owner thereof; and on the 4th November 1915 a *razinama* was entered into between the widows of Venkatachalapathy and the plaintiff which contains an admission of the plaintiff's title to the said properties. The material portion of the *razinama* is this :

" In respect of the suit which the plaintiff instituted against us for a declaration that the sale-deed executed in the name of our husband was executed only nominally on behalf of the plaintiff and that we have no right whatever therein * * * * as it is learnt that the-sale deed was, as alleged by the plaintiff, executed nominally on behalf of the plaintiff, it is settled that the plaintiff shall get a declaration that he himself is entitled to the said properties * * *." In virtue of this *razinama* the plaintiff asserts that he is the owner of the F. Schedule properties and that he is entitled as such owner to contribution.

In paragraph 7 of the 1st defendant's written statement in the present suit, the following plea was raised :—

" The plaintiff further, in the dealings relating to the F. Schedule properties, was a mere name-lender and *alias* of Seshasayi whose friend he was throughout."

The learned Subordinate Judge on this plea raised the issue : " was the plaintiff the real owner ?" and recorded a finding adverse to the plaintiff. With this finding of fact I entirely agree. On behalf of the plaintiff (appellant) no motive was suggested for the numerous dealings with the properties described in the F Schedule. As already observed, they were sold on the 15th December 1894 to Sundaracharlu and Sundaracharlu reconveyed them to Seshasayi on the 15th September 1902, and on the 11th October 1902, Seshasayi sold them to the plaintiff. This sale in favour of the plaintiff is admitted to be merely nominal. In fact, in a deposition given by the plaintiff he said that the properties were not his and that he was supervising them on behalf of Seshasayi. It is also not disputed that Seshasayi and the plaintiff were on very intimate terms. We have not been referred to the circumstances in which the sale was made in favour of the plaintiff in 1902 or to the motive for the transaction. Whatever be the reason, the sale was fictitious and the plaintiff himself

had to admit that it was so. Presumably, to get over the effect of this admission, another sale-deed was executed by Seshasayi in favour of the plaintiff (Ex. A-1) on 17th April 1906. If the plaintiff was already the owner, there was no need to have a second sale-deed in his favour. It seems me, therefore, that the second sale-deed was got up merely with a view to keep up the pretence that the plaintiff was the real owner of the property although in fact he was not. This view receives support from Ex. XIX, dated 7th August 1909, a letter addressed by the plaintiff to Seshasayi. He says :—

" As you ask me to execute a sale-deed for the resale of the properties for which you have executed a sale-deed to me, I have no objection to so execute the sale-deed for the resale." It is in pursuance of this letter that the plaintiff reconveyed the properties to Seshasayi on 2nd September 1909 (Ex. A-2). The appellant's learned Vakil has not been able to tell us why the properties were reconveyed to Seshasayi. But it is clear from Ex. XIX that the plaintiff was never the owner of them and that the properties were ultimately conveyed to the man to whom they belonged, namely, to Seshasayi. The fact that the plaintiff remained in possession of them is of little importance because, as the plaintiff admitted in a previous deposition, he was supervising the properties on behalf of the true owner, Seshasayi. If, so far, therefore, Seshasayi continued to remain the true owner of the properties notwithstanding the fact that they stood sometimes in the name of the plaintiff, did anything that happened subsequently have the effect of transferring the ownership to the plaintiff ? The reconveyance in favour of Seshasayi was on the 2nd September 1909 ; eleven days later, the suit 49 of 1909 was filed. A week subsequent to the filing of the suit Seshasayi sold the properties to Pichandi, and a week later again Pichandi sold the properties to Venkatachalapathy Naidu. In the course of less than a month, the properties were thus transferred thrice. The plaintiff asserts that the sales in favour of Pichandi and in favour of Venkatachalapathy were *benami* for himself. The plaintiff was made a party to 49 of 1909. He did not set up in the written statement filed in that suit that he was the owner of the properties. Although there was an interval of about five years between the institution of the suit and the final decree passed in it, during that period the plaintiff never asserted that he owned the properties. It is now argued on his behalf that in 1915 Venkatachalapathy's widows having admitted his ownership, his title to the properties cannot be questioned. This argument is clearly untenable. The parties who made the admission may be estopped from denying the plaintiff's title but the 1st defendant is not bound by the proceedings which culminated in the *razinama*.

The compromise between the widows of Venkatachalapathy and the plaintiff is clear evidence of the fact that the former were not the owners of the properties. On the evidence in the case, I am clearly of the opinion that, on the date of the compromise, Seshasayi or his representative was the beneficial owner. What then is the position of affairs ? Seshasayi, on our finding, was the beneficial owner. Venkatachalapathy's widows were *benamidars* and the plaintiff got them to admit that he was the real owner. Does any interest in these circumstances pass to the plaintiff ? I am clearly of the opinion that the plaintiff has acquired no interest in the properties. It has been strenously argued by Mr. Alladi Krishnaswami Aiyar for the appellant that, on our finding, Venkatachalapathy's widows being *benamidars* for Seshasayi were in the position of trustees and that the legal ownership was by the *razinama* transferred from the widows of Venkatachalapathy to the plaintiff. In the first place, there was no conveyance at all. There was merely an admission by *benamidars* that a person who was not the true owner was the true owner. I fail to see how such an admission can give a stranger to the properties any right over them. The widows did not profess to deal with the legal (as distinguished from the beneficial) ownership which they possessed and there was no attempt to convey this legal ownership. The mere fact that the widows admitted the plaintiff to be the beneficial owner, which he was not, cannot have the effect of conveying to the plaintiff the interest of Venkatachalapathy's widows in the properties.

In the second place, granting that the transaction amounted to a conveyance, what is the legal effect of the transaction ? Venkatachalapathy's widows being *benamidars* were merely possessed of the legal ownership in the properties. They were the trustees in

respect of the properties accountable to Seshasayi. There could not be an effectual transfer of the trust. The office of trustee is incapable of transfer. See *Rajah Varmah Valia* v. *Ravi Varma Kunhikuti* (1) and *Ganasambanda Pandara Sannadhi* v. *Velu Pandaram* (2). It was impossible to dissociate the office of trustee from the possession of the properties. The widows of Venkatachalapathy were bound to preserve the properties and to render an account in respect of them to Seshasayi. The parting with the properties virtually amounted to parting with the office and such an alienation cannot be recognised. Moreover, the plaintiff knew that Seshasayi was the owner. The essence of the transaction was the recognition of the plaintiff as the owner while, as a matter of fact, he was not owner. The clear object of the transaction was to make out that party who was not entitled to the properties was the real owner thereof. It is fraudulent and the Courts will refuse to give recognition to the transaction. If Seshasayi or his representative was not a party to the transaction, it was clearly a fraudulent attempt by Venkatachalapathy's widows and the plaintiff to create a title in the plaintiff to the detriment of Seshasayi. If, on the other hand, Seshasayi or his representative was also a party to the transaction, it should undoubtedly have been brought about with the fraudulent object of making it appear that the plaintiff was the owner, while he was not, in order to enable him to file this suit. In my view, therefore, the plaintiff is not a *benamidar* for Seshasayi. I have found that Seshasayi is the owner of the properties in the F. Schedule and I am also clear that the plaintiff has no interest whatsoever in the properties. He is neither the beneficial nor the legal owner.

It has been argued on behalf of the appellant, on the strength of *Gur Narain* v. *Sheolal Singh* (3), that a *benamidar* can successfully maintain a suit. But this argument is of little avail in view of the finding that the plaintiff is not even the *benamidar* for Seshasayi in respect of the suit properties. Granting for a moment that the plaintiff is the *benamidar* for Seshasayi, the further question arises, is the suit for contribution at the instance of Seshasayi maintainable? If Seshasayi cannot bring the suit, his *benamidar* cannot equally maintain it. The appellant's learned Vakil relies upon section 82 of the Transfer of Property Act. The material portion of the section is as follows :—

"Where several properties whether of one or several owners, 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, after deducting from the value of each preperty the amount of any other incumbrance to which it is subject at the date of the mortgage." So far as contribution is claimed against the A Schedule properties, it must be remembered that the 1st defendant became the owner of them in virtue of a sale in his favour by Seshasayi himself. In regard to those properties the position is this: The mortgagor Seshasayi who was the owner of the properties in A and F Schedules sold the properties in A Schedule to the 1st defentant. Can he, then, as owner of the properties in F. Schedule, claim that A Schedule properties are liable to contribute to the mortgage debt? The answer is furnished by *In re Darling's Estate* : *Rendall* v. *Darby* (4). It was held in it that an assignee of a part of the mortgage security was not liable to contribute as against the mortgagor to the payment of the mortgage debt. An assignor, having executed a deed of charge to his bankers in respect of various items of property, assigned by a voluntary deed one of those items to his wife. The latter deed contained no reference to the charge. The assignor died and his executors paid off the debt due to the Bank. The question arose whether the widow as assignee of one of the items was liable to contribute to the payment of the debt. It was held that the widow was under no liability to contribute. Warrington, J., says :—

"The assignor owed a sum of money charged on certain property. What equity would he have had in his lifetime to call upon

(1) 1 M. 255; 1 Ind. Jur. 184; 4 I A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S) 159 (P. C.).

(2) 28 Mad. 271; 2 Bom L. R. 597; 4 C. W. N. 825; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(3) 49 Ind Cas. 1 ; 46 C 566 ; 17 A. L. J. 66 ; 86 M. L. J. 69 ; 9 L. W. 385 ; 28 C. W. N. 521 ; 1 U. P. L. R. (P. C.) 1 ; 12 Bur. L. T. 122 ; 46 I. A. (P. C.).

(4) (1907) 2 Ch. 465J. ; 76 L. Ch. 689 ; 97 L. T 900.

an assignee from him to pay any part of that debt ? I can see none, unless he assigned the property subject to the debt. If, then, the assignor would have had no such equity, I fail to see what greater right his executors can have to call upon the assignee to contribute."

To entitle one to contribution from another, their equities must be equal. If, for instance, there was any obligation on the person who paid the encumbrance to discharge it as a debt of his own, he cannot claim anything from that another ; and, similarly, if a mortgagor sells a part of an encumbered estate with a covenant against encumbrances he cannot claim contribution from the purchaser because he is himself liable for the whole debt. See *Halsbury, Vol.* 21, *p.* 306, and *Ghose on Mortgages, 4th Edition, Vol.* 1, *p.* 374.

In the sale-deed by Seshasayi conveying the A Schedule properties to the 1st defendant, the former makes a distinct allegation that the debt under Ex. K was discharged and that the sale was not subject to the encumbrance evidenced by the said document. In the face of this, it is impossible to hold that Seshasayi is entitled to contribution from the 1st defendant so far as the A Schedule properties are concerned. The principle underlying the decision in *In re Darling's estate* : *Rendall* v *Darby* (4) is recognised in section 56 of the Transfer of Property Act. It runs thus :—

"Where two properties are subject to a common charge and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property so far as such property will extend."

It has been contended by the appellant's learned Vakil, that as, on the date of the conveyance in favour of the 1st defendant of A Schedule properties, Seshasayi was not the owner of the properties described in F Schedule, the section has no application. Whether the terms of section 56 are literally applicable or not, there can be no doubt that the general rule enacted in section 82 is subject to the exception that a mortgagor is not entitled to contribution when he has assigned the property with an express covenant against encumbrances. In *Kerr* v. *Kerr*, (5) Christian, L. J., says :

"The conclusions which I gather from *Herbert's case* (6) are the following : First, that the original principle of the common law was *equality*, that is to say, contribution in the ratio of value, wholly irrespective of priority of dates of purchase ; second, that the case of the debtor himself and his heir-at-law, in respect of retained lands was an exception to that principle by reason solely of his personal liability and that to such exception it mattered not whether the purchasers were such with consideration or without it " The Transfer of Property Act enacts the rule in section 82 and the exception in section 56. I am of the opinion that Seshasayi could not have successfully maintained a suit for contribution against the 1st defendant. It follows that, even if the plaintiff was the *benamidar* of Seshasayi, his suit would fail.

There is only one further matter to consider. If the 1st defendant, as the owner of the properties in Schedule A, is not liable to contribute, the question still remains, is he bound to contribute by reason of his being the owner of the properties in B, C and D Schedules ? It is agreed on both sides that if the valuation adopted by the Subordinate Judge is accepted, no liability to contribution can arise; in other words, that the properties in B, C and D Schedules have paid their share of the mortgage-debt. But it is said that valuation is not correct, that the Subordinate Judge did not decide the issue relating to valuation in the judgment under appeal and that he postponed the consideration of it to be disposed of in C. S. No. 17 of 1919. It is then argued that the learned Subordinate Judge did not try the issue in the second suit, but the valuation was fixed by the consent of certain parties and that the plaintiff is not bound by it. There is no force in this contention as the plaintiff did not offer to give evidence in the second suit on the point and as he was not prevented from placing such materials as he could before the Court. There is no reliable affirmative evidence upon which we can act and disturb the finding of the learned Subordinate Judge. It is not seriously contended that there is material on the record which would justify a different finding.

In the result, the appeal fails and is dismissed with costs.

(5) (1869) Ir. R. 4 Eq. 15.

(6) (1584) 3 Rep. 116.

One set to be divided among the respondents that have appeared in the proportion of their interests in the properties in A to D Schedules.

Phillips, J.—I agree and am of opinion that the decision may also be based on the short ground that all the dealings with the F. Schedule properties by Seshasayi from 1902 onwards were purely nominal and that the conveyance to plaintiff—Pichandi and Venkatachalapathy Naidu, (Ex. A series) were never intended to take effect—the property remaining all along in the ownership of Seshasayi. As plaintiff has no interest in the mortgage property he cannot claim contribution from defendant since the payment on account of Schedule F, if really made by plaintiff, must have been made by him as a volunteer, for he had no interest in Schedule F.

V. N. V.
S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1866 OF 1922.
March 26, 1923.

Present:—Mr. Justice Moti Sagar.

SHEO RAM—PLAINTIFF—APPELLANT
versus
INDRAJ, AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913) s. 30—Pre-emption suit—Vendee in possession as lessee before sale—Physical possession—Limitation.

Where a vendee of land is, on the date of the sale, in physical possession of the land as lessee, he cannot take physical possession of the land under the sale, within the meaning of section 30 of the Punjab Pre-emption Act, and limitation for a suit for pre-emption in respect of the sale would commence to run from the date of the mutation. [p. 58, col. 1]

* *Tala Ram* v. *Lorinda Ram*, 8 L. 261, 69 Ind. Cas. 715; (1922) A. L. R. (*d*) 21 followed.

Miscellaneous second appeal from the decree of the District Judge, Hissar, dated the 3rd April 1922, reversing that of the Munsif, 1st class, Hissar, dated the 11th May 1921, and dismissing the plaintiff's claim with costs.

Mr. *N. C. Pandit*, for the Appellant.

Lala *Hargopal*, for the Respondents.

JUDGMENT.—This is an appeal against a decision of the District Judge of Hissar, dated the 3rd of April 1922, reversing a decision of the Munsif, dated the 11th of May 1921, granting plaintiff a decree for possession by pre-emption. The learned District Judge, holding that the claim was barred by limitation, has dismissed the suit. It appears that on the 21st of June 1918 one Shah Muhammad sold the land in suit with some other land to defendants 1 to 11 and father of defendants 12 and 13 for a sum of Rs. 5,800 by means of a sale-deed which, however, has not been placed upon the record. On the 8th of July 1919 defendants 1 to 13 are alleged to have sold this land to defendants 14, 15 and 16 for a sum of Rs. 321 and to have got mutation sanctioned in their favour on the 18th of July 1919. The plaintiff thereupon brought this suit for possession by pre-emption on the ground that he was a *biswedar* in the village and that, therefore, he was entitled to pre-empt in preference to the defendants vendees who were not *biswedars*. The suit was resisted mainly on the ground that it was barred by limitation. Certain other pleas were also raised which, however, have not been decided by any of the Courts below, and it is, therefore, unnecessary to mention them in this judgment. It was alleged that the sale, as a matter of fact, had taken place on the 21st of June 1918; that the sale was in favour of all the defendants; that the names of defendants 1 to 13 had been mentioned in the sale-deed only for the sake of convenience, and that possession had been delivered to all the vendees including defendants 14 to 16 on the same date. It was consequently contended that the suit having been brought more than one year after possession was delivered it was barred by time. The trial Court rejected this plea and held that possession under the sale, as a matter of fact, passed on the 18th of July 1919 when mutation was sanctioned. The learned District Judge did not agree with this finding and held that the sale having taken place on the 21st of June 1918 as urged by the defendants the suit was barred by limitation. In my opinion the view of the learned District Judge is clearly wrong, and this appeal must succeed.

It appears that the defendants-vendees were already in possession of the land in suit before the sale as lessees, and it is impossible to hold that they took possession of the land under the sale when the sale was effected. In

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Dhanna v. *Lekh Ram* (1) it has been held by Mr. Justice Martineau that it is impossible for a person to take physical possession of property of which he has already got the physical possession, and that time must run from the date of mutation under section 30 of the Pre-emption Act. *Tala Ram* v. *Lorinda Ram* (2) is also a case in point were under similar circumstances it was held that time began to run from the date of the mutation under the provisions of the Pre-emption Act and not before. In the present case it appears from an entry in the Revenue Records that the sale in favour of the defendants was orally effected on the 8th of July 1918, and not on the 21st of June 1918 as alleged by the defend ants. The defendants being already in physical possession of the land sold, possession under the sale could not have passed before the mutation was sanctioned. The suit in the present case is, therefore, within time having been instituted within one year from the date of the mutation. As the other issues in the case have not been decided, a remand is necessary.

I accept the appeal and, setting aside the decree of the lower Appellate Court, remand the case to that Court under O. XII, r. 23 of the Civil Procedure Code, for disposal of the appeal on the other issues. Court-fee will be refunded, and other costs will be costs in the case.

Z. K. *Appeal allowed.*

(1) 76 Ind. Cas. 206.
(2) 69 Ind. Cas. 715; 3 L. 261; (1922) A. I. R (L) 21.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 359 of 1922.
August 14, 23.

Present:—Mr. Baker, J. C.

BAKARAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Family arrangement acted upon—Registration.

A Court of Equity will uphold a family arrangement which has been acted upon, even where legal forms have not been strictly complied with.
[p. 59, Col. 1]

Case Law discussed.

Appeal against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 34 of 1922, decided on the 29th March 1922.

Messrs. *P. C. Dutt* and *M. R. Bodde*, for the Appellants.

Messrs *M Gupta* and *R P. Awashy*, for the Respondents.

JUDGMENT.—The facts of this case are as follows.—One Dayaram was the owner of the property consisting of two villages. He died without issue in 1895 and the plaintiff, who was a distant relation, took possession. Thereupon Dayaram's sister's sons, Ramu, Renglal and others, brought a suit for possession, in which they succeeded in getting an 8-annas share of the property. Out of this Ramu and Renglal gave Umrao, who is also a son of one of Dayaram's sisters, a 1-anna share in each village by way of a family arrangement. They gave a similar share to Moji, another nephew of Dayaram.

Subsequently, the plaintiff purchased a 3-annas share in the villages from Renglal and Moji, and obtained possession of 2-annas share but was unable to obtain possession of the remaining 1-anna share, which was in possession of Umrao. He. therefore, sued for the possession of it from the defendants 1—4 to whom Umrao had transferred it. The Subordinate Judge, Betul, dismissed the plaintiff's suit and on appeal the District Judge, Hoshangabad, confirmed the decree.

The only points arising in appeal are as to the execution and validity of Exhibit 5 D-1, the document by which Umrao got a 1-anna share in a family arrangement. Both the Courts below have held this proved on the evidence of Renglal (D. W. 3) who is one of the executants. This is a finding of fact which will not be disturbed in second appeal. It is contended that the compromise was not referred to by Umrao in Suit No. 261 of 1913 brought by him against the plaintiff. That suit, however, was based on Umrao's own title as one of the nephews of Dayaram, and the question of a compromise between him and his cousins, the other nephews, had nothing to do with the suit. The suit was dismissed on

the ground that Umrao was not born at the date of Dayaram's death in 1895, and was, therefore, not one of his heirs.

That the compromise was acted on is shown by the fact that Umrao's name was entered in the Revenue Records. It is to be observed that by a similar arrangement a 1-anna share was given to Moji, who is one of the plaintiff's vendors. It is contended that the document required registration, that the lower Courts found that the plaintiff had no notice of it, and that, therefore, the plaintiff's registered sale-deed is entitled to priority over it under section 50 of the Registration Act, and reference is made to *Seth Ramlal* v. *Bhuria* (1), *Lalbeg* v. *Vishnusa* (2), and *Dundya* v. *Chenbasapa* (3), all of which are cases relating to registered and unregistered sale-deeds or mortgage-deeds, and as to the necessity of registration reference is made to *Pranal Anni* v. *Lakshmi Anni* (4), *Muthayya* v. *Venkataratnam* (5), and *Kali Charan Ghosal* v. *Ram Chandra Mandal* (6),

It is to be noted that in this case we are dealing with the case of a family arrangement which has been acted upon. It has been frequently held by the Privy Council and the High Courts that a Court of Equity will uphold such a family arrangement provided that it has been acted upon, even where legal forms have not been strictly complied with. In this connection I may refer to *Baldeo Singh* v. *Udal Singh* (7), where a number of cases on the point are cited, and refer in particular to the passage on page 12 where it is said: "Even if the petition of compromise required registration, it would still be admissible in evidence as collateral evidence of the agreement which the plaintiffs seek to impeach, though it might not operate to effectuate a valid transfer of rights; and inasmuch as it has been acted upon and the parties have enjoyed benefits thereunder irrespective of what might have been or might not have been their respective rights in the property from which they received those benefits, neither party can be allowed to resile from the arrangement then made." In *Mahomed Musa* v. *Aghore Kumar Ganguli* (8), it was held that the acts and conduct of the parties founded upon the performance or part performance of such an agreement were sufficient to make it operative, for "equity will support a transaction clothed imperfectly in these legal forms to which finality attaches after the bargain has been acted upon."

In this case the arrangement by which Umrao got a 1-anna share in the villages has undoubtedly been acted upon. The executants of Exhibit 5 D 1 are bound by it and cannot go behind it, and the plaintiff who derives his rights from one of them, Renglal, will also be bound by it. The title of Moji depends on the same family arrangement and is evidenced by the same document. If the plaintiff seeks to set aside the arrangement as regards Umrao, it must be held invalid as against Moji also, and, therefore, the plaintiff can derive no title by his purchase from him, and as the plaintiff is admittedly to possession of a 2-annas share, he would not be entitled to claim a 1-anna share of Moji. The plaintiff cannot base his claim on the rights of Moji and deny those of Umrao, when both rights arise out of the same transaction.

I agree, therefore, with the lower Courts and hold that the family arrangment which was acted upon is valid and the plaintiff by his purchase from Renglal and Moji did not acquire any right to the share of Umrao. The result is that the appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 1 N. L. R. 125.
(2) 8 Ind. Cas. 58 ; 5 N. L. R. 82.
(3) 9 B. 427 ; 5 Ind. Dec. (N. S.) 283.
(4) 22 M. 508 ; 1 Bom. L. R. 894 ; 3 C. W. N. 485 ; 26 I. A. 101 ; 9 M. L. J. 147 ; 7 Sar. P. C. J. 516 ; 8 Ind. Dec. (N. S.) 363.
(5) 25 M. 553.
(6) 30 C. 783.
(7) 58 Ind. Cas. 732; 43 A. 1; 2 U. P. L. R. (A) 202; 18 A. L. J. 877.
(8) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420, 21 C. L. J. 231; 28 M. L. J. 548 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 268; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

JAN MAHOMED *v.* MUKHI GAZI

SIND JUDICIAL COMMISSIONER'S COURT.

MISC. APPEAL NO. 11 of 1920.

August 28, 1923.

Present :—Mr. B. C. Kennedy, J. C., and Mr. Madgowkar, A. J. C.

JAN MAHOMED—PLAINTIFF—APPELLANT

versus

HAJI MUKHI GAZI AND OTHERS —DEFENDANTS - RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch II, para 12—Accounts, suit for—Arbitration—Larger sum awarded than mentioned in plaint—Court's power to modify such award—Officer of Court appointed arbitrator—Powers of, and award by such arbitrator—Award, finality of.

The mere fact that an arbitrator is an officer of the Court does not affect his power or its exercise, nor does it justify his award to be scrutinized to a greater extent than the award of an independent person. [p. 60, col. 2.]

Where no misconduct of the arbitrator is proved the award is final and the Courts cannot set it aside, except for a patent error apparent on the very face of the award as made. [p. 60 col. 2.]

An award in a suit for accounts cannot be modified by the Court on the ground that the arbitrator has awarded a larger amount than that mentioned in the plaint. [p. 60, col. 2.]

Appeal from the judgment and decree of the Additional Judicial Commissioner (N. W. Kemp, Esq.) in Suit No. 255 of 1915.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *T. G. Elphinston*, for the Respondents.

JUDGMENT.

Madgowkar, A. J. C.—During the pendency of the suit, the Nazir who was a Commissioner was, on the application to the Court of the parties, appointed an arbitrator, and he made an award under which he held Rs. 12,162-13-6 due to the plaintiff-appellant. The defendants-respondents objected to the award. The learned Judge below reduced the amount to Rs. 5,431. The plaintiff-appellant appeals here.

The main ground on which the learned Judge reduced the amount was apparently that the accounts had been taken by the arbitrator on a wrong basis. He further appears to have been of the opinion that the arbitrator in this instance being an officer of the Court, the award could be scrutinized to a greater extent than the award of an independent person.

The award, however, falls under the Second Schedule of the Code of Civil Procedure and the only power to modify or correct it is under para. 12 of that Schedule. The fact that the arbitrator was an officer of the Court does not affect the power or its exercise. It is now well settled that where, as in this instance, no misconduct is proved, except for a patent error apparent on the very face of the award as made, the award is final and the Courts cannot set it aside. Cf. *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (1) In the present instance it should be observed that the plaintiff has in his plaint estimated his claim at Rs. 8,000 solely for the purpose of Court-fees and in para 9 he expressly stated that he was prepared to pay additional Court-fees if a larger sum is found due. The award, therefore, is not outside the plaint or the reference. Whatever, therefore, the merits of the accounts between the parties and whether the Court would or would not have arrived at the same finding of fact on these accounts, it is not, in our opinion, open to the Courts to modify the award on that ground, as the learned Judge below has in effect done. The parties with open eyes of their own accord deliberately chose to alter the legal position of the Nazir from that of a Commissioner into that of an arbitrator. If so, they must accept the legal consequences of their own action and accept the finality of the award on the fact at issue, namely, the amount due from the defendants-respondents to the plaintiff-appellant.

(1) 78 Ind. Cas. 836 ; 44 M. L. J. 706 ; 25 Bom. L. R. 588 ; (1923) A. I. R. (P.C.) 66 ; (1923) M. W. N. 596 ; 50 C. 130 ; 47 B. 578 ; 33 M. L. T. 419 ; (1923) A. C. 480 ; 50 I. A. 324 (P.C.).

RAM RATAN *v.* RAJA RAM

The interest awarded also appears to be within the reference. The result is that the appeal must be allowed and the decree made in terms of the award.

The respondents must bear all costs throughout.

S. D. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 791 OF 1920.
March 29, 1923.

Present :—Mr. Justice Martineau and Mr. Justice Zafar Ali.

RAM RATTAN—DEFENDANT—APPELLANT

versus

RAJA RAM—PLAINTIFF—AND SANTU AND NARAINA—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913) s 22 (4)—Civil Procedure (Act V of 1908) s. 148—Pre-emption suit—Failure to deposit one-fifth of purchase-money—Extension of time—Procedure.

Section 148 of the Civil Procedure Code, which gives the Court a general power to enlarge the period fixed or granted for the doing of any act, is applicable to a case where the plaintiff in a pre-emption suit has failed to make the deposit required by section 22 of the Punjab Pre-emption Act within the time fixed by the Court. [p. 62, col. 2]

The words "his plaint shall be rejected" in clause (4) of section 22 of the Punjab Pre-emption Act, read with the provision as to an extension of time contained in the same clause, means that the plaint shall be rejected if the Court should not deem it proper to allow further time, or, if the deposit is not made within such further time as the Court may allow. [p. 62, col. 2]

Where a plaintiff in a pre-emption suit fails to make the deposit required by section 22 of the Punjab Pre-emption Act within the time fixed by the Court, his plaint should not be rejected without affording him an opportunity to furnish an explanation of his failure to make the deposit and considering the question whether time should or should not be extended. [p. 62, col. 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 20th March 1920, reversing that of the Subordinate Judge, 2nd class, Amritsar, dated the 11th November 1919.

Pandit *Sheo Narain, B. B.*, for the Appellant.

Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—The question in this second appeal stated briefly is, whether the order of a Court of first instance rejecting a plaint under clause (4) of section 22 of the Punjab Pre-emption Act (I of 1913) on the ground that the plaintiff pre emptor had failed to deposit 1|5th of the purchase-money within the time allowed to him for that purpose, can be reversed on appeal if the first Court did not take into consideration the advisability of allowing further time.

The order rejecting the plaint was made under the following circumstances :—

The plaint was filed not by the plaintiff himself but by his Pleader Lala Duni Chand, and in his presence an order was endorsed thereon on the 19th May 1919 directing issue of summonses to the defendants for settlement of issues on June the 13th and requiring the plaintiff to deposit 1|5th of the purchase-money on or before that date. The issues were eventually framed on the 16th July and then followed a few adjournments for evidence. It was on the 11th November that Counsel for the defendants drew the attention of the Court to the fact that the plaintiff had not complied with the order as to payment of 1|5th of the purchase-money, and the Court on discovering this rejected the plaint straight away. The plaintiff appealed from this order, and his main grounds of appeal were, (1) that the order of the 19th May was not complied with because it had not been pronounced, and (2) that the Court ought to have granted further time to deposit the money.

As to (1), the learned District Judge expressed the opinion that the plaintiff's Pleader Lala Duni Chand must be assumed to have been made aware of the order, but that he did not probably communicate it to his client. In respect of (2) he made the following remarks: "I think that when the matter was brought

to the notice of the Court on November the 11th, it should have called on the plaintiff's *mukhtar* for some explanation as to why the amount had not been deposited, but the order does not show that this was done. There is, it is true, also nothing to show that any application was made by the plaintiff's *mukhtar* for an extension of time beyond his own affidavit in which he states that he offered to deposit the money if half an hour were allowed him for this purpose, but if this affidavit be not relied on, the order itself shows that it was passed summarily. In accordance with *Narsingh Das* v. *Ghulan Nabi* (1) the time could have been extended even after the period for depositing the money had passed, and I think that, in the circumstances of the case, there was sufficient reason for allowing the plaintiff a further opportunity."

As against the above conclusion, the argument of the learned Counsel on behalf of the defendant-appellant is to the following effect: "The order of the first Court rejecting the plaint was perfectly legal and was one that it was bound to pass because the law is that if the plaintiff fails within the time fixed by the Court to make the deposit his plaint shall be rejected. The plaint goes automatically if the deposit is not made. As the plaintiff failed to make the deposit the Court had no other alternative than to reject his plaint. This being so, the order was not liable to be interfered with by the lower Appellate Court. As regards the extension of time, it was not the duty of the first Court to call upon the plaintiff to explain why the money was not deposited within the time fixed. It was the plaintiff's own concern to give explanation and ask for an extension of time. If the first Court had refused to allow it in spite of the plaintiff's application for it the lower Appellate Court could in that case interfere with the order of the first Court on the ground that there was sufficient cause for enlargement of time."

The learned Counsel concedes that the Appellate Court possesses the same power as the first Court in respect of extension of time, and could reverse the order of the first Court if it were illegal or unjust. But he contends that before reversing it the lower Appellate Court ought to have recorded the finding that the order was wrong in law or unjust.

In our opinion it is clear that the phrase "his plaint shall be rejected," read with the provision as to an extension of time, means that the plaint shall be rejected if the Court should not deem it proper to allow further time. Therefore, the contention that the plaint goes automatically if the plaintiff fails to make the deposit possesses no force. According to section 22, clause (4), the plaint shall be rejected if the plaintiff fails to make the deposit (1) within the time fixed by the Court, or (2) within such further time as the Court may allow to make the deposit. In the event of his failing to comply within the time originally fixed and also within the one or more extensions of time that the Court may grant, the plaint shall be rejected. The mandatory phrase "the plaint shall be rejected" occurs in O VII, r 11, Civil Procedure Code, also, and is interpreted in the same way with reference to clauses (b) and (c) of that rule where the Court fixes time to correct the valuation of a claim or to make good the deficiency in Court-fee. Section 148 of the Civil Procedure Code (which is new) gives the Court a general power to enlarge the period fixed or granted for the doing of any act, and this principle applies in all such cases. Thus, the argument that the first Court was bound to reject the plaint forthwith is untenable. But that Court appears to have taken this erroneous view of the law, for no sooner was it brought to its notice that the deposit had not been made than it rejected the plaint before the plaintiff could come to know what action it was going to take or before he could give any explanation or apply for an extension of time. Though the Court of the first instance may not extend time *suo motu* it should not all the same act with such celerity as not to allow the plaintiff a moment for reflection or action. The language of the order shows that the plaintiff must have been taken by surprise because the order runs thus:—"*Zar panjam* was to

(1) Ind. Cas. 605: 78 P. R. 1909; 129 P. W.R. 1909; 144 P.L. R. 1909.

be deposited by the 13th June 1919 but nothing has been paid to this day. ..... Defence Counsel draws my attention to this fact to-day. I reject the plaint accordingly under section 22 of the Pre-emption Act."

The word 'accordingly' bears out the inference that the Court thought that the phrase 'the plaint shall be rejected' meant that the plaint must be rejected and accordingly rejected it at once. We are of opinion that, under these circumstances, the lower Appellate Court was competent to reverse the order of the first Court on the ground that it was passed summarily under the impression that no other order could be passed and that the first Court acted without applying its mind to the consideration of the circumstances which might have led it to extend time. Therefore, we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 342 of 1922.

September 7, 1923.

Present:—Mr. Baker, J. C.

Mst. GOWRA—PLAINTIFF—APPELLANT

versus

CHAITRAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Central Provinces Tenancy Act (I of 1920), ss. 5, 11—Tenancy—Hindu Law—Succession by survivorship, whether applicable—Civil Procedure Code (Act V of 1908), s. 100—Second Appeal—Grounds.

The Hindu Law of succession by survivorship and as to the vesting of a son's interest by birth is not applicable to a tenancy governed by the Central Provinces Tenancy Act of 1920. [p. 63 Col. 2]

The general rule as to the grounds of Second Appeal is that a party is not entitled to a relief upon facts or documents not referred to or stated in the pleadings, nor on any ground which has never been considered, taken or tried in the Courts below, unless it is a pure point of law going to the question of jurisdiction of the lower Court and capable of being determined without a consideration of any other evidence than that on the record. [p. 64, Col. 1]

Appeal against the decree of the Additional District Judge, Betul, dated the 31st March 1922, in Civil Appeal No. 55 of 1921.

Mr. *S. B. Gokhale*, for the Appellant.

Mr. *J. Sen*, for the Respondent 1.

JUDGMENT.—The plaintiff sued to recover possession of suit land on the ground that she was a tenant along with Sobharam, defendant No. 2, father of the defendant No. 1, and that she was dispossessed by the defendant No. 1. Both the Courts below dismissed her suit on the ground that her tenancy was not proved.

The finding as to the tenancy is a finding of fact, and it is not a suit between landlord and tenant but between a person claiming to be a tenant and a trespasser. It is contended that, so long as the defendant No. 2 is alive, his son, defendant No. 1, has no interest in the tenancy. A reference is made to *Chanya* v. *Ukund Rao* (1) in which it is held that the Hindu Law of succession by survivorship, and as to the vesting of a son's interest by birth, is not applicable to a tenancy governed by the Central Provinces Tenancy Act. This is the law in these Provinces, and, therefore, the defendant No. 1 has no interest in the tenancy during his father's lifetime. The same principle may be deduced from section 11 of the present Tenancy Act: cf. also section 5. Defendant No. 2 supports the claim of the plaintiff. He had passed to her a document, which has been referred to by the lower Courts, and the defendant No. 1, regarding this as a transfer, proceeded under section 46 of the Tenancy Act of 1898, but his application was rejected as time-barred. It is argued, therefore, that the plaintiff entered into possession of the land in suit by virtue of the arrangement between herself and the defendant No. 2, which defendant No. 2 admits, and that defendant No. 2 is a mere trespasser and has no title to the land, and that this attempt to establish his title has been rejected by the Revenue Court. Hence the plaintiff is entitled to possession.

It is contended on behalf of the respondents that this plea is a new case set up for the first time in second appeal and that the plaintiff cannot be allowed to take this posi-

(1) 4 N. L. R. 9.

tion. The suit in the lower Courts was based on title and title alone and not on possession, and reference is made to *Kanhayalal Kunni* v. *Satiya* (2) which lays down that an objection of mixed law and fact, where such fact is outside the findings arrived at by the Courts below, cannot be entertained for the first time in second appeal. The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings : cf. *Muhammad Zahoor Ali Khan* v. *Thakoorani Rutha Koer* (3), nor on any ground which has never been considered, taken or tried in the Courts below, cf. *Sreemutty Dossee* v. *Ranee Lalunmonee* (4) unless it is a pure point of law going to the question of jurisdiction of the lower Courts and capable of being determined without the consideration of any other evidence than that on the record : see *Fakir Chand* v. *Anunda Chand Bhuttacharji* (5).

On reference to the pleadings I find that the plaintiff sued in ejectment as owner in possession, but on defendant denying her possession she applied for amendment of the plaint on 18th July 1921. In her rejoinder of that date, while asserting that the land in question was acquired by her husband and defendant 1's father, she specifically referred to defendant having no interest in his father's fields during the life time of his father. She referred to the agreement between herself and defendant 2 and to the rejection of defendant 1's application to the Revenue Court for setting aside the alleged transfer by his father. It will thus appear that the plaintiff did state the facts as to the agreement between her and defendant 2 and as to defendant 1 having no interest in the land during his father's life time and his unsuccessful attempt to get the transfer set aside. No alternative claim for possession was based on this, but, in the circumstances, I do not think that plaintiff is precluded from setting up this case in second appeal. There is no question of any new fact, and the facts relied on have been stated in the pleadings. It is a pure point of law capable of being determined without the consideration of any other evidence than that on the record.

I am, therefore, of opinion that plaintiff is entitled to possession, as defendant 2 admits her right and defendant 1 is a trespasser whose right has been negatived by the Revenue Courts.

I set aside the decrees of the lower Courts and direct that plaintiff be awarded possession. The case must go back to the first Court for determination of the issue regarding mesne profits, which has not been decided. Parties to bear their own costs in the Courts below. Costs in appeal on respondent.

G. R. D. *Appeal allowed.*

(2) 1 N. L. R. 1.
(3) 11 M. I. A. 468 at p. 475 ; 9 W. R. P. C. 9 ; 2 Suth P. C. J. 107 ; 2 Sar. P. L. J. 520 ; 20 E. R. 177.
(4) 12. M. I. A. 470 at p. 475 ; 11 W. R. P. C.27;
(5) 14C. 566, 7 Ind. Dec. (N. S.) 868.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 71 OF 1921.

September 11, 1923.

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

NATESA PILLAI—APPELLANT—PETITIONER

versus

KANNAMMAL AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908) O. XXII s, 3—Death of plaintiff after preliminary decree—Legal representative not brought on record—Abatement—Subsequent application to pass final decree.

Where after the passing of a preliminary decree, the plaintiff dies and his legal representative does not bring himself on the record within the time prescribed, the suit abates and after such abatement, an application to pass a final decree if not made within the time provided by law is time-barred.

A suit in which a preliminary decree is passed continues till the stage of final decree is reached.

Subbarayudu v. *Ramadasu* 42 M. L. J. 801, and *Lakshmi Achi* v. *Subramania Iyer*, 39 M. 488, followed.

Civil miscellaneous second appeal against the order of the Court of the Subordinate Judge of Negapatam in A. S. No. 33 of 1920, preferred against the Order of the Court of

the District Munsif of Negapatam in I. A. No 1639 of 1918 in O. S No. 97 of 1912.

Mr. *K. S. Champakesa Iyengar*, for Appellant.

Messrs. *S. Ramaswami Iyer* and *T.V. Ramanatha Iyer*, for Respondent.

JUDGMENT.—The appellant claims to be the legal representative of the plaintiff, who obtained a preliminary decree in a mortgage suit in O. S. No. 97 of 1912.

The plaintiff admittedly had died before this appellant applied on November 19th, 1915 to be recognised as the heir of the plaintiff and to get a final decree passed.

His application was dismissed on February 9th, 1916 on account of his absence.

As he did not get himself brought on the record at that time, the suit abated under O. XXII, r. 3 of the Code of Civil Procedure upon six months expiring after the plaintiff's death ; and as he did not apply subsequently to have the abatement set aside, the present application, presented on October 10th, 1918, is out of time and incompetent.

It is true that the District Munsif erroneously held that the suit had not abated because the plaintiff's death occurred between the passing of the preliminary and the final decrees. But this Court has held in *Lakshmi Achi* v. *Subbarama Aiyar* (1), that the suit is continued till the stage of final decree is reached : See also *Dokoju Subbarayadu* v. *Musti Ramasasu* (2), which is a direct authority for holding that after the abatement of the suit an application to pass a final decree, which is not made within the time provided by law, should be dismissed as time-barred.

This Civil miscellaneous second appeal is, therefore dismissed with costs.

V.N.V. *Appeal dismissed.*

(1) 29 Ind. Cas. 142 ; 39 M. 488 ; 2 L. W. 403 ; 88 M. L. J. 491 ; (1915) M. W. N. 327 ; 17 M. L. J. 325.

(2) 68 Ind. Cas. 942 ; 42 M. L. J. 307 ; 15 L. W. 309 ; 30 M. L. J. 202 ; (1922) M. W. N. 375 ; 45 M. 872 ; (1923) A. I. R. (M.) 237.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 71 OF 1921.

November 1, 1923.

Present :—Mr. Wazir Hussain, A. J. C., Mr. Neave, A. J. C.

Must. RAJ DULARI—PLAINTIFF—APPELLANT

versus

Must. CHANDESHUR DEI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res Judicata—*Parties claiming through the same person*—*Limitation Act (IX of 1908), Sch. I, Art. 141*—*Suit for possession by daughter*—*Transfer by widow inter vivos, whether effects daughter's title.*

It is a well settled rule of law that when both parties in the subsequent litigation claim through the same same person, there is no bar of *res judicata*, [p. 69 col. 2].

Asghar Raza Khan v. *Muhammad Mehdi Khan*, 30 C. 556 : 30 I. A. 71, 7 C. W. N. 482, 8 Sar. P. C. J. 489 (P. C.) **relied on.**

The limitation under Art. 141 of Sch. I to the Limitation Act is 12 years and begins to run from the death of the female. Any dealings with the property by her, or her transferee during her lifetime cannot affect the title of her husbands' heirs which does not come into existence a moment earlier than her death. [p. 68, col. 1.]

Ranchordas Vandravandas v. *Parvatibai*, 23 B. 725 : 26 I. A. 71, 1 Bom. L. R. 607, 3 C. W. N. 621, 7 Sar. P. C. J. 543, 12 Ind. Dec. (N. S.) 485 P. C. and *Amrit Dhar* v. *Bindesri Prasad* 23 A. 443, **relied on.**

Appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated 21st March 1921.

Mr. *Mohamed Ayub*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondent No. 1.

Mr. *Niamat Ullah*, for the Respondents Nos. 2-1, 2-2 and 3.

JUDGMENT.—This is a plaintiff's appeal. Her claim for possession and partition of certain properties has partly failed and partly succeeded in the Court below. This appeal relates to that part of the claim which has failed.

A short pedigree may be given here,—

Chandra Lal=Mt. Lakhpati Dei, widow, died on 20th April 1909.

Chandesar Dei, Deft. 1	Raj Dulari, Plaintiff.
Rameshar Prasad, deceased.	

The suit relates to the property of Chandra Lal. The details of that property are given in lists A, B, and C. attached to the plaint. Chandra Lal died in the year 1876. His widow,

Mt. Lakhpati Dei, died on the 20th April 1904. This is a claim by Mt. Raj Dulari, one of the two daughters of Chandra Lal, for a half share in the estate of her father. The chief defendant, Mt. Chandrasar Dei, is the other daughter of Chandra Lal. The defendants 2 and 3 are transferees in respect of certain properties from Mt. Lakhpati Dei. The defendant 4 is a transferee in respect of one item from defendant No. 1. The lower Court has given a decree to the plaintiff in respect of items 4 to 6 of list A. and of item 1 of list C. Item 1 of list A. is now abandoned by the plaintiff, so is item 2 of list C. The present appeal, therefore, relates to items 2, 3, 7 and 8 of list A. and to all the items of list B. We have also before us cross-objections in respect of such of the items as have been decreed in favour of the plaintiff by the lower Court. These cross-objections were, however, withdrawn at the hearing of the appeal and, therefore, no further notice need be taken of them.

So much of the defence as is now material for the purpose of this appeal was, that items 6 and 7 of list A. are *waqf* property, that the plaintiff's claim in respect of items 1, 2, 7 and 8 of list A. was barred by the rule of estoppel, the claim in respect of items 3 and 8 (list A.) was barred by time, and that the properties mentioned in list B. being *chaukis* are not divisible. The findings of the learned Additional Subordinate Judge are as follows:—Items 2, 3, 7 and 8 of list A. belonged to Chandra Lal but he made a *waqf* of item 7, which was consequently not partible; that the plaintiff is estopped from claiming a share in items 2, 7 and 8 of list A on the allegation that they belonged to her father; that the claim in respect of items 3 and 8 of the same list was barred by limitation; that items 2, 3 and 7 of list B. were not the properties of Chandra Lal, and that out of 57 pieces of items 8 and 9 of the same list 52 belonged to Chandra Lal but that no decree could be granted in respect of them for the reason that they were not sufficiently specified in the plaint. As regards items 1, 4, 5 and 6 of the same list he held that they were not divisible.

We will first take up list B. Items 2, 3 and 7 have been held by the learned Additional Subordinate Judge as not shown to have belonged to ChandraLal. We think that he is right in that opinion. Reliance was placed in this Court upon Exhibits 9, A-1, 2, 3, 34 and 35 in support of the contention that these items belonged to Chandra Lal. We have examined these documents carefully. None of them has even a remote bearing on the question under consideration. Exhibit 9 is a register of *chaukis* prepared in the year 1887. In this register the widows's name is entered in respect of certain *chaukis*. Exhibit A1 is the Will which the widow made in favour of Rameshar Prasad, son of Mt. Chandesar Dei. There is no description of any property in this Will. Exhibit 2 is a plaint by one Raghunath in a suit brought against the widow Mt. Lakhpati Dei and Rameshar Prasad claiming that the properties mentioned therein belonged to Chandra Lal and that the widow had no power to make a disposition in respect of them. No properties were specified in this plaint. Exhibit 3 is the written statement filed on behalf of Rameshar Prasad, minor, under the guardianship of his mother, Mt. Chandesar Dei, and also on behalf of Mt. Lakhpati Dei in answer to the plaint mentioned above. This written statement also does not specify any properties. The suit was dismissed (Ex. A-8). After the death of the widow, Raghunath brought a second suit for possession on the same title as against the two daughters of Chandra Lal. In the lists attached to the plaint of this suit (Ex. 34) he mentioned the items now under consideration as belonging to Chandra Lal. In answer to this claim Mt. Raj Dulari, the present plaintiff, filed a written statement (Ex. 35) in which she admitted the plaint allegations in respect of these properties but the plaintiff cannot prove her own admission in her favour. We were also referred to a portion of the evidence of Ganpat Prasad (D. W 4) in this connection. He stated that after the death of Chandra Lal, Mt. Lakhpati Dei became the proprietor. In the earlier portion of his evidence he had stated that he had seen the properties in suit. We think that this evidence is too vague and insufficient to support the plaintiff's claim in respect of these items.

Items 8 and 9 of list B. These items comprise 16 *chaukis* at Nayaghat and 41 at Ramghat. The learned Additional Subordinate Judge has found that some 16 *chaukis* at Nayaghat and some 36 at Ramghat belonged

to Chandra Lal, but he has dismissed the plaintiff's claim in respect of them on the ground that there was no sufficient specification of them in the plaint. An application has now been presented to us asking for leave to amend the plaint so as to introduce the numbers of the 16 and the 36 *chaukis* found to have been the property of Chandra Lal. We do not think that we should accept this application because there is nothing to show that the numbers of the *chaukis* stated in this application are the numbers borne by the *chaukis* now in dispute but we think that the learned Additional Subordinate Judge should not have thrown out the plaintiff's claim on the ground on which he has done. The defendants did not complain of the want of specification. Both parties, we think, knew very well what and which the *chaukis* were that belonged to Chandra Lal. Considering the nature of the *chaukis* we think that the description given in respect of them as situate at Nayaghat and at Ramghat was quite enough in the circumstances of this case. We are, therefore of opinion that the plaintiff is entitled to a decree in respect of the 16 *chaukis* at Nayaghat and 41 *chaukis* at Ramghat out of the 57 *chaukis* comprising items 8 and 9 of List B.

Items 1, 4, 5 and 6 of list B. The claim in respect of these items has been thrown out on the ground that they are not divisible. The nature of the *chaukis* and of a claim for partition in respect of them has been considered by us in our judgment in First Civil Appeal No. 22 of 1921 just now decided. For the reasons stated therein, we are of opinion that the plaintiff is entitled to a half share in these items.

Now we come to List A. Items 2, 7 and 8 are houses. The claim in respect of them has been dismissed on the ground of estoppel. The only estoppel now relied upon before us is one of *res judicata*. This matter is discussed by the learned Additional Subordinate Judge in his finding on issue No. 8. It appears that Anand Bahadur, and Rameshar Prasad, members of a joint Hindu Family, brought a claim against the present plaintiff, who is the widow of Lal Bahadur, brother of Anand Bahadur, for the recovery of certain properties including those now under consideration. In answer to that claim the plaintiff pleaded that these items were the exclusive property of her husband Lal Bahadur and were not joint family property. The plaintiffs to that suit succeeded, the Court having held that these items were the joint family property. Exhibit A2 is the plaint, Exhibit A3 is the written statement and Exhibits A4 to A6 are the judgment and decree in that suit. We are of opinion that there is no bar of *res judicata*. The title to the properties is claimed through Chandra Lal. The plaintiff and the defendant No. 1 are both claiming through him. It is a well-settled rule of law that when both parties in the subsequent litigation claim through the same person there is no bar of of *res judicata*. See the decision of the Privy Council in the case of *Asghar Reza Khan* v. *Muhammad Mehdi Husain Khan* (1). On the merits, the learned Additional Subordinate Judge has found that these items belonged to Chandra Lal. We, therefore, hold that the plaintiff is entitled to a decee in respect of items 2, 7 and 8 of list A.

Items 3 and 8 of list A. The claim in respect of these two items is thrown out by the Court below on the ground that it is barred by limitation. As regards item 8 it applies Article 134, and with regard to item 3 it applies Article 144 of the Indian Limitation Act. As to item 8, it appears that the widow made a mortgage by way of conditional sale to one Ram Narain (Exhibit A 42). Afterwards, the mortgagee obtained a decree for foreclosure on the basis of that mortgage against the widow on the 17th May 1888 (Exhibit A 44). On the 8th March 1889 he sold it to one Bisheshur (Exhibit 25.) As to item No. 3, it appears that the widow made a mortgage to Anand Bahadur on the 12th August 1884 (Exhibit C4). Subsequently, on the 4th February 1917, the mortgagee mortgaged it to one Pahlad Dass professing to be the owner of that property (Exhibit C5). Pahlad Das brought a suit on the foot of his mortgage and put the property to sale. The defendant No. 3 purchased it. We are opinion that the proper Article applicable to the claim in respect of both these items is Article 141 of the Indian Limitation Act. That Article specifically relates to a case for possession of immoveable property by a Hindu or Muhammadan entitled to the possession of that property on the death of a Hindu or Muhammadan

(1) 30 C. 556; 30 I. A. 71; 7 C. W. N. 482; 8 Sar P. C. J. 489 (P. C).

female. The limitation under that Article is 12 years and begins to run from the date of the death of the female. The widow of Chandra Lal died within 12 years of the date of this suit and the plaintiff's title to the possession of her father's property arose only on the death of Chandra Lal's widow. Any dealings with this property by the widow or her transferees during the lifetime of the widow could not affect the daughter's title which did not come into existence a moment earlier than the death of the widow. The leading case on the subject is the decision of the Privy Council in *Ranchordas Vandravandas* v. *Parvartibai* (2). The other case to which we may refer is that of *Amrit Dhar* v. *Bindesri Prasad* (3). We, therefore, hold that the plaintiff is entitled to a decree for a half share in these items.

Item 7 of list A. As regards this item we think that the decision of the learned Additional Subordinate Judge is right. He has held that it is *waqf* property. The matter is discussed by him under issue No 6. For the reasons given in his judgment, which need not be repeated here, we agree with him that the property is *waqf* in its true sense of the word and cannot be made the subject of partition. The plaintiff's claim in respect thereof must fail.

We, therefore, allow this appeal and modify the decree of the Court below by giving a decree to the plaintiff in terms of her plaint in respect of the properties which we have held in this judgment the plaintiff is entitled to in addition to the properties decreed to her by the learned Additional Subordinate Judge. The plaintiff will get her costs in proportion to her success in both the Courts. The cross-objections are dismissed but without costs.

G. H. *Appeal allowed.*

(2) 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar P. C. J. 543(P. C.); 12 Ind. Dec. (N. S.) 485 (P. C.)

(3) 23 A. 448; A. W. N. (1901) 183.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1805 OF 1919.
March 27, 1923.

Present:—Mr. Justice Martineau, and Mr. Justice Zafar Ali.

GELA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOHNA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (*XVII of* 1887) *s.* 158 (2) (17), (18)—*Jurisdiction of Civil and Revenue Courts—Partition—Suit for declaration that certain lands are* shamilat, *whether cognisable by Civil Courts.*

A suit for a declaration that certain lands are *shamilat* and should be partitioned on that basis is not a suit contesting the mode of partition and does not fall within the purview of clauses (17) and (18) of section 158 (2) of the Punjab Land Revenue Act. The cognisance of such a suit by a Civil Court is not, therefore, barred. [p. 70 col. 1]

Singa Ram v. *Data Ram*, 67 Ind. Cas. 240; 8 L. 4 (1922) A. I. R. (L.) 88; 4 U. P. L. R. [L] 72; 63 & 70 P. L. R. 1922; *Ahmad Khan* v. *Bahadar*, 88 P. R. 1892; *Devi Dyal* v. *Ahmad Khan*, 44 P. R. 1908; 91 P. L. R. 1908; 14 P. W. R. 1908; *Khuda Baksh* v. *Kaim Din*, 6 Ind. Cas. 486; 3 P. L. R. 1910; 16 P. W. R. 1910; *Munnagir* v. *Hazari*, 2 P. R. 1895; (Rev.); *Taja* v. *Tara Chand*, 11 P. R. 1896 (Rev.); *Dewa Singh* v. *Musammat Jawala*, 39 P. R. 1892, distinguished.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 19th May 1919, affirming that of the Subordinate Judge, 1st Class, Jhang, dated the 10th February 1919, dismissing the claim with costs.

Bakhshi *Tek Chand*, for the Appellants.

Dr. *G. C. Narang*, for the Respondents.

JUDGMENT.—The parties in this litigation are the male lineal descendants of one Sobha Ram, who had four sons. The plaintiffs are the offspring of one of them and the defendants of the remaining three. These plaintiffs and defendants were among the members of the proprietary body of the village Nika Daultana, and as such were co-sharers in the *shamilat* of that village. In the Settlement of 1902, proceedings for partition of the entire *shamilat* were set on foot. In the course of those proceedings two questions arose for decision, *i.e.*, (1) what was the share of Sobha Ram's descendants, and (2) how that share was to be divided among them. The plaintiff's claim was that it should be

GELA RAM *v.* SOHNA RAM

ivided in proportion to proprietary lands or evenue paid thereon (*hasab rasad khewat*) vhile the defendants demanded partition on ncestral shares. The present defendants nstituted a civil suit to have the matter lecided, but while that siut was pending the arties executed an agreement to the effect that artition of the *shamilat* might be completed as ar as the other co-sharers were concerned, but hat a separate *shamilat patti* to be called obha Ram's *patti* should be coustituted f the area that should fall to the share f the descendants of Sobha Ram to be artitioned after the decision of the civil uit. The revenue authorities accepted this greement, but, instead of allotting to the escendants of Sobha Ram one plot of land nd naming it *patti shamilat* Sobha Ram, they llotted to them three separate holdings Nos. 38, 39 and 41 and included the same mong proprietary holdings, showing all the escendants of Sobha Ram as co-owners of ach holding. The civil suit was finally ecided in 1908 by a Division Bench of the hief Court which upheld the contention of the resent defendants that the *shamilat* was to e divided on ancestral shares. On the 12th une 1916 the present defendants applied for artition of *khata* No. 38 only, but the laintiffs objected that this was not *khewat* nd, but a portion of the *shamilat* of the escendants of Sobha Ram, that *shamilat* could ot be partitioned piecemeal, and that the ode of partition to be followed was that laid own in paragraph (1) (*a*) of the *Wajib ul-arz*, ccording to which every co-sharer in the *hamilat* was entitled to retain at partition he land already in his possession. Paragraph 1 *b*) of the *Wajib-ul-arz* is to the effect that in artition of *khewat* land possession is to be isregarded. Thus, there were two separate ules for partition of *shamilat* and *khewat* nds. The revenue authorities, however, isallowed the plaintiff's objection on the round that as, according to the revenue re-ords, the land comprised in the holdings was *hewat* and not *shamilat*, it could not be artitioned but as *khewat* land. Feeling ggrieved at this decision the plaintiffs appear-d in the Civil Court to obtain a declaration to he effect that the lands comprised in the oldings in question were *shamilat* and were able according to the agreement of the parties o the partitioned as such. The defendants raised the preliminary objection that the suit was one to contest the mode of partition and was, therefore, not cognizable by a Civil Court. The Courts below upheld this contention and came to the conclusion that the suit was barred by clauses 17 and 18 of section 158 of the Land Revenue Act (XVI of 1887) as its object was to contest the mode of partition. The suit was accordingly dismissed. The plaintiffs have come to this Court in second appeal and it is contended on their behalf that the question involved in the suit is one of title and that the mode of partition will depend upon the decision of that question. We are of opinion that this contention must prevail.

Though the plaintiffs seek declaration to the effect (1) that the lands in suit are *shamilat* and are liable to partition according to clause 1 (a) of the *Wajib-ul-arz*, and (2) that the defendants are not entitled to claim partition piecemeal, what they really require is a declaration that the lands are *shamilat*, because if they are *shamilat* the clause of the *Wajib-ul-arz* relating to partition of *shamilat* must necessarily apply to partition thereof, and they must all be brought in the hotchpot for equality of division. Now, the question whether certain lands are *shamilat* or not can by no stretch of language be called one as to the mode of partition, though in the present case the mode of partition will depend on the answer to this question. The learned Counsel for the defendants-respondents maintains that the suit was one to contest the mode of partition and cites ruling *Singa Ram* v. *Data Ram* (1); *Ahmed Khan* v. *Bahadur* (2); *Devi Dyal* v. *Ahmed Khan* (3); *Khuda Baksh* v. *Kaim Din* (4); *Munnagir* v. *Hazari* (5); *Taja* v. *Tara Chand* (6); *Dewa Singh* v. *Musammat Jawali* (7), in support of his contention. But none of these rulings is in point. He further contends that the suit for a declaration was not competent under

(1) 67 Ind. Cas. 240; 3 L. 4; (1922) A. I. R. (L.) 88; 4 U. P. L. R. (L). 72; 63 & 70 P. L. R. 1922.
(2) 88 P. R. 1892.
(3) 44 P. R. 1908; 91 P. L. R. 1908; 14 P. W. R. 1908.
(4) 6 Ind. Cas. 486; 8 P. L. R. 1910; 16 P. W. R. 1910.
(5) 2 P. R. 1895 Rev.
(6) 11 P. R. 1896 Rev.
(7) 89 P. R. 1892.

section 42 of the Specific Relief Act because no consequential relief was asked for. But all that the the plaintiffs claim is that the lands in suit should be treated as *shamilat*, and as the Revenue authorities refused to treat the lands as such they had no other alternative than to bring this suit. Therefore, we hold that the suit is cognizable by a Civil Court, and, accepting the appeal, we reverse the judgments and decrees of the Courts below and remand the case for decision on the merits, costs will abide the event.

Appeal accepted, suit remanded.

Z. K.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 3 OF 1922.

September 17, 1923.

Present:—Sir Walter Salis Schwabe, K.C., Chief Justice, and Mr. Justice Waller.

ITIKYALA PEDDA ASWATHAPPA —APPELLANT—PETITIONER

versus

ANKULUGADU AND OTHERS—RESPONDENTS —COUNTER PETITIONERS.

Transfer of Property Act (IV of 1882) s. 88—Civil Procedure Code Act (V of 1908) O. XXXIV, rr. 5, 12—Mortgage decree under s. 88, subsequent to passing of Civil Procedure Code of 1908—Order absolute—Final decree—Execution proceedings.

Where a mortgage decree was passed in 1908 under the old procedure of section 88 of the Transfer of Property Act, the proceedings thus started must be continued under that Act, though the new Code of Civil Procedure had come into operation.

Ramasami Reddi v. *Sakkappa Reddi* (1) 48 Ind. Cas. 732 ; 85 M. L. J. 194 followed.

The mere fact that an order absolute for sale instead of a final decree for sale is passed does not render the execution proceedings invalid.

Appeal against the appellate order of the Court of the Subordinate Judge of Anantapur, dated the 31st January 1921, in A.S. No. 255 of 1920, preferred against the order, dated the 19th October 1920 of the Court of the District Munsif of Anantpur in E. P. No. 493 of 1920 in O.S. No. 168 of 1904 on the file of the Court of the District Munsif of Penukonda.

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

Respondents unrepresented.

JUDGMENT.

The Chief Justice.—In this case a mortgage decree was obtained in November 1908 under section 88 of the Transfer of Property Act which then applied. By the terms of that decree, if the amount of the mortgage was not paid by a certain date, the mortgaged property could be brought to sale. In 1911 an application was made to make the order absolute, which was the procedure prescribed under the Transfer of Property Act, and an order was passed. In 1914, 1915 and 1917 unsuccessful attempts were made to bring the interest of the mortgagor in the mortgaged property to sale, and the application which resulted in this appeal was launched in August 1920. An order was made for sale by the District Munsif in October 1920. The mortgagee having got his order after all those years was met by an appeal to the Subordinate Judge in which it was alleged—and it had been alleged before the District Munsif also—that the execution proceedings were all void *ab initio* because he had not obtained a proper final decree in his mortgage suit. That was based on the fact that, between the date of the original decree in 1908 and the date of his application to make that decree absolute, the sections of the Transfer of Property Act dealing with the matter had been repealed and their place taken by the Code of Civil Procedure, 1908, O. XXXIV, which by r. 5 (2) requires, first of all, a preliminary decree to be obtained and if the money is not paid by the date named in the preliminary decree then an application shall be made to the Court, and, instead of the decree for sale being made absolute, as used to be the practice, a final decree passed. The learned Subordinate Judge found that that point was a good one and, therefore, these execution proceedings have got to be taken all over again. In my judgment he was wrong. It is quite clear that where proceedings of this kind were started under the old procedure of the Transfer of Property Act they are to be continued under that Act although, meanwhile, the new Code of Civil Procedure has come into operation. There is a clear authority for the proposition in *Ramasami Reddi* v. *Sakkappa Reddi* (1) Further, it seems to me, even apart from that somewhat obvious ruling, it will be

(1) 48 Ind. Cas. 732 ; 85 M. L. J. 194.

quite impossible at this stage to hold that an order which *ex hypothesi* was made accidentally in the form of making a decree absolute instead of in the form of making a decree final could be disregarded or set aside.

This appeal must be allowed with costs here and in the Court below, the District Munsif's order being restored.

Waller, J.:—I agree and I have nothing to add.

V. N. V. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL NO. 3 OF 1921.

September 19, 1923.

Present:—Mr. B. C. Kennedy, J. C., and Mr. E. Raymond, A. J. C.

AMIRBUX—APPELLANT

versus

JANIMAL—RESPONDENT.

Registration Act (XVI of 1908) s. 2 (7)—Conditional agreement to execute lease, if compulsorily registrable.

A conditional agreement to execute a lease is not an agreement within the meaning of s. 2 (7) of the Registration Act, which contemplates a present demise and is not, therefore, compulsorily registrable. [p. 27 col. 1.]

Purmananddas Jiwandas v. *Dharsey Virji*, 10 B 101, 5 Ind Dec. (N.S.). 458. relied upon.

Appeal from the judgment and decree of the District Judge, Larkana, dated the 12th Novem ber 1920.

Mr. *Lunidaram Tikamdas*, for the Appellant.

Mr. *Suganlal H. Jeswani*, for the Respondent.

JUDGMENT.—In this case Janjimal was holding certain land belonging to the defendant Amirbux under a lease for five years executed in January 1915. On the 6th of March 1917 Janjimal and Amirbux are said to have entered into an arrangement whereby under certain circumstances Janjimal would be entitled to extend his holding for a further period of five years from the expiration of the current lease. The defendant failed to execute the lease as required and the plaintiff thereon brought an action for specific relief, directing that the defendant should execute the lease as called for by the agreement of the 6th of March. The Court of the first instance found that the document in question of the 6th March 1917 was an agreement to lease and was, therefore, complusorily registrable under the Registration Act. Not being so registered, it could not be admitted in evidence. Inasmuch as the agreement was reduced to writing, no other evidence to prove it was admissible, therefore, it found that the allegation as to this agreement to lease was not proved and it, therefore, dismissed the suit. The matter went up on appeal to the District Judge of Larkana and he held that this document is not an agrmeement to lease within the meaning of section 2 of the Registration Act and he held, therefore, that it was not compulsorily registrable and it was, therefore, improperly excluded from the evidence. And he, therefore, set aside the decision of the lower Court on the preliminary point and ordered the lower Court to dispose of the matter on the merits. The defendant comes here on appeal.

It is, perhaps, rather singular when the whole case turns exclusively on the interpretation of the document of the 6th of March, that no copy of it has been laid before us. We are not sure we ought not to dismiss this appeal purely on the ground that the appellant had furnished to us no material on which we could decide the interpretation of the document of the lower Court is incorrect. But, apart from that, and going solely on the account given of it in the papers before us, it would appear that the finding of the lower Appellate Court is correct. The earliest ruling in this matter is that of *Purmananddas Jiwandas* v. *Dharsey Virji* (1) and that ruling, except in Madras, has been generally followed. The effect is that it is only when a present demise is contemplated that an agreement to execute a lease is an agreement to lease under section 2 (7) of the Registration Act. And this seems a natural interpretation because it would appear that it is only in such cases that registration would be necessary to protect the interests of the intending purchaser of the land. In the present case, there was no agreement to make a present demise. It is not the case that it was intended that the current lease should be surrendered and the

(1) 10 B. 101, 5 Ind. Dec. (N.S.) 458.

new lease should be immediately entered into. The intention was that two and half years later, if certain conditions were fulfilled, the lessor should grant a fresh lease to the actual tenant. It was possible that those conditions might not have been complied with and the lessee might have failed to qualify for this lease. It was also not possible to definitely fix the conditions of the lease because part of the terms contemplated necessitated the taking of the accounts and the ascertaining what was due on either side under the old lease. It does not appear that the parties intended to frustrate the Registration or Stamp Laws in any way. There is nothing, therefore, to cause us to suppose that the fresh transaction was intended to supersede the old lease and to create a fresh tenancy. And, therefore, the defendant was not in a position to transfer any property to the appellant at the moment because he was not seized of it. The agreement was merely a conditional agreement to execute a lease and not an agreement to lease. It appears to us, therefore, that this document was not compulsorily registrable under the Registration Act and should not, therefore, have been excluded by the first Court and that, therefore, the order of the lower Appellate Court is correct.

We, therefore, dismiss this appeal with costs.

P. B. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 20 OF 1922.

September 12, 1923.

Present :—Mr. Baker, J. C.

Must. MULIA—DECREE-HOLDER—APPELLANT

versus.

PARTAB—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XXIII r. 3—Limitation—Inherent jurisdiction—Compromise of appeal out of Court—Appeal dismissed—Help of Court.

There is no limitation for an application under section 152 of the Civil Procedure Code. [p. 75 col. 1.]

A Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would meet the necessity of the case. [p. 73 col. 2.]

If, as the result of a compromise effected out of Court, an appeal is withdrawn unconditionally and is consequently dismissed, the parties cannot get help from Court if one of the parties resiles from the compromise. [p. 74 col. 1.]

Appeal against the decree of the District Judge, Hoshangabad, dated the 26th April 1922, in Civil Appeal No 8 of 1921.

Mr. *C. B. Parakh*, for the Appellant.

Mr. *W. R. Purnaik*, for the Respondent.

JUDGMENT.—The facts are simple. The appellant Mt. Mulia brought a suit for possession of certain land against the non-applicant and obtained a decree, Suit No. 272 of 1920. The defendant appealed and the appeal was registered as No. 8 of 1921 in the Court of the District Judge, Hoshangabad and notice issued to respondent. On 24th February 1921 the appellant's pleader withdrew the appeal, saying the case was compromised. The appeal was consequently dismissed. Respondent is not shown to have been present. On the same day the compromise was filed, but was not incorporated in the decree, as the appeal had already been dismissed and no enquiry was made as to respondent's admitting the compromise, as the appeal had been withdrawn. The plaintiff then applied for execution of the original decree, which of course stood untouched and notice being issued to the judgment-debtor he set up the compromise (by which he was to remain in possession) as a bar to execution. The executing Court enquired into the compromise and for various reasons decided the case adversely to the judgment-debtor on 21st November 1921. Thereupon the judgment-debtor appealed to the District Judge, Hoshangabad, the appeal being No. 2 of 1922 filed on 3rd January 1922. On 20th February 1922 the judgment-debtor (defendant) also filed an application to amend the decree in appeal No. 8 of 1921 on the ground that he got the appeal dismissed through fraud on the part of the plaintiff's Mukhtyar. Notice was issued to the respondent in both these appeals and they were decided on 26th April 1922. In appeal No. 8 of 1921 the District Judge held that the compromise was really made and that the decree of the lower Court should be modified in

terms of it. In appeal No. 2 of 1922 it was held that in view of the order in appeal No. 8 of 1921 execution be stayed.

The present appeal is by plaintiff against the decree in appeal No. 8 of 1921, and it is to be noted that there is no appeal or application for revision against the order in appeal No. 2 of 1922. Nor can any order passed in the present appeal affect the order in that appeal, even though that appeal was decided on the reasons given in the order in appeal No. 8 of 1921, between the same parties.

The next question is whether the District Judge had power to reopen appeal No. 8 of 1921 and what was the nature of his proceedings. Originally, the present appeal was filed as a Revision application, but my learned predecessor held that it should be treated as an appeal under O. XLIII, r. 1 (m), Civil Procedure Code, that is, an appeal against an order under r. 3 of O. XXIII, recording an agreement, compromise or satisfaction. It is not contended that any application would lie under O. XXIII, r. 3, in a suit which had long been decided at the date of the application. It is also clear that no such application was made. It is contended on behalf of the appellant that the District Judge had no power to alter or review the order dismissing the appeal.

The appeal was withdrawn by the appellant. No application was made that a decree should be passed in terms of the compromise. No such decree could have been made without enquiry and the evidence of the respondent. Consequently, the Court passed an order in terms of the appellant's request, which cannot be altered.

The application was for amendment of the decree. The order sheet of 20th February 1922 shows that this was so and the notice issued to the respondent was to show cause why the decrees should not be amended. It cannot be considered as one for review. It is only stamped with an 8-annas stamp. The application itself does not state under what provision of law it is made, but from the order sheet it appears to have been treated as an application for amendment of the decree.

Under section 152 of the Code, clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may be corrected at any time.

There is no clerical or arithmetical mistake in the order dismissing the decree, and no error arising from any accidental slip or omission. It is quite clear that the appellant withdrew the appeal without asking that the decree of the lower Court should be modified in accordance with the compromise. The compromise was put in the same day and the endorsement of the District Judge on it is: "Admitted. Presented to-day by Mr. Beharilal. The case has been dismissed as appellant has withdrawn, but he desires this to be put on record to show that the case was settled out of Court."

The Court was not, therefore, asked to incorporate this compromise in the decree, which, as I have said, could not have been done without enquiry or the consent of the other party, who does not appear to have been present to admit the compromise. Section 152, Civil Procedure Code, therefore, does not seem to apply.

The learned pleader for the appellant relies on section 151, Civil Procedure Code, referring to the inherent power of the Court to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the Court.

No question of preventing abuse of the process of the Court arises here, and the question is whether the Court had power to make such an order for the ends of justice.

It has been held in *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited* (1) that a Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would meet the necessity of the case.

Now, in the present case it was open to the defendant-appellant to have asked the Appellate Court to modify the decree in the terms of the compromise and if the Court was satisfied that the compromise was lawful and had been entered into by respondent, the decree would have been modified accordingly, otherwise the appeal would have been disposed of on the merits. The appellant, however, as has been shown, did not do this but withdrew his appeal unconditionally. The Court had, therefore, no option but to dismiss the appeal, leaving the decree of the lower Court standing as

(1) 41 Ind. Cas. 598 ; 44 C. 929 ; 21 C. W. N. 877 ; 26 C. L. J. 49 (F. B.).

it was, and I am of opinion that the appellant had no right to have this order modified and the Court had no power either to review its order or to alter it under section 151 of the Civil Procedure Code.

The present case is not an unusual one. Lately several parties to appeals in this Court have intimated through their pleaders that the appeal is compromised, but fail to appear to put in the compromise or to ask for a decree in terms of the compromise. It should be widely known that unless they do that and if they allow the appeal to be dismissed for want of prosecution, they can get no help from the Court, if one of the parties resiles from the compromise, and must seek other remedies.

In the present case the defendant in his application states that his withdrawal of the appeal was obtained by fraud. But this does not bring the case within section 151, as there was no fraud on the Court. He was represented by a pleader throughout. In these circumstances, whatever remedies may have been open to the defendant by way of suit or otherwise, I am of opinion that having unconditionally withdrawn his appeal he had no right to get the matter reopened and the Court had no power to reopen it.

The decree of the lower Appellate Court modifying the decree of the first Court will, therefore, be set aside and the original decree restored. The respondent will bear the costs of this appeal and the costs in the lower Appellate Court.

G. R. D. *Decree set aside.*
S. D.

LAHORE HIGH COURT.

FIRST APPEAL NO. 2378 OF 1919.

November 30, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

KIRPA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RABI DATT AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Adoption — Daughter's son —Bhitwaria Brahmins of village Beri, Rohtak District.

In accordance with strict Hindu Law a man cannot adopt his daughter's son although in ancient times such adoptions were recognised. [p. 75, col 1.]

Bhagwan Singh v. *Bhagwan Singh*, 21 A. 412 1 Bom. L. R. 811; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 434; 9 Ind. Dec. (N. S.) 971 (P. C.) relied on.

The present view, however, more especially in the Punjab, is veering round to an acceptance of the adoption of the daughter's son although the theory exists that to qualify for adoption a man must be the son of a woman whom the adoptive father could have married. [p. 75, col 1]

A valid custom exists among Bhitwaria Brahmins of the Beri village of the Rohtak District allowing the adoption of a daughter's son. [p. 75, col 2]

In that part of the Punjab which adjoins the United Provinces the nomination of an heir on lines resembling the Krittima Hindu adoption is unknown, that is to say, even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family, to his new family, and is entirely cut off from his past. [p. 75, col 2]

Baij Nath v. *Shamboo Nath* 53 P. W. R. 1908; 113 I. L. R. 1908, followed.

Appeal from the decree of the Senior Subordinate Judge, Rohtak, dated the 31st July 1919.

Lala *Fakir Chand*, and Mr. *C. L. Mathur*, for the Appellants.

Lala *Jagan Nath*, and Mr. *Shamair Chand*, for *R. B.* Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—The parties in this case are admittedly governed by Hindu Law. The plaintiffs, being some of the collaterals of two men Ram Sarup and Jawahra, who both died childless, bring this suit against Rabi Datt, son of Sheo Sahai, and various *pro forma* defendants claiming the whole of the property left by Ram Sarup and Jawahra, of which mutation has been effected in the name of Rabi Datt. Rabi Datt's father Sheo Sahai was admittedly the daughter's son Mangat Rai, and Mangat Rai and the two ancestors of Ram Sarup and Jawahra formed one branch of the family being all three sons of Naina. It is alleged by the defendant that his father Sheo Sahai was duly adopted by Mangat Rai, that the adoption was vaild because of a custom varying the strict Hindu Law on the subject and that, any how, the plaintiffs and their predecessors-in-title have all acquiesced in the adoption and have treated it as valid. The plaintiffs, on the other hand, deny the factum of the adoption, as also its validity and urge that they are in no way estopped from questioning it.

KIRPA *v.* RABI DATT

Mangat Rai died in 1833 and on his death his widow was shown as in possession of his land until 1846. She then executed a registered deed by which she made a gift of the whole of Mangat Rai's property in favour of Sheo Sahai, her daughter's son, whom she described as the adopted son of Mangat Rai. In the Revenue Records of 1879 Sheo Sahai is shown as the adopted son of Mangat Rai. The adoption is said to have taken place in 1827. Sheo Sahai has throughout been treated by the whole family as the adopted son ; the entry in the Revenue Records has not been questioned and, taking everything into account, we find that it is fully established that as a matter of fact he was adopted.

As to the validity of the adoption, there is no doubt, as laid down in *Bhagwan Singh* v. *Bhagwan Singh* (1), that, in accordance with strict Hindu Law, a man cannot adopt his daughter's son, although in ancient times such adoptions were recognised. The position is fully discussed in Mayne's Hindu Law and it is there explained how the present view, more especially in the Punjab, is veering round to the acceptance of an adoption of the daughter's son, although the theory no doubt exists that to qualify for adoption a man must be the son of a woman, whom the adoptive father could have married. It is true, as pointed out by Counsel for the appellants, that no special custom was pleaded in so many words, but it was pleaded that there had been a valid adoption, an issue was framed on the point and the whole case has been fought out on the clear understanding that the validity of the adoption depended on the custom varying the strict Hindu Law being established. Now, no fewer than 11 instances including, a contested case, have been proved amongst the *Bhitwaria Brahmans* of this village. It is stated that there are one hundred families of such *Brahmans* in this village, and this very large number of adoptions of daughter's sons establishes in our opinion the existence of a custom varying the Hindu Law in this direction. Counsel for the appellants urges that even if a custom be held to be established it only proves that a *Krittima* adoption of a daughter's son is allowed. In the first place, the *Krittima* form of adoption is confined for practical purposes to Behar and the West Coast of India, and both in the Customary Law edited by Mr. Joseph and in *Baij Nath* v. *Shamboo Nath* (2), it is explained that in this part of the Punjab, which adjoins the United Provinces the nomination of an heir on lines resembling the *Krittima* Hindu adoption is unknown; that is to say, even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family to his new family, and is entirely cut off from his past. How much more so must this be the position among people governed by Hindu Law. Another most significant fact is that Sheo Sahai's *got* by birth was *Vat*; that Mangat Rai was a *Kanshik*, and that Sheo Sahai's grandson, the present defendant's son, has been married to a Vat girl, which would have been impossible unless Sheo Sahai had been adopted into some other *got* than *Vat*. We find that it is fully established, that a valid custom does exist amongst these *Bhitwaria Brahmans* of the Beri village of the Rohtak District allowing the adoption of a daughter's son.

Upon the third point also the plaintiffs fail. The registered deed of 1846 was signed by four ancestors of the present plaintiffs, including the real brother of Mangat Rai, Hem Raj, and it is also signed by Ramjas, the Lambardar of the Patti. The plaintiffs have allowed Rabi Datt to treat the property as his own during the past 11 years ; two of them, Jawahara and Mutsaddi, have actually cultivated a part of the land under him and from the time of the adoption onwards the whole family has recognised Sheo Sahai and treated him as the full adopted son of Mangat Rai. We find, therefore, on all three points in favour of the defendant-respondent and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 21 A. 412 ; 1 Bom. L R 811 ; 3 C. W. N. 454 ; 26 I. A. 158 ; 7 Sar. P. C. J. 454 ; 9 Ind. Dec. (N. S.) 971 (P. C.).

(2) 53 P. W. R. 1908 ; 118 P. L. R. 1908.

ARUMUGA GOUNDAN *v.* PERIAVANJIAPPA

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 385 OF 1923.

December 7, 1923

Present:—Mr. Justice Spencer.

ARUMUGA GOUNDAN AND OTHERS—PETITIONERS

versus

PERIAVANJIAPPA GOUNDAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 151—Minor not properly represented—Decree against minor nullity—Decree declared not binding—Power of Court to revive original suit against minor—Inherent powers of Court.

A decree which declares that a prior decree obtained against minors was not binding upon them on the ground that they were not validly represented therein has merely the effect of remitting the parties to their original rights and does not involve the retrial afresh of the earlier suit. Therefore, the Court which originally disposed of that suit has no jurisdiction to restore the suit to its file and re-try it.

Monohar Lal v. *Jadunath Singh* 28 A. 585; 4 C. L. J. 8; 8 Bom. L. R. 89; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128 (P.C.) followed.

A Court has no inherent powers under section 151 of the Civil Procedure Code to restore a suit once disposed of or to add parties to it who were not represented at the original trial.

Bhagavan Dayal v. *Param Sukh Das* 36 Ind. Cas. 866; 39 A. 8 not followed.

Venkata Row v. *Tuljaram Row* 38 Ind. Cas. 270; (1917) M. W. N. 30 distinguished.

If a minor is not properly represented before a Court a decree passed against him is a nullity.

Eda Punnayya v. *Jangala Kamakottayya* 58 Ind. Cas. 184; (1920) M. W. N. 1; 37 M. L. J. 399; 26 M. L. T. 327; 10 L. W. 471 relied on.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Udumalpet, dated the 2nd October 1922, in I.A. No. 1334 of 1922 in O. S. No. 559 of 1919.

Mr. *C. S. Swaminadhan*, for the Petitioners.

Mr. *T. G. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.—In O. S. 476 of 1921 it was decided that the decree in O. S. 559 of 1919 was not binding on the minors because they were not validly represented in the earlier suit, the guardian appointed by the Court not having consented to act as guardian and not having appeared for them at the trial.

The decree in O. S. 479 simply declared that the decree in O. S. 559 was not binding on the minors, and in this respect it was in accordance with what, in the view of the Privy Council in *Monohar Lal* v. *Jadunath Singh* (1), was a proper decree, *viz.*, that it would be sufficeint in such a case to remit the parties to their original rights without declaring that the earlier suit would have to be tried afresh.

In the judgment in O. S. 479 there is an observation that O. S. 559 will have to be revived as against these minor plaintiffs, and the District Munsif has now, in the exercise of his supposed powers under section 151 Civil Procedure Code, taken the case back on his file and proceeded to try it. I do not think that the Court possessed inherent power to restore a suit once disposed of and to add parties to it who were not represented at the original trial. *Bhagwan Dayal* v. *Param Sukh Das* (2), is quoted as an authority for so doing, but that case has been dissented from by a Bench of this Court in *Eda Punnayya* v. *Jangalu Kamakottayya* (3). As pointed out by Oldfied and Seshagiri Aiyar, JJ., if a minor is not properly represented before the Court, a decree passed against him is in effect a nullity and the Court cannot set aside the *ex parte* order and reopen the suit under O. IX, r. 13.

If the minors were not legally made parties to the suit, the action of the Court in making them parties now is tantamount to restoring to file a suit already disposed of and adding parties who were not represented at the original trial. The case in *Venkata Row* v. *Tuljaram Row* (4) is not an authority for such a proceeding.

I set aside the order of the District Munsif with costs in this Court and remit the parties to their rights as they stood at the disposal of O. S. 479 of 1921.

V. N. V. *Order set aside.*

S. D.

(1) 28 A. 585 9; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128 (P. C.).

(2) 36 Ind. Cas. 366; 39 A. 8; 14 A. L. J. 818.

(3) 58 Ind. Cas. 184; (1920) M. W. N. 1; 37 M. L. J. 399; 26 M. L. T. 327; 10 L. W. 471.

(4) 38 Ind. Cas 270; (1917) M. W. N. 30; 5 L. W. 482.

BALIRAM SINGH *v.* RAMCHANDRA

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST APPEAL NO. 54-B of 1921.

October 4, 1923.

Present—Messrs. Prideaux, A. J. C , and R. B. Kinkhede, A. J. C.

BALIRAM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMCHANDRA—DEFENDANT—RESPONDENT.

Berar Inam Rules, rule V—Succession to Inam —Madatmash Inam—Alienation.

A person succeeds to the Inam property in Berar not as an heir under the Hindu Law but as an heir to the last holder under the Berar Inam Rules which regulate the devolution and incidents of an Inam Estate in Berar subject entirely to the Sanad, or certificate or other documents evidencing the special terms of the grant in each particular case. [p. 79, col. 1]

Madatmash inam is a grant for maintenance or subsistence under rule V of the Inam Rules and any permanent alienation or a transaction likely to result in a permanent alienation can only be acted upon during the life time of the then certificate holder and at his death by the order sanctioning the appointment of another Inamdar, the Inam land passes on to him free of any encumbrance imposed on the land by the last holder. [p. 79, col. 1]

Appeal against the decree of the Additional Sub-Judge, West Berar, Akola, dated the 6th May 1921, in Civil Suit No. 126 of 1919.

Mr. *G. V. Kukade*, for the Appellant.

Mr. *B. W. Joshi*, for the Respondent.

JUDGMENT.—This suit has been brought on a registered mortgage-deed for Rs. 5,000, dated 11th June 1906, by conditional foreclosure of the mortgaged property. Both the mortgagor and the mortgagee are dead. The latter's legal representatives sue the defendant as the adopted son of the mortgagor.

It seems to us that after the execution of the mortgage-deed there was a partition between the defendant and his father, the mortgaged property falling to the defendant's share at that partition, while the property described in Schedule A came to the share of the executant of the mortgage. That property has now by reason of the mortgagor's death come to the defendant and the plaint stated that in case it was found that the mortgaged property could not be made liable under the mortgage, the property mentioned in the Schedule above referred to be substituted for it as the property of the mortgagor. Various defences were raised and the points in dispute are covered by the following issues :—

1. Did the defendant's deceased father Ganpatrao execute the deed sued for and for consideration ?
2. Was the debt incurred for payment of antecedent debt and legal necessity as alleged ?
3. Is the defendant liable to pay the debt apart from the question of legal necessity on the ground of pious obligation to pay the debt of his father ?
4. Whether the mortgage transaction is void and inoperative as it was effected during the pendency of the partition suit No. 14 of 1906 between the defendant and his father ?
5. How much area out of 118 was Inam ?
6. Had defendant's father no right to mortgage the fields shown in the plaint ?
7. (*a*) Whether the Government granted the Inam fields to the defendant on the death of the latter's father ?

   (*b*) Does the plaintiffs' mortgage lien extend to the Inam field in the hands of the defendant whether he (defendant) claims them because of the partition or because of his being the Inam holder after the death of his father ?
8. (*a*) Is the plaintiff not entiled to claim a decree against the mortgaged property because it has fallen to the share of the defendant in the said partition suit ?

   (*b*) Whether the defendant took the mortgaged property to his share in the partition fraudulently, what is the effect of the deliberate fraud on the claim ?
9. In case it is held that the mortgaged property is not liable for the claim of the plaintiff, can they get a mortgage-decree on the property which fell to the share of the defendant's father in the partition ?
10. Are the fields 122 of Patur and 41, 47 and 48 of Pipalgaon and the house of Nagpur in defendant's possession ? Has the defendant recovered the amounts

from his father's *asamis*? If so, how much?

11. Has the defendant's father sold one of the fields No. 122 to Hassain Bhai ?

12. To what reliefs are the plaintiffs entitled?

The conclusions of the trial Court are as follows :—On the first issue the Judge writes :—

" According to section 69 of the Transfer of Property Act, the deed must be proved by showing that the attestation of one attesting witness at least was in his handwriting and that the signature of the executant was in his handwriting. P. W. 1 and P. W, 2 have proved the attestation to be in the handwriting of the attesting witnesses but the other requirement of section is not complied with. It is not shown that the signature of the executant is in his handwriting. I, therefore, find that the mortgage deed is not duly proved to be genuine and valid ."

The second issue was found against the plaintiffs as was issue No. 3. On the 4th issue the Judge finds the mortgage inoperative on the ground that the document was executed during the pendency of the partition suit then pending between the defendant and his father. Sixteen acres and 21 gunthas of field No 118 was found to be Inam and the rest Khalsa. No decision was come to on the 6th issue and on the first half of the 7th issue it was found that the Inam land was granted to the defendant after the death of his father by Government. No finding was given on (*b*) of this issue As regards issue No. 8 the Judge states that the case of *Amolak Ram* v. *Chandan Singh* (1) governs the suit. No fraud in the present case had been established and the mortgagee could proceed against the substituted security. Issue No. 9 was found in the plaintiff's favour, while issue 10 was found against him as was issue 11. On the last issue the Judge comes to the following conclusion : that the mortgage-deed was not duly proved ; that the mortgage taken during the pendency of the partition suit was inoperative against the defendant as no fraud in partition was established. The mortgage of the Inam fields was not invalid as it was not permanent. The property under the mortgage having fallen to the share of defendant plaintiffs could only seek the substituted security. The suit was dismissed.

It is here pressed that the decision as regards the execution of the mortgage by Ganpatrao not being duly established is erroneous and we think that there is some force in the contention. The first witness for the plaintiffs proves that the attestation by his brother Balkrishna is in his brother's handwriting and P. W. 2 is a son of the writer of the document and proves that the document is in his father's handwriting. But in the partition suit the present defendant, then plaintiff, had pressed for the issue of an injunction to restrain his father from disposing of the property of the family on the ground that he had by the mortgage in the present suit dealt with some of it to the detriment of the then plaintiff and in the appeal from that suit decided by a Judge of this Court the fact of this mortgage was found a ground for allowing the minor to claim partition. We do not think that the respondent can be allowed to blow hot and blow cold. He has in the former litigation relied on this mogtgage and in that litigation admitted its execution by his father. We think that that fact with the evidence on record is sufficient to warrant a finding that Ganpatrao did in fact execute the mortgage-deed sued on and we find accordingly.

For the appellants on the second ground of the memorandum of appeal it is admitted that the doctrine of *lis pendens* applies and that the document sued on cannot be operative on the property that came to defendant's own share in the partition suit ; while it is conceded by the learned Counsel for the respondent that a decree may be passed against the property mentioned in the plaintiffs' written statement, Schedule A, *i. e.*, against the substituted security, property that fell to the father's share in the partition, but such a decree cannot be passed against the Inam fields for the defendant succeeded to these fields not as heir to his father under the Hindu Law but as the next male heir under the Inam Rules. We think that there is force in this contention under the authority of

(1) 24 A. 488; A. W. N. (1902) 97.

Krishnaji v. *Manwar Ali* (2). And it was held in *Krishnaji* v. *Nilkant* (3) that the devolution and incidents of an Inam estate in Berar are regulated by the Berar Inam Rules subject entirely to the *Sanad*, or certificate or other documents, evidencing the special terms of the grant in the particular case. In the present case the Inam fields are *madatmash*, that is, a grant for maintenance or subsistence under rule V of the Inam Rules, and we are of opinion that any permanent alienation or a transaction likely to result in a permanent alienation can only be acted on during the lifetime of the then certificate-holder and that at his death by the order sanctioning the appointment of another Inamdar, the Inam land passes to him free of any encumbrances imposed on the land by the last holder. We, therefore, think that in the present case the mortgage by Ganpatrao cannot in any case affect the Inam land which is now held by the present defendant as Inamdar.

The learned pleader for the respondent states that a decree may be passed against field No. 122 of Patur and fields Nos. 41, 47 and 48 of Pipalgaon and the house at Nagpur and against the right of Ganpatrao to recover debts amounting to Rs. 3,000 and this contention has been accepted by the plaintiffs. The immoveable property above-mentioned, has been found not to be in the possession of the present defendant and the question arises whether we should, under these circumstances, pass such a decree.

In spite of the finding that the defendant is not at present in actual possession of the fields and house at Nagpur, we do not see why plaintiffs should not get a decree directing that in case of non-payment of the decretal amount on or before the expiry of six months from this date the defendant's right to redeem the property mentioned in Schedule A excepting the Inam fields shall be extinguished. Whether after the preliminary decree is made final the plaintiffs shall be entitled to get possession of the property from the persons in actual possession or not it is premature for us to decide.

The result is that a preliminary decree under O. XXXIV, r. 2, Civil Procedure Code, be drawn up fixing 4th April 1924 as the due date on or before which the mortgage should be redeemed by payment of the amount sued for plus costs of both Courts and interest at Court rate from the date of suit until due date hereby fixed.

G. R. D.

(2) 6 Ind. Cas. 821 ; 6 N. L. R. 72.
(3) 69 Ind. Cas. 800 ; 18 N. L. R. 168 ; 5 N. L. J. 25 ; (1922) A. I. R. (N) 52.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 95 OF 1923.

October 6, 1923.

Present :—Mr. Baker, J. C.

GULAM MOHIUDDIN AND ANOTHER—DEFENDANTS—APPLICANTS

versus

SHANKAR—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908) O. III r. 4—Vakalatnama—Person able to sign—Mark made with his consent—Presentation of plaint by pleader, whether valid.

A person who, though able to write his name, intending to give a *vakalatnama* to a pleader, touches the pen of a scribe who makes his mark, satisfies the provisions of O. III, r. 4 of the Civil Procedure Code in executing a valid *vakalatnama* in favour of a pleader and the presentation of a plaint by the latter is not invalid.

Revision of the order of the Sub-Judge, Khandwa, dated the 22nd February 1923, in Civil Suit No. 114 of 1922.

Mr. *M. Y. Shareef*, for the Applicant.

Mr. *Fida Hussain*, for the Non-applicant.

ORDER.—This is a very peculiar case. The non-applicant plaintiff, who is a Korku by caste and is able to write, sued the defendants for possession of occupancy fields in the Court of the Munsif, Burhanpur, but the suit not being cognizable by the Munsif the plaint was returned, and then it was instituted in the Court of the Subordinate Judge, Khandwa, through another pleader. A *vakalatnama* was written, but as the pleader's clerk either did not know or had forgotten that the plaintiff could write, the plaintiff did not sign it but only made his mark. It was contended by the defendants that, inasmuch as the *wakalatnama* was not properly executed, there was no proper presentation of the plaint by the pleader and, therefore, the suit must fail.

The Subordinate, Judge, holding that the plaintiff had executed the *vakalatnama*, decided that the plaint was presented by a duly appointed pleader of the plaintiff. Against this order the present application for revision is made.

It is contended that under O. III, r. 4, Civil Procedure Code, the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorised by power-of-attorney to act in his behalf. There is no question of the pleader's clerk,who made the plaintiff's signature, being his authorized agent. Under section 3, clause (52) of the General Clauses Act (X of 1896), "sign," with reference to a person who is unable to write his name, includes "mark." As the plaintiff admittedly can write his names his mark cannot under the law be held to be his signature. Consequently, the *vakalatnama* is not signed by the plaintiff and there is no appointment of the pleader under O. III, r. 4, and, therefore, the plaint was not presented by an authorized person.

In this case there is evidence to show that the plaintiff was actually present at the time the *vakalatnama* was written and that he touched the pen. There was no necessity to forge his signature in his absence, and although it has been argued that there was some ground for haste, as the suit is *prima facie* time-barred, it will appear at first sight that it must have been time-barred several days before. Consequently, there was no necessity for any haste and as the plaintiff was personally present the making of his signature would only occupy a few seconds. As the Subordinate Judge remarks, the plaintiff appears to be a youth belonging to an ignorant class who is not expected to be able to sign, and it is very likely that it did not occur to the clerk that the plaintiff could sign and the plaintiff probably was not aware that his signature was necessary and contented himself with touching the pen.

The question then is whether the plaint should be rejected for this technical defect. If there were any doubt about the plaintiff's intention of giving a *vakalatnama* to this particular pleader and about his presence on the day on which it was executed, it would have been a different matter. In the circumstances, I think I should not interfere on this technical point.

A reference has been made to *Dhannoolal* v. *Baji* (1), in which it was held that the provisions of O. III, r. 4, Civil Procedure Code, are clear and imperative, and the Courts have no power to relax them. In that case the appeal was presented by a pleader who had no power to present it. In the present case the plaintiff intended to execute and believed that he had executed a power-of-attorney, but instead of signing it made his mark. In this connection, I may refer to the case of *Maharashtraya Jnan Kosh Mandal, Ltd*, v. *Bijjulal* (2), in which it was held that the Court must not only refrain from being astute to defeat a just claim on some technical point of procedure; it is bound to make every effort to prevent such a result when it amounts to injustice and abuse of its process.

I do not think there is any necessity for interference and the application is accordingly dismissed with costs.

G.R.D. *Application dismissed.*

(1) 37 Ind. Cas. 103 ; 12 N. L. R. 189.
(2) 71 Ind. Cas. 436 ; 19 N. L. R. 36 ; 6 N. L. J. 100 ; (1923) A. I. R. (N.) 182.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 146 OF 1923.

April 7, 1923.

Present:—Mr. Justice Harrison.

KESHO RAM—JUDGMENT-DEBTOR—APPELLANT

versus

THAKUR DAS—DECREE-HOLDER—RESPONDENT.

Construction of document—Award—Oral evidence, when admissible—Decree passed on award—Executing Court, whether can modify terms of award.

Where the words used in an award are perfectly clear oral evidence cannot be admitted as to their meaning. Such evidence can only be given where the words are ambiguous or are capable of more interpretations than one.

KESHO RAM *v.* THAKUR DAS

An award is not a compromise or a contract, and a court executing a decree passed on an award has no power to modify the terms of the award.

Balambhat v. *Vinayak*, 10 Ind. Cas. 746, 35 B. 289; 13 Bom. L. R. 154; *Surendra Nath Banerjee* v. *Secretary of State for India*, 57 Ind. Cas. 643; 24 C. W. N., 545, distinguished.

Miscellaneous first appeal from the order of the Subordinate Judge, 1st class, Amritsar, dated the 8th of January 1923.

Lala *Jagan Nath*, for Dr. *Narang*, for the Appellant.

Lala *Badri Das*, *R. B.*, for the Respondent.

JUDGMENT.—On the 15th of July 1922 an award was given by two arbitrators in a dispute between *Lala* Thakur Das and *Lala* Kesho Ram. This directed *Lala* Kesho Ram to pay Rs. 5,289-6 to *Lala* Thakur Das within 60 days of the date of the award, or in default to pay Rs. 5,789-6; a decree was given in accordance with the terms of this award. *Lala* Thakur Das applied to execute the decree for the larger sum urging that the money, not having been paid within the sixty days, he was entitled to do so.

Various objections were taken before the Senior Subordinate Judge, who decided that there had been a default and that *Lala* Thakur Das was entitled to recover the larger sum. From this decision an appeal has been preferred in which eleven grounds are entered and Counsel wished to take a twelfth that there was no proper application for execution but I have not allowed him to add this additional ground of appeal.

Admitting that no money was actually paid within sixty days, Counsel contends that according to Amritsar usage sixty days mean the same thing as two months or, in this case, sixty two days, and that he should have been allowed to produce evidence in support of this contention. I find that the Senior Subordinate Judge rightly disallowed the production of such evidence. The words used in the award are perfectly clear and it would only be in case those words were ambiguous or were capable of more than one interpretation that oral evidence could be given as to their meaning. It is, moreover, not even stated that within sixty days any money was actually paid or tendered in the true sense. Counsel next urges that further time was allowed as shown by two telegrams, unnumbered as exhibits. These show that *Lala* Thakur Das was apparently prepared to allow a further period of twenty-four hours, and it is contended that within those twenty-four hours money was deposited with a third party and that this deposit amounted to a full tender. The telegrams are as follows:—

"Asonand Thakardas, Katra Ahluwalia, Amritsar. You refused receiving balance money tendered. Money deposited with Kanahialal Lohgarh. Receive money against delivery receipts.

Radharam Vaishnodas."

15th September, 1922.

"X Tf. 30'30 Amritsar 17—73. Radharam Vaishnodas Darshani Deori Amritsar. You have not paid Rs. 5,289-6-0 within sixty days from 15th July hence you are liable to pay my clients Asanand Thakurdas Rs. 5,789-6-0 which please pay and get receipts otherwise legal action holding you responsible for all costs in case you pay direct within 24 hours Rs. 5,289-6-0 my clients may accept and give you receipt. Kanhayalal has made no payment notwithstanding repeated requests.

Mahesh Das, Vakil."

It is quite true that *Lala* Thakur Das was prepared to allow twenty-four hours' grace but it is not correct to say that there was any proper tender during those twenty four hours. The second telegram shows clearly that Kanhaya Lal paid nothing. It is not even urged that *Lala* Thakur Das agreed to accept payment to Kanhaya Lal as equivalent to payment to himself and there was no sort of proper tender as defined in *Chetan Das* v. *Gobind Saran* (1), *Muhammad Mushtaq Ali Khan* v. *Bankey Lal* (2).

The chief point on which the appellant relies is that the provision increasing the amount recoverable is a penal clause and should not have been enforced in its entirety. Counsel quotes various rulings such as *Balambhat* v. *Vinayak* (3); and *Surendra Nath Banerjee* v. *Secretary of State for India* (4) which are not at all in point, for the fact that an executing Court can modify a penalty which

(1) 22 Ind. Cas. 659; 36 A. 139, 12 A. L. J. 111.
(2) 55 Ind Cas. 991; 42 A. 420; 18 A. L. J. 440.
(3) 10 Ind. Cas. 746; 35 B. 289; 13 Bom. L. R. 154.
(4) 57 Ind. Cas. 643; 24 C. W. N. 545.

has been fixed in a compromise or contract even if that compromise or contract is subsequently embodied in a decree, is quite immaterial when we have to deal with an award which is in no sense of the word a compromise or a contract. The executing Court has no power to modify the terms of that award and, as the money was not paid by due date, the full amount is now recoverable. I have dealt with all the grounds of appeal argued before me and finding that there is no force in any of the contentions of the appellant, I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS 200 AND 254 of 1922 AND CIVIL REVISION PETITION NO. 422 of 1922.

September 12, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice and Mr. Justice Waller.

THE SECRETARY OF STATE FOR INDIA, REPRESENTED BY THE COLLECTOR OF SALEM, AND ANOTHER —DEFENDANTS APPELLANTS

versus

KUPPUSAMI CHETTI - PLAINTIFF. —RESPONDENT

Land Acquisition Act (I of 18 4)—Property subject to mortgage—Payment of compensation money to mortgagor without notice to mortgagee—Suit against Government for recovery of money due on mortgage—Mortgagee's remedies.

Where property subject to a mortgage is acquired by Government under the Land Acquisition Act and the whole compensation amount is paid to the mortgagor without notice to the mortgagee, the mortgagee may claim a reference under section 18 to the Civil Court and after the expiration of 6 months he is confined by the Act to a suit under section 31 against the persons to whom the money was wrongly paid. There is no other remedy at all either against the Secretary of State or the Land Acquisition Collector. [p. 88, Col. 1]

Per Chief Justice :—**Where a new right is brought into existence by a Statute and a remedy in respect of that right is also given by the same Statute, that remedy is exclusive of any ordinary rights. [p 88, Col. 1]**

The compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the Statute and nothing else. The statute in creating the rights has given the remedies to be exercised in respect of those rights. [p. 88, Col. 1]

The principles of the Land Acquisition Act are that the Crown should in the first instance be allowed to recognise the person in possession as ostensible owner. A mortgagee as such need not be recognised at all though he can, within a certain time and within certain limits, come in and institute proceedings provided under the Act. [p. 88, Cols. 1 & 2]

Appeal against the order, dated 20th September 1921, of the Court of the Subordinate Judge of Salem in A. S. No. 300 of 1920, preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 628 of 1918.

Petition under Section 115 of Act V of 1908, praying the High Court to revise the order, dated 20th September 1921, of the Court of the Subordinate Judge of Salem, in A. S No 300 of 1920, preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 628 of 1918.

The Government Pleader, Mr. *C. V. Anantha-krishna Aiyar*, for the Appellants.

Messrs. *T. M. Krishnaswami Iyer and Sankara Sastriar*, for the Respondent.

JUDGMENT.

The Chief Justice.—In this case certain land was taken many years ago under the Land Acquisition Act and ultimately the value was fixed and compensation allowed at Rs. 270. In the course of the proceedings under the Land Acquisition Act, a mortgage by the owner of the land in favour of the present respondent came to light. The Revenue authorities who were enquiring into the matter came to the conclusion that the mortgage was a sham and not an effective transaction. When the award was made, the mortgagee who had not come in and claimed and was not taking any part in the proceedings, was disregarded and a part of the money was paid over to the mortgagor, the owner of the land. Before the whole of the money had been paid over, or rather while the Crown was in a position to get back some of the money that had been paid over, the mortgagee made his claim and, ultimately, when his claim was found to be a good one, he received the balance of the compensation money which had not been irrevocably paid

over to the mortgagor. He then proceeded to sue on his mortgage and after many vicissitudes, he ultimately got a decree having establised his mortgage to be good one against the mortgagor. Apparently he has been unable to execute that decree, although he has got the whole of the principal sum and interest except Rs. 8 from the balance of compensation money referred to above, and he has been out of pocket in respect of his costs in the mortgage suit, which costs no doubt he would be able as between himself and his mortgagor to add to his security. He now sues the Secretary of State and the present Land Acquisition Collector of Salem, treating the present Collector appparently as responsible for the act of his predecessors, and he frames his plaint in general terms by stating the facts, namely, that he was a mortgagee, that the then Collector had notice of his mortgage and that, notwithstanding that he had notice of his mortgage, he paid the money over to the mortgagor. The Crown (in which expression I include the Secretary of State and the Collector) replies "you have no cause of action against the Crown at all, and. secondly, if you had a cause of action it has long since been barred by limitation." In my judgment, the Crown is right on its first contention, and it is, therefore, unnecessary to consider the second contention, although, as at present advised, I think that the Crown is also right on that.

The compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the Statute and nothing else. The Statute in creating the rights has given the remedies to be exercised in respect of those rights, and the law is quite clear that, where a new right is brought into existence and a remedy in respect of that right is given at the same time by the same Statute, that remedy is exclusive of any ordinary rights. The leading authority on the point is the decision of Willes, J., in the *Wolverhampton New Water Works Co*, v. *Hawkesford* (1). The principles of the Land Acquisition Act seem to be that the Crown should, in the first instance, be allowed to recognise the person in possession as ostensible owner. There is nothing in the Act to show that it is to recognise mortgagees as such at all. It can make its award to the mortgagor, the ostensible owner of the property. The mortgagee can come in and, within a certain time and within certain limits, can apply to have the matter referred for the decision of the District Court. The Collector himself, if he has any doubt as to who is entitled to the money, can also refer it. Within a certain time, up to six months, the time varying according as the claimant has, or has not, had notice under the Land Acquisition Act, but with the outside limit of six months, the claimant may himself institute proceedings under the Act; so that the real owner of the property which has been acquired in this way is not left without a remedy. After the expiration of six months, it is provided by section 31 of the Act, that he can take proceedings against the person who has received the money. So that the whole scheme of the Act is that down to a certain date before the money is paid over, if persons intervene and make a claim, their rights shall be enquired into and their rights established; but that after the money is paid over by the Crown to somebody else, they must take proceedings against that somebody else. Those being the only remedies given by the Act, I can find no sort of cause of action against either of the present defendants.

It was suggested that some cause of action might be framed in part for a wrong, breach of duty, or something of that sort against the Collector, but the view was not pressed possibly in view of the fact that we have not the right Collector before the Court: and admittedly any action for tort would have long since been barred by limitation. Under these circumstances, in my judgment, the Crown is right and this appeal must be allowed, and allowed with costs throughout.

I ought to add that a great part of this claim, in fact all except Rs. 8 being in respect of costs incurred as between the mortgagor and the mortgagee, I cannot ascertain any principle of law under which either of the defendants, even if otherwise liable, could be made liable for that.

In the result, C. M. A. No. 200 of 1922 is allowed with costs throughout.

(1) (1859) 6 C. B. (N.S.) 336; 28 L. J. C. 242; 5 Jur. (N. S.) 1104; 7 W. R. 464; 120 R. R. 151; 141 E. R. 486.

C. M. A. No. 254 of 1922 and C. R. P. No. 522 of 1922 are dismissed, but without costs.

Waller, J.—I agree to the order proposed.

It seems to be obvious that plaintiff was aware of the award. He should, therefore, have applied under section 18 of the Land Aquisition Act for a reference to the Civil Court. This course he did not adopt. Failing that, he was entitled, under section 31 of the Act, to sue the persons to whom the compensation money had been paid wrongly. This course he did adopt and obtained a decree. He now sues the Secretary of State and the present Land Acquisition Collector for the balance due on the decree *plus* the costs incurred in getting the decree. I am of the opinion that he has not been able to show that he has any cause of action against the defendants. The compensation money was properly paid to the ostensible owner of the property, as plaintiff did not appear and claim a reference to the Civil Court. After that, he was limited by the Act to a suit under section 31 and that against the persons to whom the money was wrongly paid. He had no other remedy at all.

I agree that the appeal should be allowed with costs throughout.

C. M. A. No. 254 of 1922 and C. R. P. No. 422 of 1922.

I also agree to the order proposed in respect of these.

V. N. V. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1128 of 1922.

September 24, 1923.

Present :—Mr. B. C. Kennedy, J. C.

CHETANSING BAGASING—PLAINTIFF

versus

GULIBAI AND OTHERS—DEFENDANTS.

Receiver, appointment of, pending arbitration proceedings—Jurisdiction of Court—Civil Procedure Code (Act V of 1908), S. 151, Sch. II, para. 8, cl. (2.)

A Court has jurisdiction to appoint a Receiver while an arbitrator is proceeding with a reference but this power of the Court should not be exercised except in exceptional circumstances, without the concurrence of the arbitrator.

A Court has also power to appoint a Receiver in the interim between the submission of the award and the final acceptance or rejection of it.

Application for appointment of a Receiver in a suit for partition in the interim between the submission of the award and the disposal of objections to the award filed by the defendants.

Mr. *O'Sullivan*, for the Plaintiff.

Messrs. *Kimatrai Bhojraj* and *Tolasing Khushalsing*, for Defendant 1.

Other defendants, absent.

ORDER.—This is a suit by one Chetansing against one Gulibai and others, Gulibai being the widow of one Dewan Mushtaksing, in respect of certain property alleged by the plaintiff to be ancestral and joint, which, however, Gulibai says was separate property of Dewan Mushtaksing and in respect of which she sets up a Will. The suit was for partition and in the course of that suit, it was referred to arbitration and the arbitrator submitted his award under Second Schedule of the Civil Procedure Code. Objections have been taken to this award. In the interim the plaintiff has applied that a Receiver should be appointed. An interim order for appointment of Receiver was issued but was not given effect to because certain parties in the suit asked that the matter should be disposed of without formal issue of notice. I have heard the parties and now proceed to consider whether an order for appointment of a Receiver should be passed.

It is urged that under clause (3) para 2 of the Second Schedule of the Code of Civil Procedure the Court has no power to deal with the matters in suit and therefore has no power to appoint a Receiver. But I am not of the opinion that the powers of the Court in this matter are affected by that clause. The Court can no doubt, when the matter is before the arbitrator, issue an injunction under section 151 and the issue of injunction and the appointment of a Receiver are so intimately connected that it would seem the Court would, in proper cases, have the power to appoint a Receiver. It is clear that it might often be necessary in the interests of all the parties to appoint a Receiver while the arbitrator is proceeding with the matter. The Court, has therefore

in my opinion jurisdiction to appoint a Receiver. The question is whether this is a fit case in which a Receiver should be appointed.

Now it would appear that this ancillary jurisdiction should not be applied to frustrate the object of the reference. I take it that where arbitration is actually proceeding the Court is not to appoint a Receiver except in exceptional circumstances without the concurrence of the arbitrator. In the present case, of course, the arbitrator is *functus officio* he having given his award in the suit, yet in a proper case, I think the Court has power to appoint a Receiver in the interim between the submission of the award and the final acceptance or rejection of it. In the present case there is nothing exceptional to justify the appointment of a Receiver. This very matter of the interim custody of the property was one of the subjects submitted to the decision of the arbitrator and it is one of the subjects dealt with by the arbitrator. It would appear, therefore, that the appointment of a Receiver at this stage would be to frustrate the object of the reference and it does not appear to me proper unless there were very strong grounds made out, so to do.

I, therefore, refuse this application and cancel the interim order.

P.B.A. *Application refused.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 3 OF 1923.

November, 5 1923.

Present .—Mr. Wazir Hussain, A. J. C.

B. ADITYA PRASAD—DEFENDANT—APPELLANT,

versus

B. CHHOTE LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Rent (Act XXII of 1886), s. 108, cl. 15—Interest on arrears—Lambardar's liability.

According to the rule in the English Courts of Equity an accounting party may under certain circumstances be charged with interest. [p. 86, col. 1.]

A lambardar stands in a fiduciary position to his co-sharers in the village and if he fails to account to them for their share of the profits, he is liable to pay interest. [p. 86, col. 1.]

Mirza Sadick Husain v. *Havirul Rahman*, 1 O. C. 52, followed.

Appeal against the decree of the Assistant Collector of the 1st class, Sitapur, dated 23rd September, 1922.

Mr. *L. S. Misra*, for the Appellant.

Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of an Assistant Collector of the first class of Sitapur, dated the 23rd September 1922, made in a suit brought by the plaintiffs-respondents against the defendant-appellant under section 108, clause (15), of the Oudh Rent Act in respect of the profits of the 9-annas share of the plaintiffs in village Kusela, pargana Maholi, district Sitapur. The defendant is the lambardar of the village and holds a 5-annas 4-pies share in that village. There are other co-sharers with whom we are not concerned in this appeal. The claim has been decreed for Rs. 12,957-5. The present appeal by the defendant is limited to the sum of Rs. 2,636-14-7, being the amount of village expenses claimed by the defendant but disallowed by the Court below and interest allowed by that Court to the plaintiffs as against the defendant.

The first point argued in appeal relates to the question of the defendant's liability to pay interest on the arrears of profits due to the plaintiffs. It was contended that there is no such liability in law, the provisions of section 73 of the Indian Contract Act and also the provisions of the Indian Interest Act not being applicable. It was further urged that even on grounds of equity the defendant was not liable because his conduct has neither been contumacious nor arbitrary. I agree with the learned Counsel for the appellant that in this case the liability for interest as against his client cannot be founded either on section 73 of the Indian Contract Act or on the provisions of the Indian Interest Act.

The question therefore is—Is the defendant otherwise liable for such interest? In the present case I have come to the conclusion that he is. The grounds of liability of a lambardar to pay interest in respect of the profits of the shares of the other co-sharers in the village were, if I may say so, discussed in a learned judgment of Mr. Spankie, A. J. C., in

the case of *MirzaSadick Husain* v. *Havirul Rahman* (1). I have no hesitation in following the principle laid down in that case. Mr. Spankie referred to the rule in the English Courts of Equity that an accounting party may under certain circumstances be charged with interest. He pointed out with reference to the rules relating to lambardars that a lambardar is in a fiduciary position with regard to his co-sharers and has to account to them. Now if the present defendant has refused to fulfil the trust reposed in him in virtue of his position as a lambardar I have no doubt in my mind that he is liable to pay interest under the rule of equity mentioned by Mr. Spankie in his judgment. The question, therefore, narrows itself down to this, has the defendant without any reasonable cause refused to render the accounts? That he has not rendered them is admitted. That he has refused to do so in the present case is equally clear. His learned Counsel, however, argues that his client's attitude in this behalf was not unreasonable by reason of the facts that these plaintiffs had obtained the share for profits claimed under a sale deed from other co-sharers in the village; that the sale was made subject of a suit for pre-emption by the defendant; that the defendant succeeded in his claim for pre-emption: that he satisfied the decree for pre-emption; payment of the money due to the vendees in Court; that subsequently on an appeal by the vendees, that is the plantiffs, the decree of the first Court was reversed by this Court, and that there is still pending an appeal to his Majesty in Privy Council from the decree of this Court.

The first observation which falls to be made with regard to this argument is that these are mere allegations of the learned Counsel and some of them are contained in his client's written statement but there is no proof whatsoever in support of any of these facts on which the argument that the plaintiffs cannot in equity be permitted to retain the pre-emption money as well as claim the profits with interest thereon in respect of the share in suit is founded. It would certainly seem highly unjust that the plaintiffs should have the benefit both of the pre-emption money and also of the profits of the share, but here again there is no evidence that the pre-emptor ever paid a single pie in pursuance of the decree for pre-emption and that anything went into the pockets of the plaintiffs. It was urged, however, that this Court might remit an issue for the trial of these questions. I am not prepared to accede to this contention. It is true that no specific issue was framed with respect to these allegations of the defendant as they were set out in the written statement an issue cannot be framed with reference to evidence which a party may choose to produce in support of his allegations at the trial of the case. If the defendant intended to rely on those facts it was open to him to produce evidence in support of them. He seems to have made no grievance in that behalf at all to the Court below nor did the issue as framed exclude the admission of any evidence that the defendant might have chosen to produce in this respect. From what I have heard at the hearing of this appeal from Counsel on both sides, I have formed the opinion that it will be a waste of time to delay the final decision of this appeal any longer. I, therefore, agree with the Court below that the defendant is liable for interest in this case.

The next point argued by the learned Counsel for the appellant was with reference to the rejection of the claim of the defendant in respect of village expenses. On this matter the lower Court says that there is no evidence in support of any expenditure under that head and it is admitted before me by the learned Counsel for the appellant that the Court below is right. I am, however, asked to allow something for village expenses because, it is argued, I must presume that some expenditure must have been incurred in that behalf. I am unable to make any such presumption. The appellant is a co-sharer in the village in his own right. There is nothing to indicate that he has incurred any extra expenditure in fulfilling his duties of a lambardar in relation to the share of which the profits are claimed. On these grounds I uphold the decree of the Court below and dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 6 O. C. 89.

AKHTAR BEG v. HAQ NAWAZ

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1139 OF 1917.

April 10, 1923.

Present:—Mr. Justice Campbell and Mr. Justice Moti Sagar.

AKHTAR BEG AND OTHERS—DEFENDANTS—APPELLANTS

versus

MR. HAQ NAWAZ,—PLAINTIFF,—AND MR. BASHIR AHMAD,—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882) s. 6 (e)—Contract for sale of land, transfer of rights under, nature of—Contract Act (IX of 1872) s. 73—Breach of contract to sell land—Damages, measure of.

A transfer of all the rights of the vendee under a contract to sell land, even after the vendor has refused to perform the contract, is not a transfer of a mere right to sue, although a right to sue is involved in it. The vendee or his transferee has still the right to enforce specific performance of the contract, in spite of the breach by the vendor. The Law of India in respect of breaches of contract for sale of immoveable property differs from that of England, and the ordinary rule as to the measure of damages laid down in section 73 of the Contract Act applies to such breaches, the measure of damages being the difference between the contract price and the market value of the land on the date of breach. [p. 88, cols 1 & 2]

Adikesavalu Naidu v. *Gurunatha Chetty* 39 I. C. 358; 40 M. 388; *Nabin Chandra Saha Pramanik* v. *Krishna Borani Dassee*, 31 C. 458; *Ranchod Bhawan* v. *Manmohandas Ramji* 32 B. 165 **relied on.**

In suit to recover damages for breach of a contract to sell immoveable property, the plaintiff has no power to postpone the date of the breach of contract to that on which he demanded a conveyance for the last time. [p. 89, col 1]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 21st February 1917.

Mr. *M. C. Michael*, for the Appellants.

Bakhshi *Tek Chand, and LalaMehr Chand Mahajan*, for the Respondents.

JUDGMENT.—On 2nd February 1913 *Mirza* Asad Beg agreed to sell to the late Mr. Justice Shah Din of Lahore certain landed property at Azamabad in the Lahore District for Rs. 1,72,000 and was handed a cheque for Rs. 5,000 as earnest-money, for which he gave Mr. Justice Shah Din a receipt. On the same date *Mirza* Asad Beg wrote to Mr. Shah Din saying that he would not be able to come to his house on either of the following two days as he would be busy with a case but that "the rest will be complied with." On 17th February 1913 *Mirza* Asad Beg again wrote to Mr. Justice Shah Din returning him the cheque and saying that the agreement to sell had been dependent on the consent of his sons, that this consent had not been given and that he had decided not to sell the land. Mr. Haq Nawaz, Barrister, nephew of Mr. Juttice Shah Din replied on the latter's behalf that *Mirza* Asad Beg could not withdraw from the agreement, and sent back the cheque. On the 1st March *Mirza* Asad Beg repeated his inability to conclude the sale and returned the cheque once more. The correspondence closed with a letter by Mr. Haq Nawaz, dated 25th March, in which *Mirza* Asad Beg's obligation was again asserted. These facts are not disputed.

On 10th February 1916 Mr. Justice Shah Din transferred to Mr. Haq. Nawaz by registered deed of gift all his rights under the contract with *Mirza* Asad Beg of the 2nd February 1913. Mr. Haq Nawaz gave notice the same day to *Mirza* Asad Beg to complete the sale and a week later, on 17th February 1916, instituted a suit against him with Mr. Justice Shah Din as the second defendant and claimed Rs. 15,000 damages for breach of contract, stating the cause of action to be failure to reply to the notice of 10th February 1916.

The suit was resisted by *Mirza* Asad Beg but unsuccessfully.

The first three issues, which were as follows, were found against him :—

(1) Whether the assignment of Mr. Justice Shah Din in favour of the plaintiff is invalid?

(2) Whether the suit is within limitation? and

(3) Whether there was a condition in the contract that it will be performed, if the sons of defendant No. 1 (*Mirza* Asad Beg) agree?

On the fourth issue regarding the damages to which the plaintiff was entitled, the trial Court awarded him the full sum claimed. *Mirza* Asad Beg's sons have appealed, he having died.

AKHTAR BEG *v.* HAQ NAWAZ

The principal points which have been argued on their behalf are in regard to the first and last issues. The contention that the suit is time-barred, because the breach took place on 17th February 1913 and the suit was instituted one day over 3 years later, *i.e.*, on 17th February 1916, is effectively answered by reference to the provisions of section 12 (*i*) of the Limitation Act. Regarding the third issue we agree with the Court below that there is no proof of the contract having been subject to the reservation that *Mirza* Asad Beg's sons should consent. The terms of *Mirza* Asad Beg's letter to Mr. Justice Shah Din dated 2nd February 1913 are inconsistent with any such arrangement.

On the first issue it is asserted that the transfer to the plaintiff by Mr. Justice Shah Din was invalid and could not be the basis of an action, (1) because what was transferred was a mere right to sue (section 6 (*e*) of the Transfer of Property Act), (2) because the transaction offended against the provisions of section 136 of the Transfer of Property Act, and (3) because it was contrary to public policy, in that Mr. Justice Shah Din could not under the rules governing the conduct of public servants purchase land without the previous sanction of competent authority. The short answer to (2) and (3) is that section 136 of the Transfer of Property Act is not in force in the Punjab, that, although Mr. Justice Shah Din was a Judge and Mr. Haq Nawaz, his nephew is a legal practitioner, there was no buying of, trafficking in, or stipulation for any share of or interest in an actionable claim and that it was neither pleaded in the Court below nor proved that Mr. Justice Shah Din acted in contravention of any of the Government Servants Conduct Rules.

Nor was it a mere right to sue that was transferred to Mr. Haq Nawaz. The deed of gift (Exhibit P 3 printed on page 12 of the record) conveyed to him all Mr. Justice Shah Din's rights under what was an executory contract for the future sale of immoveable property. Such a contract, as pointed out by the Madras High Court in *Venkateswara Aiyar* v. *Raman Nambudri* (1), is not a mere right to sue, although a right to sue is involved in it on breach of its conditions. In the present instance *Mirza* Asad Beg had refused before the transfer to complete the sale, but the contract for sale had not thereby become incapable of specific performance and one of the rights transferred undoubtedly was a right to demand or enforce such performance.

There remains the question of the amount of damages. The plaintiff was clearly entitled to sue at his option either for specific performance or for compensation for breach of contract or for both. He has chosen to sue for compensation. It has been pointed out in *Adikesavalu Naidu* v. *Gurunatha Chetty* (2), *Nabin Chandra Saha Pramanik* v. *Krishna Baroni Dassee* (3), and *Ranchod Bhawan* v. *Manmohandas Ramji* (4), that the law of India in respect of breaches of contract for the sale of immoveable property differs from that of England and that the ordinary rule laid down in section 73 of the Contract Act applies to such breaches. The Calcutta and Bombay cases also lay it down that the measure of damages ordinarily should be the difference between the contract price and the market-value at the date of breach, though it is remarked in *Ranchhod Bhawan* v. *Manmohandas Ramji* (4) that each case has to be considered on its own merits.

In the present case *Mirza* Asad Beg deliberately and unmistakeably repudiated the contract and has failed to prove that he had any good reason for doing so. We are clear that loss was caused and that damages are due, but the difficulty in the case lies in the assessment of the damages since there is no direct evidence of the market-value of the estate at the dates when the cheque was returned to Mr. Justice Shah Din, *viz.*, the 17th February and the 1st. March 1913. One witness, it is true, has estimated that the land was worth Rs. 2,00,000 on 2nd February 1913, but he is *Mian* Amin Din, Mr. Justice Shah Din's father-in-law, a person who could not fairly be asked for an unbiassed opinion, and there is no satisfactory explanation forthcoming of why

(1) 83 Ind. Cas. 696 3 L. W. 485 ; 19 M. L. T. 329.
(2) 39 Ind. Cas. 358 ; 40 M. 338 ; 32 M. L. J. 189; (1917) M W. N. 171 ; 5 L. W. 425 ; 22 M. L. T. 300.
(3) 9 Ind. Cas. 525; 31 C. 458 ; 15 C. W. N. 420.
(4) 32 B. 165 ; 9 Bom. L. R. 1087.

Mirza Asad Beg should be prepared to sell an estate worth Rs. 2,00,000 for Rs. 28,000 less. The outside price which he attempted to obtain at that time, according to the plaintiff (see letter Exhibit A page 6 of the printed record), was Rs. 1,75,000.

Mr. Tek Chand for the defendant has attempted to argue that the lower Court was wrong in fixing the 17th February 1913 as the date of breach, but in the light of the authorities above quoted the lower Court was right. There was a definite and positive refusal to sell the land on the part of defendant No. 1 on the 17th February 1913, and when the cheque was returned for the second time on the 1st of March 1913 Mr. Justice Shah Din could have been left in no doubt that the contract had been repudiated. Mr. Justice Shah Din no doubt had the period allowed to him by law to sue for specific performance, but the measure of damages cannot be the highest value within that period. In *Nabin Chandra Saha Pramanik* v. *Krishna Barani Dassee* (3); it was held that the plaintiff had no power to postpone the date of the the breach of contract to that on which he demanded a conveyance for the last time.

The trial Court came to the definite conclusion that the land in question was worth not less than Rs. 2,00,000 in February 1913 but the evidence on which it relied related to conditions in 1915 and 1916. The evidence of Jamal Din, P. W. 3., a broker, referred to what happend in 1916. Mr. Justice Shah Din said that the same Jamal Din asked him to pay a higher price than that fixed in February 1913, but this was in November or December 1915. A letter was produced (Exhibit P. W. 2), dated the 15th April 1916, in which Akhtar Beg, son of *Mirza* Asad Beg, asserted that offers had been received of Rs. 2,30,000 and Rs. 2,35,000. The learned Subordinate Judge reviewed all this evidence, attached much importance to the opinion of Jamal Din that the land in 1916 was worth more than Rs. 2,00,000 (which is not precisely what Jamal Din said), and, remarking that there was no evidence on either side of any sudden rise in land values, concluded that the value must have been not less than Rs. 2,00,000 in 1913.

Against this conclusion, however, there are two important facts. The first is that *Mirza* Asad Beg is not shown to have even asked for more than Rs. 1,75,000 in 1913 and another is that Mr. Justice Shah Din after 1st March 1913 did not press the matter. He did not sue for specific performance and three years later he gave away for nothing his rights under the contract of sale to *Mian* Haq Nawaz, a relative it is true, but not his nearest heir, who was his own son. The words of section 93 of the Contract Act are :—" Compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, was likely to result from the breach of contract." Then follows an expresss reservation that such compensation is not to be given for any remote and indirect loss sustained by reason of the breach. What we have to try to determine in the present instance is the value of of the bargain to Mr. Justice Shah Din, when it was repudiated in February 1913. We find that he was asked to pay Rs 1,75,000 but refused to pay more than Rs. 1,72,000. He tells us, and there is no reason to disbelieve him, that he wanted to purchase the lands in order to improve the estate which he already owned in Azamabad. He received back his cheque for the earnest-money promptly and thus was not deprived of the use of the Rs. 5,000. He evidently considered that he had made a good bargain, for the correspondence shows that he turned a deaf ear to the somewhat pathetic entreaties of *Mirza* Asad Beg made in the name of old friendship that he should cancel the agreement. At the same time, the loss to which he was put was not sufficient to inspire him to any definite action with a view to escaping from it or minimising it.

We think, on the whole, that the value of the estate may be taken, for purposes of calculating damages, as Rs. 1,75,000 the amount demanded by *Mirza* Asad Beg in his negotiations with Mr. Justice Shah Din. The land may have been worth Rs. 2,00,000 or more in 1916, but it is impossible to reconcile any idea that it was worth Rs. 15,000 more than the contract price in 1913 with the conduct of Mr. Justice Shah Din and *Mirza* Azad Beg. The latter made no attempt, so far as we know, to sell the land elsewhere until 1916.

We, therefore, accept the appeal to the extent of reducing the decree of the plaintiff to one for Rs. 3,000 with proportionate costs in the trial Court. In this Court the appellant will have his costs on the amount by which he succeeds.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND APPEAL NO. 724 OF 1922.

September 26, 1923.

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

JELADI BURRAYYA AND OTHERS—DEFENDANTS. 2 TO 5—APPELLANTS

versus

PONDURI RAMAYYA AND ANOTHER—1ST DEFENDANT AND PLAINTIFF'S LEGAL REPRESENTATIVE—RESPONDENTS.

Guardian and Ward—Debt incurred by guardian for purchasing lands for minor—Binding character of debt—Creditor's rights—Necessity.

The guardian of a minor has no right to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate and a debt incurred for such a purchase is not binding on the minor's estate or the heirs of the minor. All that the creditor is entitled to is to have a decree against the lands actually purchased with the money advanced by him.

Subramania Nadan **v.** *Ramaswamy Nadan* **25 M. L. J. 563 and** *Subramania Chetty* **v.** *Chidambara Mudaly* **41 M. L. J. 459 followed.**

Second appeal against the decree of the District Court of Guntur in A. S. No. 81 of 1921, presented against the decree of the Additional District Munsif of Guntur in O. S. No. 396 of 1920.

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

Messrs *V. Ramadas, U. Keshav Menon*, for the Respondents.

JUDGMENT.—In this case defendants 2 to 5 are the appellants. They are the heirs-at-law of one minor Thirupatayya who died some time ago. The plaintiff brings this suit for recovering from the 1st defendant personally and from the minor's estate in the hands of defendants 2 to 5 the amount due under the Promissory-note, Ex. A, which is a renewal of Exs. A-1 and A-2. It is found by the learned District Judge that the money due under the promissory-note was borrowed for the purpose of paying the purchase-money for certain lands which the guardian of the minor purchased for him. The question we have to decide is whether the money so borrowed for purchasing lands—we will assume that the purchase was for the benefit of the minor—constitutes a debt really binding on the estate of the minor. There can be no doubt that there was no necessity to borrow this money at all, nor to buy the lands. The District Judge has found that there was no necessity so to borrow; but he seems to have thought that, as it might be for the benefit of the minor, the minor's estate would be liable. We are unable to agree with this proposition. The guardian had no right whatever to involve the wards's estate in debt for the purpose of purchaing lands to be added to his estate. It has been so decided in this Court in several cases vide *Subramania* v. *Samaswami Nadan* (1) *Subramania Chetty* v. *Chidambara Mudaly* (2). We must, therefore, hold that the debt in this case due under the promissory-note sued upon is not binding on the minor's estate or the heirs of the minor, and the decree passed against the minor's estate in the hands of his heirs must be set aside. All that the plaintiff is justly entitled to is to have a decree against the lands actually purchased wtih the money advanced by him. There will, therefore, be a decree in favour of the plaintiff only against the lands governed by Ex. I, the purchase deed, to pay the purchase-money under which the promissory-note amount was borrowed. The lower Court has refused a personal decree against the 1st defendant. There is no appeal against that portion of the decree and, therefore, we cannot pass any orders against the 1st defendant in this appeal.

As regards costs, the right order to pass in this case is to give defendants 2 to 5 their full costs throughout, the plaintiff paying such costs. As between the plaintiff and the 1st defendant, there will be no order as to costs in the second appeal.

V. N. V. *Appeal allowed.*

(1) 21 Inre 6 6 25 M. L. J. 653.
(2) 69 Inre 759 41 M. L. J. 14 L. W. (1921) menson 740.

KONA THIMMA REDDI *v.* SECRETARY OF STATE

MADRAS HIGH COURT.

SECOND APPEAL NO. 371 OF 1921.

September 27, 1923.

Present:—Mr. Justice Waller, and Mr. Justice Kumaraswami Sastri.

KONA THIMMA REEDI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OFANANTAPUR—DEFENDANT—RESPONDENT.

Madras Local Boards Act (V of 1884) ss. 16 144—Rules made by Local Government for holding election and decision of election disputes—Jurisdiction of Civil Courts—Rules purporting to be made under wrong section if ultra vires *—Order setting aside election of candidate on the ground of his presence likely to bring administration into contempt—Notice not given to candidate.*

Sections 16 and 144 of the Madras Local Boards Act read together give power to the Government to make rules when an election is contested and also to frame rules declaring the qualifications required of a person before he is validly elected and the rules framed by the Government are not *ultra vires*. [p. 94 col. 2.]

The Local Boards under the Madras Local Boards Act are creations of Statute and the Statute having given power to the Government to frame rules for the purpose of working the Act, it is open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act and rules which take away the jurisdiction of the Civil Courts are valid and *intra vires*. [p. 98 col. 1.]

If power is given to the Government by the Act to makes rules, the fact that the Government purports to make rules under one section rather than another is not a ground for holding that the rules are *ultra vires*. [p. 98, col. 1.]

Rajan Chetty v. *Seshayya* 18 M. 236; *Queen Empress* v. *Ganga Ram* 16 A. 136; *Secretary of State for India* v. *Venkatesalu Naidu*, 80 M. 113 and *Secretary of State for India v. Appa Rao* 76 Ind. Cas. 212; 45 M. L. J. 156, followed.

An order of the Government setting aside the election of a candidate as a member of a Taluk Board under the Madras Local Boards Act of 1884 and ordering a fresh election on the ground that his presence on the Taluk Board as a member is likely to bring the Local Fund Administration into contempt is not invalid on the ground that no inquiry was held and no notice was given or opportunity provided to the person effected to show cause against the allegation.

Secretary of State for India v. *Venkatesalu Naidu* 80 M. 113, followed.

Second appeal against the decree of the District Court of Anantapur, in A. S. No. 63 of 1920 (A. S. No. 164 of 1917, District Court, Cuddapah) preferred against the decree of the District Munsif of Gooty in O. S. No. 750 of 1916.

Mr. *T. Richmond*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff against the Secretary of State for India in Council for a declaration that the Government order cancelling his election to the Gooty Taluk Board is *ultra vires* and illegal and does not effect the validity of his election; for a mandatory injunction directing his name to be published in the *Fort St. George Gazette* as duly elected; for an injunction prohibiting the Government from publishing the name of his rival candidate Subba Rao and for the recovery of Rs. 100 as damages. No evidence has been adduced in the suit. The election in question was held on the 13th of November 1915. It is not disputed that the plaintiff obtained the majority of votes; that the defeated candidate Subba Rao put in an objection petition, and that the Government set aside the election of the plaintiff and ordered a fresh election on the ground that the plaintiff's presence on the Taluk Board as a member would bring the Local Fund Administration into contempt. The order of the Government is questioned by the plaintiff on two grounds. The first is that the rules under which the Government purported to act are *ultra vires* and that consequently, he is not affected by the order and, secondly, that even if the rules are *intra vires* there was no enquiry by the Government into the matter; that he was not given an opportunity of showing cause against the allegations made by the rival candidate, and that on the merits it could not be said that his presence on the Taluk Board would have the undesirable consequences referred to by the Government as a ground for invalidating his election. He sets out his qualifications in the plaint.

The defence by the Secretary of State for India in Council was that the rules framed by the Government are valid, that under the rules the Government was not bound to give any notice to the plaintiff; that the discretion vested in the Government is absolute and unquestionable by a Civil Court, and that the

Government having made such enquiry as it thought fit and having come to the conclusion that it came, it was not open to the plaintiff to question the validity of its act. The Government denies that the plaintiff is entitled to any damages.

Two points were urged by Mr. Richmond before us in Second Appeal. The first was that the rules were *ultra vires*, and the second was that the whole proceedings were vitiated by the fact that no notice was given to the plaintiff who consequently had no opportunity to show cause against the objection raised by his rival candidate, a violation of the elementary principles of natural justice which, without more, would invalidate the proceedings.

As regards the first point, section 16 of the Local Boards Act runs as follow :—"The other members of the Taluk Board may be (a) either wholly appointed by the Governor-in- Council, or (b) partly so appointed and partly appointed by election by the members of the panchayats in the Taluk from among their own number or by the tax payers and inhabitants of the Taluk, subject to such rules and conditions as may from time to time be prescribed by the Governor-in-Council. Section 144 of the Act provides that the Governor-in-Council may, from time to time, frame forms for any proceedings for which he considers that a form should be provided, and make rules consistent with the Act—(1—a) as to the qualifications of electors and of candidates for appointment as members of a panchayat by election and the method and time of appointment of members of a panchayat by election in regard to the following matters. Then follow a number of matters specified in sub-clauses (a) to (f), (f) being "any other matters regarding the system of representation and of election." The Government have framed rules which purport to have been made under sub-section (1) of section 144 of the Local Boards Act and directed that the rules should come into operation on the 1st of January 1916. Rule 33 provides that the validity of any election may be questioned by a petition put in before the Collector of the District or the Divisional Officer within fifteen days after the result of the election has been declared, by any candidate who has not withdrawn or by not less than ten persons who have voted at the election on any of the grounds mentioned therein. Ground (e), which is the only material ground necessary to be considered for purposes of this appeal, runs as follows:—"That the person whose election is questioned is likely to bring the Local Fund Administration into contempt or that his being a member of the Taluk Board is dangerous to the public peace or order." It provides that the Governor-in-Council or the Collector may act *suo motu* and take action on any facts affecting the validity of an election which may be brought to his notice whether by a petition by a rival candidate or otherwise. Rule 35, which is material for the consideration of the objection raised by Mr. Richmond, runs as follows:—"Objection to the validity of an election on the ground specified in rule 33 (e) *i.e.*, that the person whose election is questioned is likely to bring the Local Fund Administration into contempt or that his being a member of the Taluk Board is dangerous to public peace or order, and objections on the ground of disqualification under r. 9 (d) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government. In all other cases of objection under r. 33 an enquiry shall be held by the Collector or at his discretion by the Divisional Officer, at which the contending parties shall have an opportunity of appearing in person or by representative, and orders shall be passed on the result of the enquiry by the Collector, who may, at his discretion, dismiss the petition or if he finds the election invalid, either order a new election or declare that the candidate who obtained the next highest number of votes to the candidate or candidates disqualified or found to have been validly elected has been duly elected, provided that before declaring such next candidate to have been duly elected, the Collector shall notify his intention to do so to the other candidates and the petitioners who have impugned the election and shall consider any objections which may be lodged by them in writing within ten days from the date of such notice. No appeal shall lie against the orders of the Collector passed under this rule."

It is, therefore, clear from the rules that, so far as the objection that the person elected is likely to bring the Local Fund Administration into contempt is concerned, no notice to the

person affected and no enquiry are contemplated by the rules, the reason very probably being that an enquiry into the nature of the ground referred to in cl. (e) is not desirable in public interests. It is contended by Mr. Richmond that the right of a person who is duly elected to a public office is a right which he is entitled to vindicate in a Civil Court and that it is not open to the Government by rules framed under the Act to create a forum and thus deprive the person elected of his ordinary legal remedies. It is also contended that as the rule purports to be framed under sub-section (1) of section 144 of the Local Boards Act, they could only embrace the subject specified in that clause as the matters to be dealt with by the rules and as none of those matters relate to enquiries into disputed elections, they cannot be relied on by the Government for the purpose now in question. We are unable to agree with either of these contentions. The Local Boards being creations of Statute and that Statute having given power to the Government to frame rules for the purpose of the working of the Act, we think it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act. The Government in passing the Local Boards Act has not taken away any rights which had previously vested in the public and it is difficult to see how it can be said that restrictions could not be imposed by the Government acting on the rule making power conferred by an enactment which creates new rights, so long as the rules are not repugnant to any of the provisions of the Act. Nor do we think that, if power is given to make rules by the Act, the fact that the Government purports to make rules under one section rather than another would be a ground for holding that the rules are *ultra vires*.

In *Lakshminarasimha Somayajier* v. *Ramalingam Pillai* (1), the question arose as to whether, under the Local Boards Act, the Governor-in-Council has power to make rules ousting the jurisdiction of Civil Courts as to objections to the validity of elections. Sadasiva Aiyar, J., was inclined to the view that the Governor-in-Council has no power to make rules and that the rules framed by the Government are invalid. The learned Judge was of opinion that section 16 was too vague and that, as the rules were not made under section 16, but only under section 144 (1), which merely deals with the power to make rules as to the qualifications of the electors and of candidates for appointments by election and as to the method and time of election and of elective Presidents, Vice-Presidents and Members of Local Boards, the power constituting a special tribunal to enquire into the validity of elections was not conferred by section 144 (1) under which the present rules purport to be framed. Spencer, J., was of opinion that the rules are valid and that sections 16 and 144 gave the Government power to frame rules relating to the adjudication of disputes as regards the validity of elections. After referring to sections 16 and 141 the learned Judge observes as follows :—"But in any case I think that the words any other matters regarding the system of representation and of election, illustrate what is meant in cl. (1) by the words 'method of election' of members of Local Boards. I think these words are wide enough to cover the power of making rules to provide for the whole scheme of election and for the conduct of enquiries into complaints and objections to elections held or about to be held as well as to objections to the list of voters." We agree with the view taken by Spencer, J.

The question as to the validity of the rules framed under the District Municipalities Act arose for determination in more than one case. The District Municipalities Act contains provisions analogous to those in the Local Boards Act with regard to the matter in question. Sub-clauses 1 to 6 of section 250 (1) (*a*) of the District Municipalities Act correspond to sub-clauses (*a*) to (*f*) of section 144 (1-*a*) of the Local Boards Act and give power to the Government to make rules with reference to the matters specified in that section. Section 10 of the District Municipalities Act also contemplates the power of the Government to make rules. Rules were framed under the powers conferred by the District Municipalities Act. Rules 34 and 35 provide for cases of disputes as regards the validity of elections and rule 35 (*d*) which is one of the grounds for setting aside an election is that the person is

(1) 59 Ind. Cas. 245 ; 39 M. L. J. 319 ; 12 L. W. 202 ; (1920) M. W. N. 519 ; 28 M. L. T. 205.

likely to bring the Municipal administration into contempt or that his being a Municipal Councillor is dangerous to the public peace or order. Rule 36 provides that in cases falling under rule 35 (*d*) orders should be passed by the Government and not by the Collector. In *Secretary of State for India v. Appa Rao* (2) the question arose as to the power of Government to frame rules under the District Municipalities Act. Krishnan, J., was of opinion that the fact that the Government purported to frame rules under one sub-clause, which did not refer to the matter rather than another which did so refer would not make rules *ultra vires* and observed as follows :—"Before a rule framed by a rule-making authority is declared *ultra vires*, the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act. If power can be found elsewhere from the section quoted, the rules will be referred to that power and held not to be *ultra vires*." The learned Judge referred to *Rajan Chetti* v. *Seshayya* (3) ; *Queen-Empress* v. *Ganga Ram* (4) ; and Halsbury, Vol. 27, p. 146. *In Secretary of State for India* v. *Venkatesalu Naidu* (5), the question arose as to the validity of the rules framed under section 250 (1) of the District Municipalities Act, IV of 1884, as amended by Act III of 1897. Rules were framed under section 250 as regards the power of the Government to veto the election of a person if, before his election, he is convicted of an offence which in the opinion of the Governor-in-Council, disqualifies him from being a Councillor. The plaintiff who was the respondent in the appeal was elected as a Municipal Councillor but the Goverment set aside the election on the ground that he was guilty of such an offence as unfits him to be a Municipal Councillor. The District Judge found that some of the rules framed under the Act were *ultra vires*. Referring to the contention that section 250 (1) (a) does not provide for a rule of the nature of rule 35 (a) (b) framed under it. Miller, J., observed as follows :—" I am not prepared to decide that that is so, for it is not clear to me that section 250, clauses (1) (a), (i) (vi) or (vii) would not cover the case. But even if it be so, the rule may be attributed to the power given by section 10 to prescribe conditions ; and if the power is there, the rule is good though it purports to have been made under a different section." The learned Judge held that the rule was not *ultra vires* and illegal. Wallis J., was also of the same opinion. We think that sections 16 and 144 of the Madras Local Boards Act read together give power to the Govrnment to make rules when an election is contested and also to frame rules declaring the qualifications required of a person before he is validly elected and that the rules framed by the Government are not *ultra vires*.

Turning to the next question that the appellant was not given an opportunity to be heard before the Government passed orders ; it is clear from the rules we have already referred to that no enquiry is contemplated. Rule 35 states that objections to the validity of an election on the ground specified in rule 33 (e) and objections on the ground of disqualification under rule 9 (d) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government which shall be final and that in *all other cases* of objection under rule 33 an enquiry shall be held by the Collector, etc. It is clear, therefore, that no enquiry is necessary. If the rule is valid, it seems to us that the Government has power to declare what shall be the nature and scope of the enquiry. Reference was made to the *Secretary of State for India* v. *Venkatasalu Naidu* (5), already referred to, where it was held that an enquiry was necessary before an election can be invalidated unders rule 35 and 36 framed under the District Municipalities Act. But rule 35 requires an enquiry and the decision, therefore, cannot have any application to cases where no enquiry is required. We may point out that the Local Boards Act provides for enquiries whenever the Government thinks it necessary that the person affected ought to have notice, for example, section 24, cl. (iii) provides for the removal of a President, Vice-President or member of a Taluk Board whose continuance in office is, in the opinion of the Government, dangerous to public peace or

(2) 76 Ind. Cas. 212; 45 M. L. J. 156.
(3) 18 M. 236 ; 5 M. L.J. 114 ; 6 Ind. Dec. (N. S.) 514.
(4) 16 A. 196 ; A. W. N. (1894) 89 ; 8 Ind. Dec. (N. S.) 88 (F. B.)
(5) 30 M. 113 ; 1 M. L. T. 485.

order likely to bring the administration of the Local Board into contempt. But cl. (ii) states that when action is proposed to be taken in that matter no orders shall be passed without giving an opportunity of explanation to the President, Vice-President or member concerned.

We are therefore of opinion that both the objections taken fail. It is not necessary to consider the further question whether the action for damages would lie against the Secretary of State for India assuming that the rules framed by the Government were *ultra vires*. In the result, the Second Appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL NO. 245-B OF 1923.

September, 29, 1923.

Present :—Mr. Kotval, A. J. C.

SHEIKH DALLU AND OTHERS—DEFENDANTS—APPELLANTS

versus

PANJAB *Alias* WAMAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Successive adoptions by widow—Suit by adopted son—Death—Substitution of mother—Second adoption—Right to continue suit.

A widow has power to adopt several sons in succession if the last adopted son leaves no issues or widow behind.

Surayanarayana v. *Venkatarama*, 29 M. 382; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 8 A. L. J. 702; 33 I. A. 145 (P. C.) and *Venkappa Bapu* v. *Jivaji Krishnan* 25 B. 306; 2 Bom. L. R. 1101 followed.

If during the pendency of a suit by an adopted son the plaintiff dies and his adoptive mother is substituted as his legal representative and she adopts another boy the latter has a right to step in as the representative of the estate which has vested in him after his adoption and the Court should take notice of the adoption before finally adjudicating the rights of the parties.

Appeal against the decree of the District Judge, Amraoti, in Civil appeal No 23 of 1919, dated the 20th March 1922.

JUDGMENT.—The facts have been sufficiently stated in the remanding judgment of this Court and the judgment of the lower Appellate Court. It is first contended that the adoption of Panjabrao was invalid. It is said that by the adoption of Mahadeo Radha Bai's power for adoption was exhausted since all the spiritual purposes for which adoption is allowed were achieved. A widow has power to adopt several sons in succession: *Suryanarayana* v. *Vankatarama* (1). Radha Bai after succeeding Madhorao as heir was competent to adopt if Mahadeo left no issue or widow behind ; *Venkahpa Bapu* v. *Jivaji Krishnan* (2). Admittedly, Mahadeo left no issue or widow being a mere child of about 8 years when he died. He had presumably not attained ceremonial competency before he died and the spiritual purposes were not completely achieved before his death.

It is next said that Panjabrao's adoption was invalid as it was made from a corrupt motive, namely, to defeat the rights of the defendants. If the adoption was made, as may be presumed, for the spiritual benefit of Radhabai's deceased husband it cannot be said to have been made from a corrupt motive because it has the effect of divesting her estate and, in consequence, depriving the defendants of their rights under the mortgage executed by her.

The next point argued is that legal necessity has been proved at least by the recitals in the mortgage-bond. *Banga Chandra Dhur Biswas* v. *Jagat Kishor Acharjya Chowdhuri* (3), which is relied on in this connection, does not support the appellants, if anything goes against them; vide page 195. It is to be noted, moreover, that the mortgage in this case was executed only in 1907.

It is contended that Panjabrao had no right to come in as the legal representative of Mahadeo the original plaintiff as he does not claim through or under him, but claims Babuji's estate in his own rights as his adopted son. This Court had in its judgment remanding the case held that Radha Bai was appearing in this case after Mahadeo's death

(1) 29 M. 382 ; 10 C. W. N. 921, 4 C. L. J. 171 ; 16 M. L. J. 276 ; 1 M L. T. 260 ; 8 Bom. L. R. 700 ; 3 A. L. J. 702 ; 33 I. A. 145 (P. C.)

(2) 25 B. 306 ; 2 Bom. L. R. 1101.

(3) 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 385; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L.W. 458; 18 Bom L. R. 868; 14 A. L. J. 7108; 24 C. L. J. 487; 1 P. L. W. 1; 24 C. W. N 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

in two capacities, in her pesonal capacity and as the representative of the estate. As soon as she adopted Panjabrao she ceased to represent the estate which became vested in Punjabrao. No authority is cited in support of the plaintiff's contention and there is no reason why in such case Panjabrao should not be allowed to come in as representing the estate if he proved his adoption and why the adoption should not be taken notice of by the Court before finally adjudicating the rights of the parties. The decision of this Court that the defendants were entitled to remain in possession during Radha Bai's lifetime was under circumstances which did not then exist. If the circumstances have changed *pendente lite* by the adoption there is no reason why this Court at least should not, in the interests of justice, and to avoid a multiplicity of suits notice them and adjudicate accordingly. The appeal fails and is dismissed with costs. Second Appeal No. 246-B of 1922 which was argued with this appeal is also governed by this judgment.

G. R. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS NO. 331 OF 1923.

November 26, 1923.

Present.—Mr. Wazir Hussain, A. J. C.

MATA DIN SINGH—PLAINTIFF—APPELLANT

versus

SHEO DARSHAN SINGH.—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151, 152 Misdescription of property in plaint—Error—Accidental slip or omission—Deliberate error—Fraud—Duty of Court—Inherent power of Court—Limitation.

In order to attract the application of the provisions of section 152 of the Code of Civil Procedure, the error must be a natural consequence of an accidental slip or omision. The mere misdescription of the property in the plaint and the repetition of the error in the decree will not suffice. [p. 97, col. 1.]

Where an error is delibearte, it is settled law that the provisions of section 152, Civil Procedure Code cannot be invoked for the purpose of correcting such errors [p. 97, col. 1.]

In the case of a deliberate error, the person committing it is guilty of fraud on the Court and when the fraud is brought to the notice of the Court the latter cannot let it stand and countenance its perpetration, lapse of time being immaterial. The action of the Court under such circumstances would clearly rest on the provisions of section 151, Civil Procedere Code and the aggrieved party cannot be left to seek his remedy by a regular suit. [p. 97, col. 2.]

Under section 151 the Court has the inherent power to act *ex debito justitiæ* and to do that real and substantial justice for which it alone exists. [p. 97, col. 2.]

There are certain limitations on the powers of the Court acting either under section 151 or 152, Civil Procedure Code even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. [p. 98, col. 1.]

Application under section 152 of the Code of Civil Procedure.

Mr. *Hyder Husain*, for the Applicant.

Mr. *Bisheshur Nath Srivastava*, for the Opposite party.

Order.—This application purports to have been made under section 152 of the Code of Civil Procedure. The object of the application is to obtain an order for "correction of the judgment and decree" of this Court in Second Civil Appeal No. 196 of 1903 decided on the 10th May 1904.

The facts of the case are not complicated. The applicant, Sheo Darshan, executed on the 11th May 1901 a sale-deed in favour of one Sahaj Ram in respect of one half of 1 anna, 6 pies, 13 kirants, and 2 jau share in village Daraundha. Within this share lie certain plots measuring 8 bighas 2 biswas and 6 biswansis. These were expressly exempted from the transaction of sale. On the 26th August 1901 Matadin Singh, a co-sharer in the village, brought a suit for pre-emption in respect of the sale above-mentioned. In paragraph four of the plaint of that suit it was stated, that, within the property sold, there were certain plots of land which belonged to the plaintiff pre-emptor and consequently they should not have been made the subject-matter of the sale. At the end of the plaint the relief prayed for was a decree for proprietary possession of 9 pies 3 kirants 3 jau with the exception of the plots belonging to the plaintiff and specified in a list attached to the plaint. A decree was eventually passed in terms of the plaint and was confirmed by this Court except as to a certain variation made in the amount of the pre-emption money.

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The grounds of the present application are that the plots, which were not the subject-matter of the sale and were expressly excluded from the share, which was the subject-matter of the sale, were by mistake treated throughout the trial of the suit for pre-emption as if they also were sold under the sale-deed on the basis of which the suit for pre-emption was brought. It is said that the error committed in the pleadings was repeated in the decree. It is now alleged that under the colour of that decree the pre-emptor, Mata Din Singh, is making attempts to dispossess the applicant from those plots.

The first question, which I have to decide, is—Does the case as stated above fall within the terms of section 152 of the Code of Civil Procedure? The perusal of the plaint in the suit for pre-emption leaves no room for doubt that the claim related to the property sold under the sale-deed of the 11th May, 1901. Obviously, it could not relate to any property which was not sold. The sale-deed was by its date mentioned in paragraph 4 of the plaint. The property sold was, however, described in the paragraph relating to the relief as 9 pies 3 kirants 3 jau with the exception of the plots belonging to the plaintiff with which we are not concerned in the present matter. This description on the premises stated is clearly a wrong one but the mere fact that the description of the property was erroneous will not, in my opinion, attract the application of the provisions of section 152 of the Code of Civil Procedure. The error must be a natural consequence of an accidental slip or omission. An error may be committed deliberately, and if it has been so committed it is settled law that the provisions of that section cannot be invoked for the purpose of correcting such an error.

Now, the mistake in the present case might have either arisen from any accidental slip or omission, or the pre-emptor deliberately but erroneously included such property within his suit for pre-emption as was not the subject-matter of the sale to which the suit related. If the first alternative is correct, section 152 would apply. If the second alternative is the right one to adopt, a case of fraud would emerge against the pre-emptor. In the first event, there is a long catena of decisions both in India and in England which establish the proposition that pleadings as well as the judgments and decrees of Courts may be rectified to carry out the true intention of the parties and of the Court in such a suit. In the case of *Lawrie* v. *Lees* (1) Lord Penyance said :—"I cannot doubt that, under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders.....to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that the power is inherent in every Court." In the case of *Hatton* v. *Harris* (2), Lord Watson made the following observation :—"When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce." As regards the cases decided in India I would content myself with mentioning two only, that is, *Sheo Balak* v. *Sukhdei* (3) and *Ferozsha Pestonji Randerja* v. *The Sun Mills, Limited* (4). It was urged on me repeatedly that the record now sought to be corrected was perfected and closed about 20 years ago, but, as observed by Lord Macnaghten in *Hatton* v. *Harris* (2) already mentioned, lapse of time has nothing to do with the question. In that case an error 39 years old was amended.

If, on the other hand, Matadin Singh, pre-emptor, deliberately suppressed the omission of the plots which were exempted from the sale in respect of which he brought his claim for pre-emption he was guilty of fraud on the Court, and when this fraud has now been brought to the notice of the Court, obviously, I cannot let it stand and countenance its perpetration. My action under such circumstances would clearly rest on the provisions of section 151 of the Code of Civil Procedure. Under that section the Court has the inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the

(1) (1882) 7 A. C. 19 at p. 34 ; 51 L. J. Ch. 209 ; 46 L. T. 210 ; 30 W. R. 185.
(2) (1895) A. C. 547 ; 63 L. J. P. C. 24 ; 1 R. 1 ; 67 D. T. 722.
(3) 28 Ind. Cas. 344; 12 A. L. J. 185.
(4) 22 B. 370; 11 Ind. Dec. (N. S.) 880.

administration of which it alone exists. See the observations in the case of *Hukum Chand* v. *Kamalanand Singh* (5). It was suggested that the applicant may be left to seek his remedy by a regular suit. To my mind such a suggestion would amount to a prayer to the Court to shut its eyes to the facts of the case. Those facts either reveal a case of error due to an accidental slip or omission or a fraud. I cannot obviously stay my hands and defer the decision of the question, any longer.

There are certain limitations on the powers of the Court acting either under section 152 or under section 151 of the Code of Civil Procedure. Those limitations were stated by Lord Watson in the quotation already given from his judgment in the case of *Hatton* v. *Harris* (2). The observations of Lord Herschell in the same case were similar. The result is that even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. In the present case, however, no third parties are involved. The learned Advocate for the opposite party argued, however, that it would be inexpedient or inequitable to correct the error now because of certain events that have taken place since the decree was made in the suit for pre-emption.

It appears that in 1906 this applicant claimed ex-proprietary right in some of the plots which are the subject-matter of this application. His claim was not decided on merits and the application was rejected. It further appears that two or some of these plots were in the possession of mortgagees. The opposite party has obtained possession of them by redeeming the mortgages and is now in possession of the redeemed plots. Two of the plots, however, were left in the possession of the applicant by the order of the Board of Revenue. This happened in the year 1921. I am of opinion that these facts do not render it inexpedient or inequitable to correct the record so as to bring it into harmony with the real intention of the parties and of the Judge.

On the above grounds I allow the application and direct that the decree of this Court dated the 10th May 1904 be so amended as to declare that the decree for pre-emption in respect of the share of 9 pies 3 kirants 3 jau shall not cover the plots stated in the application before me and that those plots were not the subject-matter of the sale to which the suit for pre-emption related. The applicant will get his costs from the opposite party.

S. D. *Application allowed.*

(5) 33 C. 927 ; 3 C. L. J. 67.

MADRAS HIGH COURT.

CIVIL REVISION No. 17 of 1923.

November 12, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, Mr. Justice Ramesam and Mr. Justice Waller.

KOKKU PARTHASARATHY NAIDU GARU—PETITIONER

versus

CHINTALACHERVU KOTESWARA RAO GARU AND ANOTHER—RESPONDENTS.

Madras Local Boards Act (of 1920) ss. 57, 55, 56, 28 (2), 25, 199 (2) (c)—Judge holding election inquiry whether "persona designa" or "Court"—Civil Procedure Code (Act V of 1908), s. 115—"Finality"—Appeal—Revision—Validity of nominations to membership of Board—Jurisdiction of District or Sub-Judge to go into Grounds other than prescribed disqualification —Election of member as President—Right to question validity of his nomination as member in inquiry regarding election as President—Election if can be set aside—S. 28 (2) and s. 25—Short absence of President—Right to make appointments to Local Board—Validity.

A District or Subordinate Judge holding an election inquiry and acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920 is acting as a 'Court' and not merely as a *persona designata*. [p. 99, col. 2.]

National Telephone Co., Ltd. v. *Post Master General* (1) (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T 562; 57 S. J. 661; 29 T. L. R. 637, **applied.**

The fact that the decision of the Judge is 'final' under section 57 of the Act and the rules thereunder means that there is no appeal against it. It does not preclude Revision to the High Court under section 115 of the Civil Procedure Code. [p. 100, col. 1.]

There is nothing either in the sections of, or in the rules under, the Madras Local Boards Act giving powers to a District or Subordinate Judge to question the validity of the appointment of a nominated member except under s. 57 and on the sole ground of disqualification specified in sections 55 and 56. [p. 100, col. 2.]

Therefore, on a petition dealing with the election of a President of a Local Board it is not competent to

the Judge to go into the question whether a particular candidate was duly appointed a member of the Board. [p. 101, col. 1.]

A District Judge acts wholly without jurisdiction in investigating such a question and his decision upon it is liable to be revised by the High Court under S. 115 (a) of the Civil Procedure Code. [p. 101, col. 1.]

Per Chief Justice **:—The proper method of questioning the appointment of a member, would be by proceedings in the nature of *quo warranto* [p. 101, col. 1.]**

Obiter **:—By reason of sections 28 (2) and 25 of the Madras Local Boards Act the mere absence for a few days of the President of a District Board from his jurisdiction does not necessarily vest in the Vice-President the power of appointing members to a Taluk Board. [p. 101, col. 2.]**

Per Ramesam, J **:—An error of law leading to an erroneous order does not justify interference in Revision but one leading to the exercise of jurisdiction which does not exist justifies such interference. [p. 102, col. 1.]**

Petition under Sect. 115 of Act V of 1908 and Sect. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Guntur dated 22nd December 1922 in O. P. No. 82 of 1922.

Dr. *S. Swaminadhan*, for the Petitioner.

Messrs. *C. V. Ananthakrishna Aiyar*, *V. Ramadoss* and *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.

The Chief Justice.—This is an application for the revision of the decision of the District Judge acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920. By rule 1 of the rules issued by the Local Government under the powers conferred on them by section 199 (2) (c),—

"No election of a member or of a President of a District, Taluq, or Union Board shall be called in question except by an election petition presented in accordance with these rules, to the District or Subordinate Judge having jurisdiction."

A preliminary point is taken that this Court has no power of revision, under section 115 of the Code of Civil Procedure over the decision of a District or Subordinate Judge when acting under that rule. That depends on whether the Judges therein referred to are acting as Courts, or acting merely as *persona designata*; that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. There has been considerable conflict of opinion on this point since the coming into force of this Act, and I do not think that the decisions that have been given on the matter are of great assistance to us in arriving at the proper conclusion, and we have to look at the Act and the rules and the law as it stands. The law is, I think, quite definitely established by the decision in *National Telephone Company Ltd.* v. *Post-Master General*, in the words of Lord Parker at page 562 that,—

"Where by Statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

If this matter had been referred to the District Court or Subordinate Judge's Court in terms, in my judgment, no question could arise, because, following the words of the judgment just quoted, the matter would be determined by the Court as a Court, it being given jurisdiction for this particular purpose, and all the incidents which include the incident of being liable to revision must follow, although no appeal would lie in this particular case, because an appeal has been expressly precluded, for by section 57 (2) of the Act, and by the rules, this "decision is to be final." But as the word "Judge" is used and not the word "Court," one has to look carefully to see whether the word "Judge" was used of him in his capacity as Judge or in his personal capacity, and I think great light is thrown upon this by two other rules. Rule 12 (2) of the rules for election refers to "an election or other competent Court" and it is quite clear that it is there referring to a Court of a District Judge or Subordinate Judge: and, by rule 4 (3) of the rules for the conduct of Inquiries, power is given to

(1) (1913) A. C. 546: 82 L. J. K. B 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637.

the District or Subordinate Judge in certain cases "to direct any Court subordinate to him to hold the inquiry." I find it impossible to hold that a reference to a Judge with power to refer to a Court subordinate to him can mean anything else than reference to a Judge sitting as a Judge in the exercise of his ordinary jurisdiction extended for that purpose. For these reasons, in my judgment, the power of revision lies.

It is further argued that the fact that the decision of this Judge is, by section 57 of the Act and by the rules, final, preclude any revision. There is really no authority adduced in support of that proposition and, in my judgment, it would be quite contrary to the whole object and intention of section 115 of the Code of Civil Procedure so to hold. That section only applies where there is no appeal. I know of no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. It is the ordinary mode of expression used for the purpose in much of the legislation in England on which this legislation is founded; and, where the whole object of revision is to prevent a Court, from which there is no appeal, acting contrary to its jurisdiction, a finding that it is the law that, because the words used are "the decision shall be final," a Court, ordinarily subject to the revisional powers of this Court, should be permitted to act wholly without jurisdiction without the aggrieved party being entitled to any remedy, would in my judgment be untenable, and that would be the effect of deciding this second point in favour of the contention put forward.

On these grounds, in my judgment, this Court has revisional power and the preliminary point fails

The petitioner was duly elected President of Narasaraopet Taluq Board. A petition was subsequently filed before the District Judge of Guntur for a declaration that this election may be declared void and annulled and that the petitioner, one Chintalacheruvu Koteswara Rao, a defeated candidate in the election, should be declared to be duly elected. The District Judge found that the petitioner had not been properly appointed a member of the Taluq Board and was, therefore, not eligible for election to the Presidentship of that Board, and the matter comes before us on a petition for revision of that order.

It is contended, on the one side, that the decision of the District Judge was wrong and that this is a case for the exercise by the High Court of its revisional powers under section 115, Civil Procedure Code, and, on the other side, that the decision of the District Judge is right, and that, even if it was wrong, his order is not a proper subject-matter for revision.

The powers of a District Judge in the matter of Election Petitions are contained in section 57 of the Madras Local Boards Act of 1920, and in the "rules for the conduct of inquiries and the decision of disputes relating to elections," issued by the Local Government under their powers in that behalf under section 199 of the Act. By section 57, the Judge has power to determine whether an appointed member is disqualified under section 55 or section 56 by reason of the various grounds set out in those sections, such as, insanity, bankruptcy, being interested in contracts with a local board and the like, none of which are alleged in this case. The petitioner had been appointed by the President of the District Board purporting to act under section 9 of the Act. By the rules above referred to, save as provided in section 57, no election of a member or a president can be called in question except by an Election Petition presented to the District or Subordinate Judge. This rule is somewhat obscure. I understand it to mean that, apart from the powers under section 57, a petition to the District or Subordinate Judge is the only way of questioning the election. But I can find nothing either in the section or rules giving powers to a District or Subordinate Judge to question the appointment of a nominated member such as the petitioner, except on the specified ground, namely, disqualification under sections 56 and 57. At the time of his election as President, he, the petitioner, was *de-facto* a member of the Board and as such eligible for election to the Presidentship. It is not suggested that there was any irregularity in the election; but what is suggested is that he was not eligible for election because he was not properly appointed a member by the President of the District Board. Now the appointments of members other than elected members are in certain

cases in the hands of the Local Government, in certain cases in the hands of the President of the District Board, and in certain cases in the hands of the President of the Taluq Board under section 9 of the Act, and I can find nothing in the Act to suggest that a District or Subordinate Judge is intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluk Board, as the case may be properly exercised their power of appointment. What he has jurisdiction to decide is whether a person so appointed is disqualified under section 55 or 56 and nothing else, and, in my judgment, on a petition dealing with an election to Presidentship, he cannot go into the question whether a particular candidate was duly appointed a member of the Board. Therefore, in my judgment, the District Judge in this case was acting wholly without jurisdiction in investigating that question and giving his decision upon it, and the matter, therefore, comes directly under section 115 (a) of the Civil Procedure Code. If it is desired to question the appointment of a member, it is probably open to question it in Court by proceedings in the nature of *quo warranto*.

Assuming that the District Judge had power to inquire into this matter, whether it can be said that the High Court has power to revise his order under section 115 (c) is a very different question and one upon which I do not think it necessary or advisable to express any opinion or to add one more to the many judgments dealing with what does come under that section and what does not : nor do I consider it necessary for the decision of this case to go into the question whether the District Judge was right or wrong in the decision to which he came. But as the matter has been fully argued before us and as it is of considerable importance, I think it desirable that we should express our opinion, *obiter* though it may be.

The facts are that the President of the District Board, while temporarily in Madras, prepared and signed a list of his appointments, including therein the petitioner, and sent a copy of that to the *Fort St. George Gazette* The District Judge held that, by reason of section 23 (2) of the Madras Local Boards Act, all the appointments thus made were void. That section enacts that, "during the temporary absence or incapacity of the President of a District or Taluq Board, the President's functions shall devolve on the Vice-President."

By section 25 "the exercise of these powers by the Vice-President shall be subject to such restrictions limitations and conditions as may be laid down by the President and shall also be subject to his control and revision."

I do not think that the mere absence for a few days of the President from his district on a visit to Madras necessarily vests in the Vice-President the power of appointing members of the Board. But even if it did, the fact is in this case the Vice-President did not make any appointment and the President returned to his district, and signed again in his district the list of appointments of these members and directed it to be posted on the board where, and not in the *Fort St. George Gazette*, it had by the Act to be posted. This was a perfectly proper exercise of the President's powers of appointment and, in my judgment, there was nothing wrong with the appointment of the petitioner at all.

It follows that this petition must be allowed, that the order of the District Judge must be set aside. The 1st respondent must pay costs throughout, including the costs of the 2nd Respondent.

Ramesam, J.—I agree with my Lord's conclusion in the judgment delivered that, in the light of the rules made under the Act, the District Judge must be considered to be a Court and that, notwithstanding the use of the word 'final' in section 57, a revision petition lies to this Court.

The next question is whether there is any question of jurisdiction or material irregularity within the meaning of section 115 Civil Procedure Code. It is not suggested that the District Judge acted with material irregularity in the exercise of his jurisdiction. As to jurisdiction, I think one must start with the principles laid down by the Privy Council in *Balakrishna Odayar* v. *Vasudeva Aiyar* (2). "The section applies to jurisdiction alone, the

(2) 40 Ind. Cas. 650 ; 40 M. 793 at p. 799 ; 15 A. L. J. 645 ; 2 P. L. W. 101 ; 33 M. L. J. 69 ; 26 C. L. J. 143 ; 19 Bom. L. R. 715 ; (1917) M. W. N. 628 ; 6 L. W. 501 ; 22 C. W. N. 50 ; 11 Bom. L. R. 48 ; 44 I. A. 261 (P. C.).

irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

It follows that an error of law leading to an erroneous order only, does not justify our interference. An error of law leading to the exercise of a jurisdiction which did not exist, justifies such interference (See *Atchayya* v. *Sri Seetharamachandra Rao* (3). It must be remembered that every error of law cannot be regarded as the exercise of a jurisdiction which does not exist merely because, but for such error, the order of the Court would have been different, otherwise, all erroneous decisions can be modified or revised in revision. I agree with the observations of my brother Wallace, J. in *Ahmad Thambi Maracair* v. *Basava Maracair* (4).

Applying these principles, it follows that, where a District Judge, who has jurisdiction to enquire into an election petition under the rules that made under the Local Board Act, 1920, passed as the result of his enquiry an erroneous order based on an erroneous construction of the sections of the Act or the rules, the order cannot be interfered with in revision; and it cannot be said in such a case, that on account of his error of law, the District Judge exercised a jurisdiction which did not exist or failed to exercise a jurisdiction which existed. For instance, when he held erroneously that the appointment of a member or President was void, it cannot be said merely by reason of such error that there was an erroneous assumption of jurisdiction. I do not think that the observations of Channell, J., in *Rex* v. *Manchester Justices* (5) at page 574 help us in the application of section 115. It is true that these observations have been quoted and applied by my brother Krishnan, J., in (6) *Ramaswami Goundan* v. *Muthu Velappa Gounder*. I am unable to agree with all the observations in that case. I also observe that, in that case, the ground of material irregularity was also available.

In the present case before us, I agree with my Lord the Chief Justice, in holding that the District Judge acted without jurisdiction. Under section 57 he had jurisdiction to enquire into the validity of the appointment of a member only if it is questioned on the ground that he was disqualified under sections 55 and 56. No such ground was alleged or proved and the District Judge had no jurisdiction to enquire into the Election Petition. We have not here a case of his holding that he had jurisdiction to enquire by an erroneous construction of some section or rule of law. He merely enquired into a petition in which no ground, such as is mentioned in the section, was alleged.

I agree with the order proposed by my Lord.

Waller, J.—On the first point I agree that the Judge referred to in rule (1) is not a *persona designata*. Rule IV (3) is, I think, conclusive. A judge acting as *persona designata* has no Court subordinate to him. I agree also that the description of his decision as final means no more than that there is no appeal against it. It does not mean that a decision made without jurisdiction is not open to revision under section 115 Civil Procedure Code.

It seems to me clear that, in this case, the Judge had no jurisdiction to decide what he did decide. Petitioner was an appointed member of the Board and his appointment could be questioned before the Judge only with reference to sections 55 and 56 of the Act. It could certainly not be questioned in a proceeding of this kind. The Act, no doubt, provides that the President shall be elected from among the members of the Board, but that provision does not give the Judge jurisdiction on an Election Petition to consider whether the members have or have not been properly appointed. He cannot disqualify them save on grounds that are not applicable here. The result in the present instance was the petitioner remained an appointed member of the Board although the Judge had set aside his election as President on the ground that he had not been properly appointed a

(3) 18 Ind. Cas. 555; 39 M. 195; 18 M. L. T. 60; 24 M. L. J. 112 (F. B.).

(4) 72 Ind. Cas. 902; 17 L. W. 898; (1922) M. W. N. 813; 44 M. L. J. 69; (1923) A. I. R. (M.) 254; 46 M. 123.

(5) (1899) 1 Q. B. 571 at p. 574; 68 L. J. Q. B. 358; 68 J. P. 360; 47 W. R. 410; 80 L. T. 581.

(6) 71 Ind. Cas. 1039; 46 M. 536; 16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 183; (1923) A. I. R. (M.) 192.

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member. On the last point I agree that petitioner was properly appointed and concur in the order allowing the petition and as to costs.

V. N. V. *Order Set aside.*
S. D.

LAHORE HIGH COURT.

SECOND APPEAL NO. 2284 OF 1920.
May 5, 1923.

Present:—Sir Shadi Lal Kt. Chief Justice and Mr. Justice Lumsden.

RAM SARAN DAS—PLAINTIFF—APPELLANT,

versus

MULA, MINOR, THROUGH MALUKA DEFENDANT—RESPONDENT.

Punjab Redemption of Mortgages Act (II of 1913) s. 12—Application for redemption—Order directing redemption on payment of a certain sum—Suit for declaration by mortgagee that a larger sum is due on mortgage—Limitation.

Defendant made an application under the Punjab Redemption of Mortgages Act for redemption of a mortgage. The Collector made an order directing redemption on payment of a certain sum. The mortgagee instituted the present suit for a declaration that the charge on the land was a sum higher than that determined by the Collector and that he was entitled to retain possession of the land until the sum claimed by him was paid to him :

***Held*, that the position of the mortgagee in the suit was not that of a plaintiff but was more analogous to that of a defendant, the suit being virtually a defence against an order divesting the mortgagee of possession before payment of the sum due, and no question of limitation for the suit could, therefore, arise.**

Second appeal from the decree of the District Judge, Delhi, dated the 14th August 1920, affirming that of the Subordinate Judge, 2nd Class, Delhi, dated the 28th January 1920, and dismissing the claim with costs in both Courts.

Lala *Jagan Nath*, for the Appellant.

Messrs. *Devi Dayal and N. C. Mehra*, for the Respondent.

JUDGMENT.—On the 26th January 1897 one Bhola, a *jat*, mortgaged certain lands to the present appellant for Rs. 400. According to the terms of the deed interest was to be paid for 6 years at the rate of Rs. 1-8-0 *per cent per mensem*. After the expiry of this period the land, if not redeemed, was to be considered sold to the mortgagee, the latter having the right during the subsistence of the mortgage to assume possession should the interest not be paid. On the 18th January 1905 the conditional sale clause was expunged by the Deputy Commissioner acting under section 9 (2) of Act XIII of 1900. On the 12th January 1910 the mortgagee brought a suit for possession and obtained a decree on the 16th February 1910. On the 21st August 1912 a deed of lease was executed under which the mortgagor became a tenant of the land on a yearly rent of Rs. 72. In that deed the mortgagor admitted that the charge on the land was Rs. 1,336, that sum representing the principal sum advanced on the basis of the mortgage *plus* 13 years' interest. After Bhola's death, his son, the present respondent, applied for redemption under Act II of 1913 and the Revenue Officer on the 19th January 1918 passed on order in his favour on payment of a sum of Rs. 400. On the 24th March 1919 the mortgagee brought a suit under Act II of 1913 for a declaration that the charge on the land was Rs. 1,336 and that he was entitled to retain possession until that sum was paid. The trial Court dismissed the suit holding that the claim was time-barred and that in any case Rs. 1,336 could not be due as there was no stipulation in the mortgage deed that any interest was payable after the expiry of the 6 years' term. On appeal the District Judge confirmed the decree of the trial Court, adding that the suit could not lie under the provisions of Order II, rule 2, Civil Procedure Code. Dissatisfied with both these decrees the mortgagee has come to this Court on second appeal.

It appears to us that both Courts have failed to appreciate the real position of a mortgagee in such suits. That position is not that of an ordinary plaintiff but is more analogous to that of a defendant. The mortgagee was in possession of the land and had the Revenue authorities not intervened, it would have been the business of the mortgagor to bring a suit for possession by redemption. The summary proceedings taken by

the Revenue authorities cannot affect the rights of the parties and the present suit is thus virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances, the question of limitation does not arise and the provisions of Order II rule 2 are inapplicable.

It seems doubtful whether in any case these latter provisions would have barred the suit. Under the terms of the deed the mortgagee in 1910 had the option of suing for possession or claiming the money due. He could not have asked for both remedies and it was open to him to select the one he preferred. In this connection, the principles laid down in the Full Bench ruling of this Court *Parmeshri Das* v. *Fakeria* (1) are in point.

We are satisfied that the sum of Rs. 1,336 is a valid charge on the land. It is true that the mortgage-deed does not expressly provide for the payment of interest after the expiry of the six years' term. In the full Bench ruling published in *Motan Mal* v. *Muhammad Bakhsh* (2) the principles applicable in such cases were clearly set forth. In that authority Le Rossignol. J., expressed the opinionthat in the case of mortgages comprising a stipulation of conditional sale, a covenant to pay *post diem* interest up to the date of redemption must be implied unless there are very strong reasons to the contrary. In the present case not only are there no reasons to the contrary apparent but there is the significant fact that when the registered deed of lease was executed in 1912, the mortgagor admitted that the burden on the land amounted to Rs. 1,336. This admission affords strong proof that there was an implied agreement to pay interest after the expiry of the six years' term should the mortgagor decide not to enforce his rights of foreclosure.

It follows from these findings that the appeal must be accepted and the plaintiff granted a decree to the effect that he is entitled to retain possession of the land until he is paid a sum of Rs. 1,336 less any payments already made in accordance with the order of the Collector. The plaintiff appellant is also entitled to *mesne* profits from the date of the Collector's order and these *mesne* profits will be fixed at Rs. 72 *per annum* the amount payable under the terms of the lease. The decree will carry costs throughout.

Z. K. *Appeal allowed.*

(1) 59 Ind. Cas. 71 I. L. 457 ; 56 P. W. R. 1920 ; 2 L L. J. 466.

(2) 66 Ind. Cas. 771 ; 3 L. 200 ; 4 U. P. L. R. (L) 55 ; (1922) A. I. R. (L) 254) 42 P. L. R. 1922.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 169, B OF 1923.

October 20, 1923.

Present :—R. B. Kinkhede, A. J. C.

DEVIDAS, PLAINTIFF—APPLICANT.

versus

MAMOOJI—DEFENDANT—NON-APPLICANT.

Admission of thumb impression on blank paper—Execution—Burden of proof.

An admission must be taken as a whole and not piecemeal. [p. 105, col. 1.]

A defendant's admission that he had put his thumb impression on a blank paper is not an admission of execution of any document and therefore does not shift the burden of proving the document. [p. 105, col. 2.]

Revision from the decree of the Small Cause Court, Chandur, District Amraoti, dated 10th August 1923, in Civil Suit No. 287 of 1923.

Mr. *M. B. Niyogi*, for the applicant.

ORDER.—The defendant is sued by plaintiff on the basis of what is described as a promissory-note purporting to bear his thumb impression. The defendant, though admitting that he gave his thumb impression upon a blank paper by Bhaskar, denies the execution of the promissory-note sued upon. His contention is that Bhaskar who has quarrelled with him must have in collusion with plaintiff brought into existence the promissory-note in suit by forging the contents. The Small Cause Court upheld this contention and dismissed the suit.

2. This petition for revision raises one very important question of law, namely, whether the burden of proving the execution of the promissory-note lay on plaintiff or in view

of the defendant's admission of the thumb impression, it became necessary for him to disprove the execution thereof. It is contended that when a party admits his subscription or thumb impression borne on any paper he ought to be presumed to have put it upon that paper with full knowledge of its contents and that, inasmuch as the defendant has in this case admitted that he gave his thumb impression, it was for him to show that it was blank at the time he gave the impression; that the lower Court not having looked at the case from this point of view has committed an error of law which vitiates its appreciation of the evidence and consequently the judgment of the case.

3. It is a general rule of law that an admission made by the opposite party in his pleadings of a fact necessary for the decision of a case dispenses with its proof. We must, at the same time, bear in mind another principle also that admission is to be taken as a whole and not piecemeal. The principle upon which the latter rule is grounded is that if a party makes a qualified statement that statement cannot be used as against him apart from that qualification; an unfair use is not to be made of a party's statement by trying to convert it into a particular admission by him, that which he never intended to be such an admission. It has been ruled by Batten, A. J. C. in *Balkishan* v. *Narainsha*, (1) that an admission by a defendant at the state of pleadings of the execution of a document required by law to be attested, does not dispense with the necessity of plaintiff's proving its due attestation if the same also has not been admitted. The principle underlying this rule is also the same. I have read the written statement filed in the case by the defendant and in it the defendant clearly denies genuineness of the promissory-note in suit. The admission made by defendant about the giving of the thumb impression upon a paper to Bhasker, his agent, is qualified by the use of the expression that the paper was *blank*, so that the admission is not an unqualified admission of *execution of any document* containing any recitals, much less of the promissory-note in suit evidencing a contractual liability to pay a certain sum of money to the plaintiff; on the contrary, in the lastsentence of paragraph 2 of the written statement there is a clear insinuation of a forgery by plaintiff and Bhasker with the help of the blank paper bearing the thumb impression. The Court below was, therefore, right in not looking upon the so-called admission of the defendant as in itself importing an admission of execution of the promissory-note, so as to dispense with proof of such execution. In *Pirbhu Dayal* v. *Tula Ram* (2), a Bench of the Allahabad High Court held that an admission on the part of the defendant in his pleadings to the effect that the finger impression or signature was his, was not an admission of the execution of the document so as to shift the burden of proving the case on him. The following remarks of Lindsay, J., at page 673 are very pertinent to the point involved in the present revision and may be usefully quoted here:—

> "It is obvious, in any case, that the burden of proving the case lay upon the plaintiff Prabhu Dayal We cannot concede in favour of the appellant that any admission which was made by the defendant regarding the putting of a signature or a thumb-mark on the document in question, amounted to such an admission of execution as to thrust the burden of proving the case upon him. Obviously, there was no admission *of execution of the document upon which the plaintiff relied* when the defendant stated he had put his signature and his thumb-mark on a blank piece of paper."

> "We have no doubt at all that, in view of the pleadings, it was for the plaintiff to prove the due execution of the document upon which he was suing.....It was for the plaintiff to make out his case and he could only do that by proving due execution."

4. In view of the pleadings in this case also, I cannot uphold the contention of the plaintiff that the burden was wrongly laid on him of proving the execution and the passing of consideration of the promissory-note on which he relied in support of his claim. The Court below had discarded the evidence of plaintiff's witnesses as unsatisfactory and has rightly dismissed the claim.

(1) 42 Ind. Cas. 299; 18 N. L. R. 121.

(2) 68 Ind. Cas. 809; 20 A L. J. 672; (1922) A. I. R. A. 401; 9 O. & A. L. R. 48.

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5. The next point that was argued was that ıe Judge of the Small Cause Court ignored ıe evidence of plaintiff's witnesses Nos. 2 nd 3. It has, I think, considered it. The ridence was recorded by the Judge who gave ıe judgment and he had the best opportunity watching the demeanour of the witnesses ıd to form his own estimate as to their 'edibility. The Judge does not seem to have sposed of the case after long delay. The ıere circumstance that the trial Judge does ot make express mention in his judgment of single item of evidence does not necessarily nport that the Judge has not considered it or ıs ignored it altogether.

As a matter of fact, a Small Cause ourt Judge is not bound to give any ıasons for his decision on the points for etermination. I find that the Judge has this case given good reasons in sup- ort of his findings. In view of a recent ıling of this High Court in *Padamsi* v. *heshrao* (3) although the point raised was ncluded by a finding on a question of fact, ill I have gone through the evidence, with a iew to find out whether the finding that the :o-note was not proved to have been executed y the defendant, is in any way perverse, or gainst the evidence on record or the probabili- es of the case and I do not see any grounds interfere with the lower Court's apprecia- on of evidence and of the probabilities of the ıse. It is remarkable that the record is lent as to the immediate use which the efendant was to make of this sum of s. 137-8 0. For these reasons, I dismiss the etition for revision with costs without notice the other side.

D. *Petition dismissed.*

(3) 73 Ind. Cas. 1055 ; 19 N. L. R. 72 ; (1923) A. I. . (n.) 292.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 363 OF 1923.

October 20, 1923.

Present :—Mr Wazir Hasan, A. J. C.

MUSSAMMAT ZOHRA BIBI—PLAINTIFF—APPELLANT

versus

GANESH PRASAD—DEFENDANT—RESPONDENT

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Transfer preferring one creditor to others—Time-barred debt, whether valid consideration—Limitation Act (IX of 1908), sch. I, Art. 103—Suit to recover dower—Limitation, commencement of—Oudh Laws Act (XVIII of 1876), s. 5—Muhammadan Law—Dower paid by husband—Court, whether can question arrangement.

In a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. [p. 108, col. 1]

Musahar Saha v. *Hakin Lal*, 32 Ind. Cas. 343 ; 43 I. A. 104; 30 M. L. J. 116 ; 20 C. W. N. 393; 14 A L. J. 118 ; (1916) M. W. N. 198 ; 19 M L. T. 203 ; 28 C. L. J 406; 18 Bom. L. R. 378 ; 43 C. 521 ; 3 L. W. 207 (P C.) followed.

Limitation for a suit by a Muhammadan wife to recover the amount of her prompt dower does not begin to run unless there has been a demand on the part of the wife and a refusal to pay on the part of the husband. [p. 108, col 1]

A time-barred debt can form a valid consideration for a transfer of property. If a husband is willing to pay a certain amount of the dower-debt due to his wife and has as a matter of fact paid it by a transfer of property, a Court cannot interfere with the arrangement on the ground that if the husband had resisted the claim for dower under section 5 of the Oudh Laws Act, the amount decreed to the wife would have been less than the value of the property transferred by the husband in lieu of dower. [p. 107 col. 2]

Appeal against decree of the 3rd Addl : District Judge, Lucknow, at Sitapur, dated October, 9, 1922 reversing decree of the Subordinate Judge, Kheri dated 5th January-1921.

Messrs. *Chhail Behari Lal* and *M. Wasim*, holding brief of Mr. *A. P. Sen*, for the Appellant.

Messrs *Bisheshar Nath Srivastava* and *B. Ram Prasad*, for the Respondent.

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JUDGMENT.—This is a plaintiff's appeal. Her claim succeeded in the Court of first instance but on appeal by the defendant the decree of the first Court was set aside by the Additional District Judge of Sitapur and the plaintiff's suit dismissed.

The defendant holds four simple money decrees against Hidayat Ullah Khan, the husband of the plaintiff. The total amount of these decrees is Rs. 2,902-3-6. In execution of the decrees, the defendant has attached a 3½ biswas share of Mauza Gola, mahal Barkatpur, pargana Hyderabad, district Sitapur. The plaintiff claims that the property attached is hers. She preferred an objection against the attachment under O. XXI r. 58, of the Code of Civil Procedure which was dismissed on the 30th July 1918. Hence the present claim for a declaration that the property attached by the defendant in execution of his decrees against Hidayat Ullah Khan is not liable to attachment and sale under those decrees. The plaintiff's case is that she was married to Hidayat Ullah Khan about 40 years ago and one lac of rupees was fixed as prompt dower at the marriage ; that about 20 years ago Hidayat Ullah Khan paid Rs. 5,000 towards the dower debt mentioned above ; that on the 22nd December 1905 he executed a sale-deed in respect of certain properties, including the property in question, in favour of the plaintiff in lieu of Rs 45,000 in entire satisfaction of the dower debt due to her, and that the rest of that debt was abandoned by her. She further said that she had been in proprietary possession of the properties covered by the sale-deed since the date of its execution. The main defence to the suit was that the sale-deed, on which the plaintiff founded her claim, was a fraudulent transaction to defeat and delay the creditors of Hidayat Ullah Khan and that it was without any consideration.

Both Courts have found that the sale-deed of the 22nd December 1905 represented a genuine transaction, the intention of Hidayat Ullah Khan being to divest himself of the ownership of the property sold and to confer the same on his wife, the present plaintiff. They have also found that the lady has been in complete proprietary possession of the properties covered by the sale-deed since the date of its execution. On the question of consideration the first Court found that it consisted of part of the dower debt Rs. 5,000|- or Rs. 10,000|- and also of the obligation which the vendee undertook in respect of the payment of the debts with which some of the properties stood charged. The lower Appellate Court has, however, held that there was no consideration for the sale-deed at all. As regards the dower-debt, that Court is of opinion that none was subsisting on the date of the sale-deed. The grounds of the opinion are two. First, that if a claim for the recovery of the dower-debt, which was admittedly a lac of rupees, had been brought by the plaintiff in a Court of law she would only have been allowed a sum of Rs. 5,000 under the provisions of section 5 of the Oudh Laws Act (XVIII of 1876) and this amount she had already recovered from her husband and, secondly, that her claim to the remaining portion of the dower-debt was barred by limitation at the date of the execution of the sale-deed.

In my opinion both the grounds are untenable. The sale-deed is clear evidence of the fact that the husband had no desire to resist his wife's claim for the dower-debt to the extent of one half. Indeed, he discharged the whole of that moiety by executing the deed in question. If the husband is willing to pay a certain amount of the dower debt and has as a matter of fact paid that amount it is inconceivable that any Court of Justice could or at least would interfere with such an arrangement between the creditor and the debtor ; nor is there any data on the present record to determine the exact amount of debt which would be decreed in favour of the plaintiff if a suit had been brought by her for the recovery of her dower-debt and had been resisted by her husband under the provisions of section 5 of the Oudh Laws Act. Indeed, the first Court said " that the plaintiff, having regard to the status of Hidayat Ullah Khan and herself, might have been allowed Rs. 5,000 or at least Rs 10,000 as dower. " This ground of decision, therefore, rests entirely on mere conjecture.

The second ground is equally without any solid foundation. In the first place, a time-barred debt may well form a valid consideration for a contract. In the second place,

limitation will not being to run unless there has been a demand on the part of the creditor and refusal on the part of the debtor. Assuming that the demand may be presumed from the fact that about 20 years after the marriage the husband paid Rs. 5,000 to his wife in part-satisfaction of the dower-debt, there is no evidence that there was any refusal *qua* the rest. Indeed, the execution of the deed of sale and its genuine nature, as is found by the Courts below, prove facts to the contrary. It was pointed out by the learned Judge of the Court below that Hidayat Ullah Khan owed to various people unsecured debts to the extent of about Rs. 4,500 and it was observed by the Court of first instance that Hidayat Ullah Khan in executing the sale-deed had also in mind the object of defeating his creditors other than his wife. On the basis of these findings, the argument of the learned Advocate for the respondent proceeded on the provisions of section 53 of the Transfer of Property Act, 1882. The argument may best be answered in the words of their Lordships of the Privy Council in the case of *Musahar Sahu* v. *Hakim Lal*, "As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for payment of the rest of his debts."

I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs through out.

Z. K.

Appeal allowed.

(1) 32 Ind. Cas. 343; 43 I. A. 104; 39 M.L J. 116; 20 C. W. N. 893; 14 A L. J. 198; (1916) 1 M. W.N. 198; 19 M. L. T. 208; 28 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 521; 3 L. W. 207 (P. C.)

MADRAS HIGH COURT.

SECOND APPEAL No. 989 OF 1920.

October 24, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

VENKATARAMA AIYAR—APPELLANT

versus

PARAMASIVA AIYAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXI, r. 90—Execution of decree—Sale—Collusive decree against judgment debtor notified in sale proclamation—Decree set aside after sale—Suit to set aside sale on ground of fraud and collusion, maintainability of—Remedy, proper.

During the pendency of an execution proceeding when certain property belonging to the judgment-debtor was about to be sold, the latter allowed a collusive decree to be passed against him *ex parte* declaring a prior charge on the property. This decree was notified in the sale proclamation drawn up in the earlier execution proceedings with a rider that the decree-holder objected to the later decree as fraudulent. The notification of the later decree in the sale proclamation deterred possible bidders from coming forward to purchase the property and it was finally knocked down to the judgment debtor's brother at a low price. The judgment-debtor subsequently applied to have the later *ex parte* decree set aside, which was granted and the plaintiffs in that suit allowed the suit to be dismissed. The creditors of the judgment-debtor thereupon brought a suit to set aside the auction sale in favour of the judgment-debtor's brother on the ground of fraud and collusion ;

Held **(1) that there was no fraud in conducting and publishing the sale and that, therefore, the plaintiffs' proper remedy was not by way of an application under O. XXI, r. 90 of the Civil Procedure Code ;**

(2) that the decree in the second suit having been passed and set aside by fraud and collusion the present suit was maintainable and the plaintiffs were entitled to succeed ;

(3) that there must be a re-sale of the property after a proper proclamation.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 99 of 1919, preferred against the decree of the Court of the District Munsif of Chidambaram in Original Suit No. 103 of 1918.

VENKATARAMA AIYAR *v.* PARAMASIVA AIYAR

Mr. *K. V. Krishnaswamy Aiyer*, for the Appellant.

Messrs. *B. Sitarama Rao*, *T. V. Ramanatha Iyer* and *R. Sethurama Sastri*, for the Respondents.

JUDGMENT.—This suit was brought for a declaration that the decree in O. S. No 734 of 1917 on the file of the District Munsif of Chidambaram was null and void and that the sale held in execution of the decree in the Small Cause Suit No. 658 of 1917, was also null and void. The grounds on which this declaration was asked for, were that those concerned in the sale, the judgment-debtor Alamelu and the purchaser, her brother, 3rd defendant, had combined in a fraud, the main element of which was the allowing O.S. No. 734 of 1917 to be brought and decreed collusively, that decree being in force at the time of the Court sale and deterring possible bidders, but being set aside again collusively later, the cloud on the title to the properties sold being thus removed from it in the interests of the 3rd defendant.

The first objection and the objection mainly considered by the lower Courts is that this fraud should have been brought before the Court by a petition under O. XXI r. 90, Sch. 1 of the Code of Civil Procedure for the setting aside of the Court sale on the ground of fraud in publishing or conducting it. We cannot follow this. The fraud alleged was constituted by the collusion which enabled the decree in O. S. No. 734 to be passed and set aside. The publication,—for no separate argument has been addressed to us as regards the conduct of the sale,—consisted for the present purpose in the settlement of the terms of the sale proclamation. In that settlement, we have not been shown that any term was included in the sale proclamation which was not literally in accordance with fact. The proclamation contains a reference to the charge imposed by the decree in O. S. No. 734. It further contains a reference to the objection of the decree-holder (now 1st defendant), at whose instance the proclamation was being issued, to the previous decree as fraudulent. It is difficult to say what more could have been included in the proclamation: and in any case we should be unable to hold that the judgment debtor, the 2nd defendant, has been shown to be responsible for that part of the proclamation. In these circumstances, we agree with the Lower Appellate Court that a petition under O. XXI, R. 90, was not the plaintiffs' proper remedy, and that a suit was open to them.

It is next urged that, even if the fraud alleged in the plaint is established, it will not be a ground on which the sale can be set aside. We postpone discussion of that contention, until we have before us the result of the remand, which we are about to direct in order to obtain a finding of fact as to the fraud, if any, which is proved.

There is, in our opinion, no doubt that there was evidence before the lower Courts on which fraud could be found. It was proved that O. S. No. 734 had been brought against the present 2nd defendant, that a decree had been passed against her property but that it had been set aside on her objection, and that, when the trial on the merits was resumed, the then plaintiffs, now represented by defendants 4 and 5 allowed the suit to be dismissed without adducing any evidence. There was next some evidence, which, if believed, would show that the 2nd defendant and also the plaintiffs in O.S. No 734 had at one time or other admitted to the present plaintiffs the collusive nature of that litigation. It is not necessary to go further into the materials available to support the finding of fact since what has been mentioned affords evidence, on which, if it is believed, such a finding can be based.

There being then a case of fraud for the consideration of the lower Courts, it is urged next that the lower Appellate Court has not considered that case judicially. This argument is based on the insufficiency of the judgment under appeal on this point. That judgment in fact is occupied mainly with the question of the application of O. XXI, r. 90. That may by the case, because the appellant in the lower Appellate Court was the 1st plaintiff and he would primarily be concerned with the only point, on which the District Munsif has decided against him. At the same time, it is not suggested that an attempt was made by the 3rd defendant to support the District Munsif's decree on the facts and to obtain a decision that no fraud has been established. The lower Appellate Court

dealt with the question of fraud in its paragraph 12 and 13 ; but, paragraph 12, except for a statement that there was fraud undoubtedly by the persons who colluded together for a sham decree, is occupied with the distinction between fraud in the publication of the sale and the other description of fraud for which there may be a remedy otherwise than by a petition. In paragraph 13 alone is there any discussion of the question with which we are now dealing. That discussion consists in a reference to the finding of the District Munsif that the 3rd defendant, the auction-purchaser, was a party to the fraud : and the statement of the lower Appellate Court that it is in agreement therewith. There is then a statement that the 3rd defendant was helping the decree-debtor in her litigation and he knew the decree was a fradulent decree. The lower Appellate Court, however, does not seem to have considered whether his helping her would be necessarily conclusive as to his participation in the fraud she might have committed. Lastly, there is an inference drawn that the 3rd defendant was instrumental in getting the decree passed. Here, again, there is nothing referred to, to show that he was an instrument, and that he was conscious of the full implication of what he was doing. There the discussion of the evidence of fraud in fact ends. It is undesirable that we should attempt to carry it further. We will, therefore, observe only that neither the lower Appellate Court nor the District Munsif appears to have recognised the extent to which the absence of evidence of any connection between the plaintiffs in O. S. No. 734 and either the 2nd or the 3rd defendant was material to the argument that collusion, in which all were concerned, had been established.

We may point out further that the District Munsif's finding as to the value of the property sold and the insufficiency of the price realised is too general to be of any use and we can hardly believe that the District Judge, if he had really applied his mind to that portion of the case, would not have been able to reach a more definite conclusion founded on definite reasons.

That being so, we are unable to accept the lower Appellate Court's finding on the question of fraud. We must, therefore, call on it to submit a revised finding on the second issue framed by the District Munsif, "Is the Court-sale vitiated by fraud as alleged by the plaintiffs ?" In dealing with that issue we think it advisable to authorise the lower Appellate Court to exercise the same power with reference to calling for evidence as it would have been able to exercise at the original hearing of the appeal.

Mr. Krishnaswami Aiyar, on behalf of the appellant, has drawn our attention to the fact that the plaintiffs who represented themselves and defendants 6 to 17 and other creditors entitled to share in the rateable distribution were entitled to share in the proceeds of the sale, which the plaintiffs are now attempting to set aside. Mr. Krishnaswami Aiyar tells us that they have in fact taken shares in such proceeds out of Court. On the other side, however, there is no information as to whether this is so. In the circumstances, we must ask the lower Appellate Court to report whether the proceeds of the sale have been taken out of the Court by all or any of the creditors entitled to share in the rateable distribution. If they have done so, the importance of the fact lies in the absence of any offer in the plaint or elsewhere on their part to refund what they have drawn in case they obtained the relief they claimed. It is clear to us that they cannot obtain that relief except on making such an offer : in other words, they cannot have equity, unless they do equity. We refer to the point now, because, if Mr. Sitarama Rao on behalf of the 1st respondent is to maintain the decree he has obtained, he will have to satisfy us regarding it and, unless he can do so, he will have to make some offer to return what has been received, either by amending the plaint or otherwise, which we can accept.

The finding is due in two months and seven days will be allowed for objections.

In compliance with the order contained in the above judgment, the District Judge of South Arcot submitted, along with a letter dated the 6th April 1923, the following.

FINDING : —A certain house belonging to one Alamelu was sold in Court auction on foot of a simple money decree against her obtained in Small Couse Suit No. 658 of 1917. Alamelu's husband had bought the house in 1914 from one Mangalathammal. On the 11th

of October 1917 the terms of the sale proclamation in the Small Cause Suit execution proceedings were settled in open Court and the sale was fixed to take place on the 15th of November 1917. Meanwhile, on the 17th of October six days after the sale proclamation, Mangalathammal's sons filed a suit O. S. No. 734 for a declaration that some of the purchase money had never been paid to her and for an order that this should be a first charge on the house when it came to be sold in Court auction. Alamelu did not appear to defend this suit, and the claimants obtained a decree on the 10th of November five days before the Court sale, and at once applied to the Court that the charge established in their favour by the decree should be notified at the sale. The amount was Rs. 850. This was done, with a rider, however, that the decree-holder in S. C. No. 658 contended that the said charge was illusory. The house was knocked down on 15th November 1917 for Rs. 1,225 and the purchaser was no other than Alamelu's brother by name Venkatarama Ayyar. On the 8th of December Alamelu applied to have the *ex-parte* decree set aside, saying she had no notice of the suit and had a very good defence. The Court before passing orders on her application directed her to file her statement and her documents and this was done on the 21st of December. On 29th January 1918 the *ex parte* decree was set aside after practically no opposition and on 19th February 1918 at the re-hearing of the suit the plaintiffs, Mangalathammal's sons, allowed it to be dismissed.

2. Then there was the suit out of which this appeal and second appeal arise. Alamelu had many creditors who had obtained decrees against her and were entitled to rateable distribution of the proceeds of the sale. Some of them are the plaintiffs. They sued Alamelu and her brother Venkatarama Ayyar and Mangalathammal's sons and the decree-holder in the Small Cause Suit, and they joined as party defendants those remaining creditors of Alamelu who did not join as plaintiffs. The grounds of the suit were that the whole of the proceedings in O. S. No 734 were collusive and fraudulent, merely directed towards the obtaining of a sham decree, and the creating of a sham charge which might be notified at the Court sale so as to cheapen the house, which, though worth Rs. 3,000, was knocked down for Rs. 1,225 and bought by Alamelu's brother in the absence of *bona fide* competition. But relief was claimed on the special ground that the fraud lay in the sale at Court auction where the sham charge was notified. Both in the Court of first instance and in this, the first Appellate Court, it was held that there was no irregularity in publishing or conducting the sale. But while the lower Court dismissed the suit, this Court decreed it and set aside the Court sale holding that it was the means by which the fraud was consummated—a fraud designed to prevent real competition at the Court auction and so enable Alamelu Ammal's brother to buy in the house at a low price.

On Second Appeal the suit has been remanded for a finding on the issue.

"Is the Court sale vitiated by fraud as alleged by the plaintiffs?"

* * * *

I find, therefore, on the remanded issue that the whole proceedings in O. S. No. 734 were collusive and the Court sale was vitiated by fraud inasmuch as the charge then proclaimed to exist on the property was merely the creation of that fraud.

* * * *

In conclusion, therefore, I find that the proclamation of this charge at the time of sale was the result of fraud and collusion, to get the property sold below its value, and that this design succeeded.

This Second Appeal coming on for a final hearing after the return of the finding from the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT:—The finding that the sale is vitiated by fraud is not objected to and we accept it. It is then suggested that as only one creditor has made an offer to restore the money obtained by them, the offer should not be accepted. Inasmuch as the one creditor has undertaken the responsibility of all the creditors, we see no force in the contention.

MATHURABAI *v.* LALSINGH

The Second Appeal is accordingly dismissed and the lower Appellate Court's decree confirmed, and we further order that the re-sale be held subject to the conditions agreed to by the 1st respondent in his memo. dated 31st March 1923, the amount to be charged on the property being the sale price plus the amount paid in discharge of the mortgage. Appellant will pay 1st respondent's costs of this appeal.

V. N. V.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL NO. 146-B OF 1923.

October 25th, 1923.

Present:—Rao Bahadur Kinhede, A. J. C.

Mt. MATHURABAI, DEFENDANT 1—APPELLANT.

versus

LALSINGH AND OTHERS—PLAINTIFF, DEFENDANT 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 100—Question of fact—Finding of lower Appellate Court based on one out of two inference's—Second Appellate Court's power to upset.

The mere fact that a Court of appeal draws one of two possible inferences on a question of fact does not entitle the second Appellate Court to interfere with the finding based upon such inference. It is only when only one legal inference is possible and that has not been drawn that interference is justified [p. 111, col. 2]

Appeal from the decree of the Additional District Judge, East Berar, Amraoti, dated 12th January 1923, in Civil Appeal No. 142 of 1922.

Mr. *M. R. Bobde* for the Appellant.

JUDGMENT:—This appeal seems to be concluded by the concurrent findings of fact arrived at by the Courts below. The plaintiff sues upon the basis of a sale-deed, dated 18th April 1901 for recovery of possession of certain property alleging possession and dispossession by defendant No. 1. The defendants' contention was that the sale deed was bogus and without consideration and that plaintiff and defendant No. 2 or their predecessors were never in possession of the field and that the suit was time barred. Reliance was placed upon the circumstance that at a partition made in 1909 in the family of plaintiff and defendant No. 2 the field in suit was not included in it because it never belonged to them. The first Court framed the following issues:—

1. Whether the sale-deed of 18th April 1901 was executed by defendant 1 and Damayanti under the circumstances alleged in para. 3 of defendant 1's written statement?
2. Is it not a genuine transaction?
3. Whether plaintiff and defendant 2 or their ancestors were in possession of the property in suit within 12 years of the suit?
4. Whether defendant 1 has been in continuous and exclusive and adverse possession of it for over 12 years?
5. Is plaintiff's claim barred by limitation?
6. Whether plaintiff and defendant 2 entered into a partition on 14th June 1921 and did plaintiff get half share in the field in suit by virtue of it?
7. What was the effect of the first partition deed of 1909 on plaintiff's claim?
8. Is defendant 2 estopped from denying title to the field and going back on the partition deed of 1921?
9. Is defendant 1 estopped from setting up a title to the field in suit by reason of having successfully carried out a fraud?

2. The Court of first instance held that the sale-deed was executed by defendant No. 1 but not under circumstances alleged by defendant No. 1; that the sale-deed was not proved to be bogus; that defendant No. 1 was estopped from setting up a title to the field; that in the Record of Rights of 1912 defendant No. 2 was

recorded as owner and that plaintiff and defendant No. 2 were in possession of the field within 12 years of the suit; that the defendant No. 1 failed to prove that he was in continuous, exclusive and adverse possession for over 12 years. The plaintiff was given a decree for joint possession to the extent of half share of the field in suit. Before the Court of the District Judge defendant No. 1 alone appealed. Defendant No. 2 who supported the defence of defendant No. 1 in the first Court was made a co-respondent. The Appellate Court formulated the points for determination and proceeded to decide them and arrived at the following findings. It held that the sale-deed was not bogus and that the claim was not barred by limitation and dismissed the appeal.

In the appeal before me the learned pleader for the appellant contests the finding as to the reality of the sale on the ground that the Courts below did not give ample consideration to the presumption arising from the fact that the sale-deed on which the plaintiff's title is based was produced from the vendor's custody and that, consequently, the view as to the burden of proof taken by the lower Appellate Court was erroneous. A perusal of the judgment under appeal clearly shows that the Court below has not ignored this circumstance. It has been held to have been sufficiently explained by the respondent in view of the evident collusion between the defendants Nos. 1 and 2. The fact that defendant No. 2 has adopted the defence of the defendant No. 1 in this case is, to my mind, the best indication of such collusion. I do not, therefore, see any reason to think that the lower Court's finding is in any way vitiated for the reasons alleged by the appellant. This disposes of grounds 1 to 3.

The point raised in ground No. 4, namely, the omission to include the field in suit in the partition of 1909, is amply met by the remarks in paragraph 2 of the lower Appellate Court's judgment that it was possible that it was kept joint and not divided at the partition. I think this inference of the Court was correct. Even if the Court below had drawn the inference that it was omitted from the partition because it did not belong to the parties, that inference also was possible and I would have been precluded from interfering with it. The mere fact that a Court of appeal draws one of two possible inferences on a question of fact does not entitle the second appellate Court to interfere with the finding based upon such inference. It is only when only one legal inference is possible and that has not been drawn that the second appellate Court might interfere, but it is not the case here : Cf. *Rajaram* v. *Ganesh Hari Karkhanis* (1). This disposes of grounds 4 and 5.

As regards the questions raised in grounds 6 and 7, suffice it to say that even some of the documents filed by defendants do prove possession of vendee or his successors in title. I am not prepared to accede to the argument that the entry in the Record of Rights of the year 1912 was made without reference to the fact of possession as urged by the appellant. The continuity of possession of the vendor, if any, was broken by this entry which I presume was based upon previous possession of the vendee, and the defendant No. 1 could not be said to have acquired any title by adverse possession to the property in suit. There is a finding of fact that the property in suit was in the possession of vendee within 12 years of the date of institution of the suit. In view of this finding there is no force in the question of limitation raised in ground No. 8. The appeal is, therefore, dismissed without notice to the respondents. Costs will be borne by the appellant.

G. R. D. *Appeal dismissed.*

(1) 21 B. 91 ; 11 Ind. Dec. (N. S.) 63.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 540 OF 1923.

May 8, 1923.

Present :—Mr. Justice Campbell.

HIRA SINGH, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PUNJAB SINGH—DEFENDANT—RESPONDENT.

Adverse possession—Co-sharers—Overt act—Registration Act (XVI of 1908), s. 17 (1) (a)—Deed of surrender without consideration, nature of—Registration, whether necessary.

HIRA SINGH *v.* PUNJAB SINGH

A document whereby rights in immoveable property are surrendered without any consideration is in effect a deed of gift which requires registration under section 17 (1) (a) of the Registration Act. [p. 114, col. 2]

The possession of one co-sharer is ordinarily the possession of all co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone. This adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession. [p. 115 col. 1]

Akbar v. *Tabu*, 22 Ind cas. 805 ; 45 P. R. 1914 ; 105 P. L. R. 1914 ; 61 P. W. R. 1914, followed.

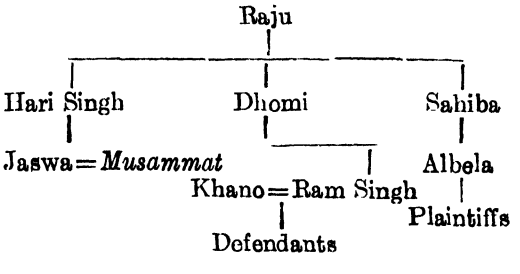
Second appeal from the decree of the District Judge, Ambala, dated the 14th November 1922, affirming that of the Munsif, 1st Class, Ambala, dated the 11th March 1922, and dismissing the plaintiff's suit with costs in his Court.

Mr. *K. J. Rustomji*, for the Appellants.

Mr. *Devi Dyal*, for the Respondent.

JUDGMENT.—The plaintiffs, Hira Singh and Mangal Singh, sued for possession of one-fourth share in a holding of 13 *bighas*, 6 *biswas*. Their suit was dismissed by the trial Court, and the decision was upheld in appeal by the District Judge.

The following pedigree-table illustrates the situation :—



The estate in question was recorded in 1852 as held by Jaswa and Ram Singh in equal shares. When Ram Singh died, his widow *Musammat* Kahno married Jaswa, but there was no issue of this second marriage. After Jaswa died the estate was recorded as owned half by the defendants and half by *Musammat* Kahno as widow of Jaswa. *Musammat* Kahno died on the 24th December 1895, and then apparently the plaintiffs claimed to succeed to half of Jaswa's estate, but on the 22nd May 1896 they executed a document by which they surrendered their rights in favour of the defendants on the ground that the latter were the sons of *Musammat* Kahno. On the 10th of July 1896 mutation of one-fourth share in the joint holding was sanctioned in favour of the plaintiffs, and the plaintiffs have continued to be shown as owners of that share ever since. In 1897, however, the defendants got a mutation entered up for the removal of plaintiffs' names, and sanction was refused on the 25th of December 1897. In connection with this mutation it was held by the learned District Judge that the defendants formally asserted their ownership of the whole land before the Revenue Officer and in the presence of the plaintiffs.

The findings of the learned District Judge are as follows :—The plaintiffs held 'possession, or at least contructive possession, as share-holders from the death of *Musammat* Kahno up to the date of execution of the document of the 22nd May 1896. This document was a valid agreement admissible in evidence and extinguished the plaintiffs' claim to inherit a share in the estate in suit. Nevertheless, mutation was made in the plaintiffs' favour but they were never in actual cultivating possession of any portion of the holding. On several occasions they paid to Government the land revenue of the land, although the defendants never at any time paid them any rent. In 1897 the defendants made the formal assertion already referred to.

The plaintiffs have come to this Court on second appeal. It is urged, in the first place, that the document of the 22nd May 1896 was not admissible in evidence since it was not registered and registration was compulsory. I agree with this contention. I have seen the document and, according to its terms, there was no consideration received by the plaintiffs, and the deed was in effect a deed of gift which, under section 17 (1) (a) of the Indian Registration Act, required registration.

Secondly, it is urged that since there is a finding that the plaintiffs paid land revenue, the defendants cannot claim to have been in adverse possession. In regard to this, no dates are given by the learned District Judge on which payments of land revenue were made, but the sums were exceedingly small, Rs. 1-8-11 on each occasion, and even if pay

ments were made, there appears to be no evidence of the circumstances in which they were made. It is not shown that the defendants were aware of the payments or that they acquiesced in their being made.

The suit was instituted on the 16th of April 1917. It has been laid down in *Akbar* v. *Tabu* (1) that "the possession of one co-sharer is ordinarily the possession of all the co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone. This adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession."

In the present case the defendants, according to the finding of the learned District Judge, by an overt act showed unequivocally to the plaintiffs in 1897 that they intended to hold for themselves alone. The Refusal of the revenue Officer to sanction mutation cannot affect that declaration, and there being no details available of how the payments of land revenue by the plaintiffs came to be made these cannot be construed to be more than mere affirmations by the plaintiffs that they were co-sharers. They did not, within limitation, take any effectual step to assert their rights, and in my opinion their suit is clearly barred by time and was rightly dismissed.

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

Z. K. *Appeal dismissed.*

(1) 22 Ind. Cas. 805; 45 P. R. 1914: 105 P. L. R. 1914; 61 P. W. R. 1914.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1024 OF 1922.

January 21, 1924.

Present :—Mr. Justice Stuart.

LALMAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FAZAL MUHAMMAD KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P Land Revenue Act (III of 1901) ss. 40, 57—Entry in Revenue Record, correction of—Possession, basis of—Title, question of—Plot entered as Sir—Entry, whether open to disproof.

Under section 40 of the U. P. Land Revenue Act where the Revenue authorities can find that a certain person is in possession the entry must be made on the basis of possession and the question can be re-opened on a basis of title in either a Civil or a Revenue Court. [p. 117, col. 1]

Where land has been recorded as *sir* at the last Settlement and has been continuously so recorded since, the correctness of the entry is open to disproof under section 57 of the U. P. Land Revenue Act [p. 116, col. 1]

Second appeal against the decree of the District Judge of Shahjahanpur, dated the 7th April 1922.

Mr. *Harnandan Prasad*, for the Appellants.

Mr. *Durga Prasad*, for the Respondents.

JUDGMENT.—This appeal is concerned with the title to a plot of land 1.38 acres in area bearing a rent of Rs. 25. It raises points of difficulty. This much appears to be clear. Bazmir Khan, the father of Fazal Muhammad Khan, defendant-respondent, sold at some time prior to 1895 a one-third share in the village of Udaipur Bhura, Shahjahanpur district, to Khub Chand, the father of Lalman, plaintiff-appellant. In this share was a field which was formerly numbered $\frac{558}{1}$. The number was changed to 613 at some time prior to 1895. This has been subsequently sub-divided into two numbers $\frac{613}{1}$ and $\frac{613}{2}$ and is the plot of 1 and area 1. 38 acres which is now in dispute. In 1825 there was a partition in the village and on a finding of the learned District Judge this No. 613 was at the time of the partition allotted to Bazmir Khan. Although Bazmir Khan had sold a portion of his *zemindary* he had retained the remainder and his son Fazal Muhammad Khan is still a *zemindar* in the village and is also the lambardar. The real

difficulty in this case is to decide whether this No. 613 passed from Bazmir Khan to Khub Chand. There can be no presumptions in the matter. It may have passed or it may not have passed. The entries in the papers although affording information are never likely to afford absolutely reliable information, in matters such as these. There is evidence which the learned District Judge has accepted as correct that in the partition of 1895 No. 613 was handed over to Bazmir Khan. This evidence is contained in a certified copy, Ex. B., of a portion of the partition proceedings but it would appear, though I am not quite clear on the point, that the whole partition record was before the Assistant Collector and before the learned District Judge. It is, however, to be noted that this entry which clearly declares that No. 613 was left with Bazmir Khan with the consent of Lalman, Khub Chand then being dead, states the area of No. 613 as '85 of an acre instead of as it is 1.38. There can, however, be no doubt as to the fact that this entry affords evidence on which a Judge could arrive at a finding of fact.

It appears that in the Settlement of 1897-98 No. 613 was recorded as Lalman's *sir*. Bazmir Khan applied in 1903 to the Assistant Collector to alter that entry and to enter the number as in his possession as *sir*. That application was made under section 40 of Local Act III of 1901. The Assistant Collector refused to alter the entry. He based his decision upon a Kanungo's report. He heard no evidence on the subject. It must be noted that under section 40 decision must be made on the point of possession if that point can be decided. The Kanungo found that Lalman was in possession. It is true he went into a point which was unnecessary for decision that Lalman was also entitled to the number. Reading section 40 it will, however appear that where the Revenue authorities can find, as they found here, that a certain person is in possession the entry must be made on the basis of possession and the question can be re-opened upon a basis of title in either a Civil or a Revenue Court. Bazmir Khan appealed to the Collector who upheld the Assistant Collector's order. The Collector's order was, however, no more than a decision as to possession.

Although the order was that Lalman was in possession and Bazmir Khan was not in possession the plaintiffs' allegation is that Bazmir Khan and after him his son Fazal Muhammad Khan has remained in possession, for the present suit is a suit under section 58 of Local Act II of 1901 for the ejectment of Fazal Muhammad Khan from this field on the finding that he is a tenant without occupancy rights. Now, it appears that the actual cultivator is a man called Munna. Fazal Muhammad Khan contested on the ground that he was actually the proprietor of the plot. Munna stated that he held the land from Fazal Muhammad Khan. The Assistant Collector decided upon the basis of the entries in the Settlement and the orders of 1903 that the plaintiff was the proprietor and that there was a tenancy between him and Fazal Muhammad Khan. So he ordered the ejectment of both defendants. The learned District Judge has found on the merits that Fazal Muhammad Khan is the proprietor of the plot. I have no doubt as to the point that, if the question was open to the learned District Judge for decision, his finding is a finding of fact which cannot be disturbed in second appeal. He further found that no relationship of landlord and tenant existed between the plaintiffs and Fazal Muhammad Khan. The latter finding is also a finding of fact. The point argued before me on behalf of the plaintiffs-appellants is that it was not open to the District Judge to arrive at any such finding and section 44, Local Act III of 1901 is relied on in this connection. Section 44 lays down that certain decisions under sections 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject-matter of the dispute. But there has been no decision under sections 40, 41 and 42 in reference to the property in dispute. It is further argued that the decisions of 1903 operate as *res judicata*. Under the provisions of section 40 they cannot operate as *res judicata* to prevent the Judge arriving at the conclusion at which he did, for they clearly refer only to possession in 1903 a matter with which we are not concerned in the present case. I find that it was open to the learned District Judge to arrive at the finding at which he did, that he was not precluded either by the provisions of the Revenue

or the Rent Acts or by the law of *res judicata* from arriving at that finding and the finding is one which cannot be disturbed in second appeal. It is really a question of fact as to who succeeded to the plot. The entry in the Settlement to the effect that the plot is Lalman's *Sir* is not binding in any way. I agree with the views taken by the Board of Revenue in *Mahesh Prasad* v. *Lala Radhika Prasad* (1) and *Pem Raj* v. *Ram Kishen* (2), that where land has been recorded as *Sir* at the last Settlement and has been continuously so recorded since, the correctness of the entry of the land as *Sir* at the Settlement is, under section 57, Act III of 1901, open to disproof.

I accordingly dismiss this appeal with costs on the higher scale.

Z. K. *Appeal dismissed.*

(1) Sel Dec. No. 17 of 1912.
(2) Sel Dec. No. 9 of 1913.

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPEAL NO. 100 OF 1923.

January 22, 1924.

Present :—Sir Lancelot Sanderson, Kt., K. C., Chief Justice, and Justice Sir Thomas Richardson, Kt.

HARI NARAYAN DE—PETITIONER

versus

HARI BHUSAN DE, AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908) s. 109, O. XLI, r. 23—Suit dismissed on preliminary point—Remand for further hearing—Order, whether final—Leave to Appeal to Privy Council.

A suit for the removal of the defendant from the office of *Shebait* and for an account of his dealings with the trust funds was dismissed by the trial Court on the ground that the plaintiffs had no *locus standi* to sue. On appeal, the High Court, holding that the plaintiffs had a *prima facie* interest in the subject-matter of the suit, remanded the case for further hearing :

***Held*, (1) that the order of the High Court was of a merely interlocutory character, no final decision having been arrived at as to the relative position of the parties or as to the liability of the defendant to render accounts to the plaintiffs ;**

(2) that the order was not, therefore, a final order within the meaning of section 109 of the Civil Procedure Code.

Application for leave to appeal to His Majesty in Council against the judgment and order of the High Court in Appeal from Original Decree No 161 of 1921, dated 20th June, 1923.

Babu *Hemendra Chandra Sen*, for the Petitioner.

Dr. *Dwarka Nath Mitra* and Babu *Debendra Nath Mandal*, for the Opposite party.

JUDGMENT.

Richardson, J.—This is an application on behalf of the defendant in the suit for leave to appeal to His Majesty in Council against the judgment and order of the High Court, dated the 20th June 1923, and the question is whether the order is or is not a final order within the meaning of section 109 of the Code of Civil Procedure.

The plaintiffs and the principal defendant are brothers. The latter, the eldest brother, is the Shebait of certain *debutter* properties. The plaintiffs make certain charges against him and seek to remove him from his office and to force him to account for his dealings with the trust funds.

The learned Subordinate Judge in the trial Court dismissed the suit not on the merits, but on the preliminary point that the plaintiffs have no *locus standi* to sue. The High Court reversed the decree of dismissal and remanded the suit for further hearing.

The order of the High Court appears to be a mere order of remand made under Order XLI, rule XXIII of the Code of Civil Procedure, and, if, so, it is an order of an interlocutory and not of a final character. It is said that the learned Judges of this Court have finally decided that the plaintiffs have a *locus standi* to sue, but, as I understand the judgment, all that the learned Judges have decided is that the plaintiffs have *prima facie*

sufficient interest to entitle them to an investigation or a fuller investigation of the case which they make, and that the facts have not been sufficiently ascertained to justify the dismissal of the suit on the preliminary point of *locus standi*, whatever may be the precise meaning of that expression.

So far as I can see, no final decision has as yet been arrived at as to the relative position of the principal parties or as to the liability of the defendant to render accounts to the plaintiffs. In my opinion the application should be refused with costs, 5 gold mohurs.

Sanderson, C. J. I agree.

Z. K. *Application refused.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 386-B OF 1921.

October 29, 1923.

Present:—Mr. Prideaux, A. J. C.

HEMRAJ—APPELLANT

versus

SURYABHAN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res Judicata—Mortgage suit—Paramount title—Failure to plead, effect of.

If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor, he is not bound to set it up by way of defence to the mortgage suit and his omission to do so will not, therefore, render this question of his title *res judicata* against him.

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 7 of 1921, dated the 25th July 1921.

Mr. *A. V. Khare*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—In this case the plaintiff's story is that field No. 7 of Mouza Nagalwadi belonged to Punjaji who had acquired the said field after a partition between himself and his brother Ramji had taken place. Punjaji is the father of plaintiff No. 1. Ramji's widow Mt. Bawalai mortgaged half the field to the defendant and the defendant took symbolical possession in 1917 of it through Court. Plaintiffs ask for a declaration that the field belongs to them and for an injunction preventing the defendants from interfering with their possession. Both the Courts below have decreed the plaintiff's claim.

It so happened that Bawalai who was sued by the plaintiff on her mortgage-deed died during the pendency of the suit, and the reversioners as her legal representatives were brought on record. Among them was the first plaintiff. It is contended that as the decree was passed against him in that suit, the question between him and the plaintiff as regards the ownership of the half field is *res judicata*. Now, it seems to me that there are two cases of this Court which conclude the matter, *viz*, *Hanuman Singh* v. *Manulal*(1) and *Laxmi Narayan Ram Narayan* v. *Vithoba*. (2) There it is enunciated that if a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor he is not bound to set up such a title by way of defence to the mortgage suit, and his omission to do so will not, therefore, render the question of his title *res judicata* against him.

For this reason I dismiss the appeal with costs. The appellant will bear the respondents' costs.

G. R. D. *Appeal dismissed.*

(1) 8 Ind. Cas. 1121 ; 6 N. L. R. 156.
(2) 52 Ind. Cas. 82 ; 15 N. L. R 114 (F. B.)

MADRAS HIGH COURT.

CIVIL APPEAL No. 74 OF 1923.

October 19, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

VELLORA KARUPPAN VETTIL CHIYANCHERI CHATHUKUTTY NAIR
PLAINTIFF—APPELLANT

versus

KALLUR VENGAYIL CHATHUKUTTI NAIR AND OTHERS—(DEFENDANTS—RESPONDENTS 1 TO 7.

Court-Fees Act (VII of 1870), s 7 (iv) (c)—Suit for cancellation of **Samudayam** *deed and for injunction*

VELLORA KARUPPAN VETTIL *v.* KALLUR VENGAYIL

and accounts—Plaintiff not party to deed—Valuation —Suit for removal of several trustees—Removal of each trustee, whether separate relief.

A suit praying for the cancellation of a *Samudayam* deed to which the plaintiff is not a party is in substance a suit for a declaration that the deed is not binding on the *Devaswom* and if an injunction and accounts are also asked as reliefs consequential on such a declaration the suit comes under s. 7, cl. IV (c) of the Court-Fees Act (VII of 1870), and the recently added proviso to the section does not affect the case, inasmuch as the *Samudayam* deed does not create any charge on immoveable property. In such a case the plaintiff is entitled to place his own valuation on the reliefs claimed but the valuation must be the same for purposes of Court-fee and jurisdiction.

A suit for the removal of several trustees on the ground of their having executed an illegal document on behalf of the *Devaswom* is governed by Art. 17 (B) of Schedule II of the Court-Fees Act, as amended by Madras Act X of 1922, but the removal of each trustee is not a separate relief and only one fee of Rs. 100 is leviable since the ground for removal, namely, the execution of the deed, is the same in the case of each and the removal of each is not a separate relief.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry, in O. S. No. 33 of 1922, dated the 5th January 1923.

The Advocate-General (Mr. *C. Madhavan Nair*) and Mr. *T. S. Viswanatha Iyer*, for the Appellant.

Messrs. *C. V. Anantha Krishna Aiyar* and *V. P. Karunakaran Nambiyar*, for the Respondents.

JUDGMENT.—This appeal relates to a question of Court-fees on the plaint. The Sub-Judge has found that the first relief prayed for is the cancellation of the plaint *Samudayam* deed, but in this he is clearly wrong, for plaintiff is not a party to the deed and merely wants a declaration that the deed is not binding on the *Devaswom*. For authority we may refer to *Unni* v. *Kunchiamma* (1), *Ramaswamy Nadan* v. *Subramania Nadan* (2) *Chappan* v. *Paru* (3) and respondents' Vakil does not seriously dispute this conclusion.

Plaintiff also asks for an injunction and accounts as reliefs consequential on this declaration.

His suit in respect of these reliefs comes under section 7, iv, (c), The Court-Fees Act, 1870, and the recently added proviso to the section does not affect the case, for we are satisfied that the *Samudayam* deed does not create any charge on immoveable property. Plaintiff is entitled to place his own valuation on these reliefs which he has done, but he has made the mistake of giving one value for purposes of jurisdiction and another value for Court fee valuation and this must be corrected. Further reliefs asked in the plaint are the removal of eight trustees and a declaration that 13th defendant is unfit to succeed his *Karnavan* as trustee. Art. 17 B. of Schedule II of the Court-Fees Act, as amended (Act V of 1922) is applicable to the former relief but we think that the Sub-judge was wrong in asking for a separate fee of Rs. 100 for each of the 8 trustees, for the ground for removal is the same in the case of each, *i.e.*, the execution of the *Samudayam* deed, and we do not think that the removal of each trustee can be treated as a separate relief. The declaration in respect to 13th defendant and appointment of plaintiff comes under Art. 17-B. also and the fee is Rs. 100. Plaintiff is, therefore, liable to pay two separate fees of Rs. 100 each and an *ad valorem* fee on the declared value of the first declaration above-mentioned and the consequental reliefs. Plaintiff's valuation of Rs. 185 may be accepted.

As regards the valuation of the relief in regard to the trustees we think that plaintiff should retain the original value of his suit for purposes of jurisdiction and, therefore, the value of the two reliefs combined must be taken as Rs. 9,815.

The costs of this appeal will be the costs in the suit. Plaintiff will, therefore, be allowed to amend his valuation in the plaint as ordered above, and the suit will be remanded for disposal according to law. The stamp on this Memo. of Appeal will be refunded.

The balance of fee due on the plaint must be paid within one week of receipt of records in the lower Court.

Suit remanded.

V. N. V.
S. D.

(1) 14 M. 26 ; 5 Ind. Dec. (N. S.) 19.
(2) 40 Ind. Cas. 620 ; 32 M. L. J. 447.
(3) 15 Ind. Cas. 587 ; 37 M. 420 ; 13 M. L. T. 118.

JAMES RALPH FREER *v.* H. A. JOHNSON

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 416 of 1922.

October 19, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

JAMES RALPH FREER—PLAINTIFF—APPELLANT—

versus

H. A. JOHNSON—DEFENDANT-RESPONDENT.

Divorce Cases—Damages—Assessment—Principles.

The damages in divorce cases are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife—whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the Judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife, or on her children, or otherwise dealt with in the discretion of the Court, on now well established principles. [p. 121, Cal. 1.]

Appeal against the decree of the District Court of Trichinopoly, dated 30th March 1922, in O. S. No. 1 of 1920.

Messrs. *V. V. Srinivasa Iyengar* and *T. Krishnaswamy Aiyengar*, for the Appellant.

The Respondent was unrepresented.

JUDGMENT.

The Chief Justice.—In this Divorce case the petitioner and the co-respondent are both engine-drivers. The tiral Judge has found the respondent guilty of adultery on the evidence of her having given birth to a child over a year after leaving the petitioner, and granted a decree of divorce. He has exonerated the co-respondent from the charges of adultery brought against him and dismissed him from the suit with costs. The petitioner asks that the decree be confirmed and appeals against the exoneration of the co-respondent and asks for damages and costs against him. There was a considerable body of evidence against the co-respondent on which the trial Judge refused to act, although he did in the course of his judgment say that in course of time the intimacy between the respondent and the co-respondent appeared to have overstepped the bounds of decency. There was fairly direct evidence of adultery given by the petitioner's mother and son, and this the Judge definitely disbelieved though, in my view, on inadequate grounds. There was also a considerable body of other evidence directed to show inclination to find opportunity for adultery,—acts of familiarity between the two, circumstances under which they were alone together when adultery may have taken place, constant association between the two, meetings arranged at out-of-the way places, and the like. To this must be added the admitted fact that the respondent gave birth to an illegitimate child, and no evidence or suggestion of any other person being the father was given, and the somewhat curious denials given on oath by the respondent and the co-respondent themselves. She gave no denial in examination-in-chief, but in answer to the co-respondent said :

> " The co-respondent had nothing to do with me sexually. I have my own resources and live on them : "

and he said

> " I never did anything to make the respondent misbehave or leave her husband," *and* " I had no indecent relationship with the respondent when she was at Madura,"

and nothing else on the subject. Now, it was definitely alleged that they had for some time been living together in the co-respondent's house. His answer was that his sister and others were living there and that the respondent was a friend of the sister ; but no evidence was called to corroborate this. Indeed, the respondent devoted attention mainly to proving ill-treatment by the petitioner, and neither seems to have taken much trouble to disprove the adultery alleged. It is possible that this was partly due to expressions that fell from the Judge indicating that he was not satisfied with the petitioner's case. On the evidence there was an overwhelming case against the co-respondent and, loth as I am to disagree with the trial Judge's findings of fact, the reasons he gives for disbelieving the evidence are so unconvincing, that I think we must reverse his decision and find the co-respondent guilty.

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There remains the question of damages. The damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife—whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the Judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife or on her children, or otherwise dealt with in the discretion of the Court, on now well established principles.

In this case I doubt if the petitioner has lost anything by the act of the co-respondent. The home was clearly an unhappy one owing to the incompatibility between the wife and the husband and the husband's mother, The wife took little or no part in looking after the petitioner's house or his comfort; and he derived little pleasure from her society. She left him long before he commenced proceedings, and it is not proved that the co-respondent in any way persuaded her thereto. She was of easy virtue and of a gregarious and pleasure-loving disposition. There were no children of the marrige to be provided for or the burden of whose up-bringing has been left to the deserted husband. The husband has no doubt been put to some expense in having his marriage dissolved. I do not accept his statement that he has injured his prospects with his Railway Campany owing to the co-respondent's association with his wife, and I can find no other elememt of damages present. He will get his costs here and below and Rs 100, to cover any loss he has suffered.

The decree is confirmed as regards divorce, but varied by finding the co-respondent guilty of adultery with the respondent. The appeal will be allowed with costs here and below against the co-respondent. The costs of the co-respondent, if paid, must be returned and the co-respondent must pay Rs. 100 as damages, such damages to be paid to the petitioner.

Coutts-Trotter, J.—I agree and have nothing to add.

Ramesam, J.—I agree.

V. N. V. *Decree confirmed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 146 OF 1923.

January 10, 1924.

Present:—Mr. Daniels, J. C.

DAULA AND OTHERS—DEFENDANTS—APPLICANTS

versus

DWARKA PAL AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit—Formal defect—Failure to give evidence—Discretion of Court—Revision.

Where an order under O. XXIII, r. 1 of the Civil Procedure Code is passed without the conditions laid down in the rule being complied with, the order is without jurisdiction and may be made the subject of revision. [p. 122, col. 2.]

Kali Prasanna Sil v. *Panchanan Nandi Chowdhry*, 88 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489; 20 C. W. N. 1000; *Mirza Muhammad Askari* v. *Lalu*, 45 Ind. Cas. 594; 21 O. C. 68 relied on.

Where, however, the Trial Court has exercised a judicial discretion in allowing the suit to be withdrawn, the High Court will not interfere in revision. The Trial Court cannot be said to have exercised a judicial discretion where it has misunderstood the nature of the conditions laid down in O. XXIII, r. 1 of the Civil Procedure Code. [p. 122, Col. 2.]

The failure of a plaintiff to adduce evidence to identify the property in dispute as belonging to himself is not a "formal defect" within the meaning of O. XXIII, r. 1 of the Civil Procedure Code, so as to justify the Court in granting leave to withdraw the suit with liberty to bring a fresh suit. [p. 122, col. 2].

Application against an order of the Munsif, Utranla, dated the 13th July, 1923.

Mr. *M. Ayulu*, for the Applicants.

Mr. *Hari Govind Dayal*, for the Opposite party.

JUDGMENT.—This is an application in revision against an order of the Munsif, Utranla, permitting the plaintiffs to withdraw

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their suit under O. XXIII, r. 1 on account of an alleged formal defect with permission to bring a fresh suit. The suit was one for the possession of four plots of land. The plots of land are described in detail in the plaint, both the present Survey numbers and the former Settlement numbers alleged to correspond to them being given. The plaintiffs also filed with their plaint a map showing exactly the position of the land which they claimed. The parties entered into evidence and a Commissioner was appointed by the Court to prepare a map on the spot and determine by measurement whether the disputed area formed a part of the plaintiffs' land or the defendants. The Commissioner reported that, according to the recent Survey, the land in dispute clearly formed part of the defendants' fields. He went on to say that there was some difference between the recent Survey and the Settlement map of 1900 and that, according to that map, that part of the disputed area which was now included in plot No. 844 corresponded to old No. 1067 which belonged to the plaintiffs. There was some difference also as regards the remaining numbers but the Settlement map shown to him by the plaintiffs was too torn and old to enable him to draw a correct map of the plots in accordance with it. The evidence on both sides was concluded. Arguments were heard and the learned Munsif was prepared to write his judgment. Apparently he found some difficulty in deciding on the evidence to which party the land really belonged, and he thereupon called up the pleaders of the parties and asked the plaintiffs' pleader to explain the difficulty. The plaintiff's pleader was unable to do so but, instead, filed an application stating that there was some "legal defect" on account of which the suit must fail, namely, that a mistake had occured in the specification of numbers and, therefore, even on taking out the decree the plaintiff will be unable to take execution. The learned Munsif accepted this application and passed an order allowing a withdrawal with liberty to bring a fresh suit.

It is quite clear from a perusal of the record that there was no formal defect of the kind contemplated by O. XXIII, r. 1. The only defect that can be suggested is that the plaintiffs have failed to give sufficient evidence to identify the land in dispute with the plots which they claim as their own. There was no doubt whatever in the mind of the Commissioner appointed by the Court as to what the area in dispute actually was. The only difficulty he found arose from the difference between the two maps and the imperfection of the map produced by the plaintiffs. This difficulty might have been removed by procuring a more complete copy of the Settlement map. It is well established that, if an order under O. XXIII, r. 1, is passed without the conditions required by the section being complied with, the order is without jurisdiction and may be made the subject of revision. I need only refer to *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1). *Mirza Muhammad Askari* v. *Lalu* (2). The respondents have referred me to cerain cases in which it was quite rightly held that, where a Court below has exercised a judicial discretion, the High Court will not interfere in revision. Here, it appears to me, the learned Munsif has misunderstood the nature of the term 'formal defect' used in O. XIII, r. 1, and that the real ground on which withdrawal was sought for was that the evidence was not sufficient to identify the land in dispute with the plots belonging to the plaintiffs. I, therefore, set aside the order of the Court below and direct the learned Munsif to restore the suit to his file and dispose of it accordingly to law. The applicants will have their costs of this application. Other costs will abide the result.

Z. K. *Order set aside.*

(1) 33 Ind. Cas. 670 ; 44 C. 867 ; 23 C. L. J. 489. 20 C. W. N. 1000.
(2) 45 Ind. Cas. 594 ; 21 O. C. 68

LAHORE HIGH COURT.

CIVIL APPEAL NO. 619 OF 1923.

January 15, 1924.

Present:—Mr. Justice Campbell.

RICHPAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MULA—PLAINTIFF—RESPONDENT.

Punjab Custom (Power to Contest) Act (II of 1920), ss. 5, 6, applicability of—Suit for possession by heirs, resisted by appointed heir—Appointment of heir by female.

Section 6 of the Punjab Custom (Power to Contest) Act deals only with the case of an allegation that the appointment of an heir is contrary to custom, it has no application to a case where the plaintiff sues for possession as heir and is resisted by the defendant on the ground that he is an appointed heir. The Act has no application to the case of an appointment of an heir by a female.

Appeal under section 41 of Act XI of 1918, against the decree of the District Judge of Karnal, dated the 20th December 1922.

Mr. *Jagan Nath*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—Ground of appeal No. 3 in which it was contended that the lower Appellate Court erred in allowing additional evidence to be produced is not now pressed, and the only point for decision is whether the plaintiffs were debarred from suing by section 6 of Punjab Act II of 1920.

The suit concerned the land of one Ballu, deceased. Ballu's great-great-great-grand-father was Parlu and the parties to the suit are other descendants of Parlu. After the death of Ballu's widow, Mst. Jiwni, the land was mutated in the name of Richpal, defendant No. 1. The plaintiffs came into Court asserting themselves to be reversionary heirs and saying that the mutation in favour of Richpal was wrong; that Richpal claimed to have been adopted by Mst. Jiwni, widow of Ballu; that in fact he was not so adopted, and that Mst. Jiwni had no power to adopt a son. Richpal pleaded that he was adopted by

Ballu before his death and both the Courts below concurred in holding that Richpal had not been adopted by Ballu.

The lower Appellate Court considered the question of whether section 6 of Act II of 1920 barred the suit and decided that it did not, because the section deals only with the case of an allegation that the appointment of an heir is contrary to custom, whereas the plaintiffs had sued for possession, as heirs, and were resisted by Richpal on the ground that he was an appointed heir. An additional reason might have been given, namely, that under section 5 of the Act nothing in the Act is to apply to any appointment of an heir by a female, and, if this suit was one by collaterals to contest the appointment of an heir, on the ground that the appointment was contrary to custom, it manifestly was a suit to contest the appointment of an heir by a female.

There is no force in this appeal and it is dismisssed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 157 OF 1923.

January 3, 1924.

Present:—Mr. Wazir Hassan, A. J. C.

KHWAJA KARAMAT ALI—PLAINTIFF—APPLICANT

versus

HARDUWAR PANDE—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal of suit for default—Restoration—Sufficient cause.

KARAMA'T ALI *v.* HARDUWAR PANDE

On a suit being called on for hearing the clerk of the plaintiffs' pleader went to call the latter from the Bar-room. Before the pleader could reach the Court-room the suit was dismissed in default;

***Held*, (1) that the Court had acted in a precipitate manner in dismissing the suit without waiting for the plaintiff's pleader;**

(2) that there was sufficient cause for the restoration of the suit.

Application against the order of the Sub-Judge, Gonda, acting as Small Cause Court Judge, dated the 28th July 1923.

Mr. *E. R. Kidwai*, for the Applicant.

Mr. *S. N. Roy*, for the Opposite party.

ORDER.—This is an application under section 25 of the Provincial Small Cause Courts Act. I must say that the order against which this application is lodged is startling. The applicant was the plaintiff in a suit pending in the Court of the Subordinate Judge of Gonda exercising jurisdiction as a Small Cause Court. On the date of hearing of the suit, that is, the 28th May 1923, the plaintiff was absent but the defendant was present. The defendant denied the claim. The suit was consequently dismissed. From the 1st June to the 1st July 1923, both days inclusive, the Civil Courts in Oudh were closed for the annual vacation. On the 2nd July 1923 the plaintiff made an application, which is one of very ordinary nature and certainly an application necessitated by the circumstances of this case, for the restoration of his suit. The ground upon which he prayed for restoration was stated to be that, at the time when the case was called up for hearing, the clerk of the pleader whom the plaintiff had engaged in the case, and was in attendance in the Court-room, went to fetch the said pleader who was sitting at the precise moment when the case was called up in the rooms of the Bar Association. These facts are admitted before me as they were admitted in the Court below. Unfortunately, however, the case was disposed of before the pleader could enter the Court-room. The application for restoration has also been rejected and the application before me is intended to get the order passed by the Court below on the application for restoration reversed; in other words, the object of this application is to seek nothing more and nothing less than the hearing of the case which the plaintiff had instituted in a Court of Justice and which, unfortunately for him, was dismissed in his default without any inquiry into the merits of his claim.

The learned Judge has expressed himself strongly in support of the view which he has taken. I fail to see any cause for the warmth which he has displayed in his judgment under consideration. The matter was one of very ordinary character and, to my mind, the reason given in the application for restoration was sufficient and should have been accepted as such by the learned Judge of the Court below. The attitude taken by him in the present case is certainly founded on the laudable object of expediting the work of his Court but I am afraid the manner in which he has tried to attain that object is calculated more to impede the work than to facilitate it. A little spirit of compromise and mutual good will go a long way towards doing justice and also towards expedition of work.

I set aside the order dated the 28th July 1923 and direct that the plaintiff's suit be restored to its original number in the register of suits and disposed of according to law. No order is made as to the costs of this application.

Z. K. *Application allowed.*

DELARUDDIN HALDAR *v.* DEOLAR BUN MOLLA

CALCUTTA HIGH COURT.

CIVIL RULE No. 948 OF 1923.

January 16, 1924.

Present:—Mr. Justice Suhrawardy.

DELARUDDIN HALDAR AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

DEOLAR BUN MOLLA—DEFENDANT — OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Adjournment costs—Rejection of application for non-payment, whether valid.

An application for adjournment granted with a direction to pay costs ought not to be rejected because of the applicant's failure to pay the costs fixed by the Court on the day the order was made. The party should be given sufficient time and opportunity to produce the money as litigants are not expected to come to Court with sufficient money to meet all unforeseen contingencies.

Application under section 52 of the Provincial Small Cause Courts Act, 1897, against an order dismissing S.C.C. Suit No. 45 of 1923, by the Munsif, 2nd Court, Alipore, exercising the powers of a Court of Small Causes.

Babu *Harendra Kumar Sarbadhicary*, for the Petitioners.

No one for the Opposite party.

JUDGMENT.—This Rule has been issued on the ground that the learned Small Cause Court Judge was not justified in law in dismissing the plaintiff's suit. The plaintiff's suit was filed on the 24th January 1923 and there were no less than 10 days fixed for the hearing of the suit which was postponed on the application of either party or of both. The last adjournment was on the application of the plaintiffs. On the 25th June the plaintiffs again applied for adjournment. The order was to the following effect: "Plaintiff is directed to pay Rs. 5 as costs to the defendant." On the same date, probably later in the day, the following order was passed: "No costs paid. The plaintiffs' petition is rejected. The suit is dismissed with costs." It is curious that, when the Court directed the plaintiff to pay Rs. 5 as costs, apparently for the adjournment he had prayed for, no further date was fixed for the hearing of the case. The order as it stands looks as if the Court fined the plaintiff Rs. 5, for asking for the adjournment. Be that as it may, the Court was not right in dismissing the plaintiff's petition for adjournment because he could not pay the costs on the day the order was passed. The plaintiff ought to have been given sufficient time and opportunity to produce the money. It is not expected that litigants should always come to Court with sufficient money to meet all unforeseen contingencies. In this connection, reference may be made to the case of *Dhanuram Mahto* v. *Murali Mahto* (1). There it is suggested that no doubt the Court has power under section 156 of the Code of 1882 to make orders for adjournment conditional upon payment of costs; at the same time, the Court in adjourning a case to a subsequent day should make the hearing on that day conditional upon payment of costs before that date.

The result is that this Rule is made absolute, the order of the Small Cause Court Judge dated the 25th June 1923 dismissing the plaintiff's suit for default is set aside; and it is directed that he should hear the case according to law. The opposite party has not entered appearance. The petitioner is entitled to costs. I assess the hearing fee at one gold mohur.

S. D. *Rule made absolute.*

(1) Ind. Cas. 866; 86 C. 566; 13 C. W. N. 525; 11 C. L. J. 150.

JAGNESWAR SIKDAR *v.* KAILASH CHANDRA

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2131 OF 1921.
January 4, 1924.

Present :—Mr. Justice Walmsley
and Mr. Justice Suhrawardy.

JAGNESWAR SIKDAR—PLAINTIFF—APPELLANT

versus

KAILASH CHANDRA MANDAL, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92—Judgment-debtor, if can dispute sale in suit for possession by decree-holder.

The provisions of O. XXI r 92, Civil Procedure Code preclude a judgment-debtor from asking the Court, in a suit by the decree-holder for possession, to go into questions which affect nothing but the regularity of the sale. [p. 127, col. 1.]

Appeal against the decree of the Additional District Judge of Zillah Jessore, dated the 30th of May 1921, affirming the decree of Officiating Munsiff, 2nd Court, at Narail, dated the 16th June 1920.

Babu *Surendra Chandra Sen* and Babu *Hemendra Chandra Sen* for Babu *Nanindra Chandra Sen*, for the Appellant.

Babu *Tarakeswar Pal Choudhury*, for the Respondents.

JUDGMENT.

Walmsely, J.—The plaintiff-appellant's case is as follows. In execution of a money decree against the defendants he caused land belonging to them to be sold in auction : he bought it himself and took formal possession through the agency of the Court : he failed to obtain actual possession of plots 1 and 2 and although he obtained actual possession of plot 3, he was afterwards turned out by the defendants. The defendants, in answer, pleaded that the plots formed part of their non-transferable occupancy *jote*, that they knew nothing of the alleged sale until the institution of the present suit, and that the sale was brought about by the suppression of notices.

There is no dispute about the nature of the *jote* of which the lands in suit form a part. The defendants have occupancy rights in the *jote*, and there is no custom sanctioning the transfer of the holding. On these admitted facts the Courts below held that the plaintiff had acquired nothing. They also held that the sale was bad, and that on that account also the plaintiff's suit could not succeed. The plaintiff in consequence lost his suit in both Courts, and it is he who prefers this appeal.

His first ground is that the lower Courts are wrong in the view they have taken about the effect of an execution sale of a non-transferable *jote*. The learned pleader who appears for the defendants admits this, so it is not necessary to say more on this ground.

The second ground is that the defendants ought not to have been allowed to challenge the sale in this suit inasmuch as they did not seek the remedy offered to them by O. XXI, r. 90. The right of the plaintiff, in the circumstances described, to bring a suit is beyond dispute, and the argument put forward on his behalf is that, inasmuch as the defendants did not seek the relief afforded by O, XXI, r. 90, they cannot raise objections which might have been heard and determined immediately after the sale.

The penalty imposed on a negligent judgment-debtor is set out in r. 92, and it is, that the Court shall make an order confirming the sale and thereupon the sale shall become absolute. This amounts to a judicial determination that none of the objections exist on which the validity of the sale could have been questioned.

Now, if we look at the judgments of the Courts below we find that, although the defendants pleaded ignorance of the sale and of the attempt to take possession, they did not press this point by having an issue framed upon it. They did not even, it appears, satisfy the Courts by negative evidence that the processes were suppressed. They contented themselves with showing that the plaintiff's evidence in support of the sale and of the processes leading up to it, was scanty, and that the price paid was inadequate. The learned Munsiff speaks of fraud, but the learned District Judge does not use the word, and limits his judgment to findings that the processes were not duly served, and

that the price was inadequate. In other words, the findings of the final Court of fact do not go beyond the findings necessary for an order cancelling a sale under O. XXI, r. 90. It appears to me that the provisions of r. 92 preclude a judgment debtor from asking a Court in such a suit as this to go into questions which affect nothing but the regularity of the sale.

My conclusion is that the plaintiff must succeed on the second ground also, with the result that the appeal must be allowed and the suit decreed with costs in all Courts.

Suhrawardy, J.—I agree.

M. B. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 371-B OF 1921.
October 31, 1923.

Present :—Mr. Kinkhede, A. C. J.

BASANTRAO AND OTHERS—DEFENDANTS—APELLANTS

versus

NARAYAN AND OTHERS—PLAINTIFFS 1 AND 2 AND DEFENDANT 6—RESPONDENTS –

Contract Act (IX of 1872), ss. 88, 50—Transfer of Property Act (IV of 1882,) s. 130—Mortgage in favour of two persons—Assignment of interest by one in favour of the other—Payments by mortgagor after surrender—Suit by assignee against mortgagor — Relief for damages against assignor co-mortgagee—Debtor of joint family—Seperation—Knowledge—Payment to one member—Discharge—Assignment of mortgage—Notice to mortgagor whether necessary—Payments after assignment without notice—Dsicharge, whether can be claimed in suit against mortgagor.

If a mortgagee, after assigning his interest in favour of his co-mortgagee, receives any payment from the mortgagor and appropriates the same, the assignee of his interest is entitled to join him as defendant and to ask relief against him in the alternative in a suit against the mortgagors and the Courts are competent to grant, in order to avoid multiplicity of suits, relief against him, if facts are found against him.

In the case of a debtor to a joint family, in the absence of any evidence to fix him with the knowledge that the joint family has been disrupted, he will be legally justified in believing in the continuance of the self same jointness or common unity of interest between the members of the representatives for the purpose of granting him discharge for payments as existed before.

A mortgage of immoveable property is excluded from the definition of actionable claim.

Section 130 of the Transfer of Property Act does not intend or purport to lay down any mode of transfer for making an assignment, much less does it declare the assignments of mortgage effective or ineffective for compliance or non-compliance with the requirements of that section. It does not also render invalid any dealing by the mortgagor, having no notice of the assignment, with the original mortgagee after the date of the assignment. All such questions arising out of assignment are left out for treatment under the general law relating to contracts, transfers, estoppel and other laws including the personal law of the parties.

The assignee of a mortgage is bound to serve a notice of the assignment on the mortgagor and in a suit by the assignee of a mortgage, the mortgagor is entitled to credit for the repayments he may have made to the original mortgagee after the assignment but without notice of the transfer, provided that there is no collusion.

Appeal against the decree of the District Judge, East Berar, Amraoti, in Civil Appeal No. 64 of 1921, dated the 25th July 1921.

Mr. *M. B. Marathe*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for the recovery of a balance of mortgage-debt alleged to be due to plaintiffs as the sons of the deceased co-mortgagee Akaji on the basis of a mortgage-deed dated 12th August 1902, Exhibit P-1, for a consideration of Rs. 3,500. This debt was repayable without interest by 14 annual instalments of Rs. 250 each. The mortgage deed stands in the name of Anyaji and his brother Akaji. Anyaji died in a couple of years after the mortgage, and his son Maroti took his place as a co-mortgagee. During the years 1903 to 1912 certain repayments were made by the mortgagor to one mortgagee or the other, *i.e.*, sometimes to Anyaji, sometimes to Anyaji's son Maroti and at others to Akahi, and credit has been given by the plaintiffs for all those payments in the plaint towards the first nine instalments. Maroti relinquished his interest in the mortgage-debt in suit amongst other properties in favour of Akayi by means of a registered Farakat dated 10th July 1907, and with effect from that date the plaintiffs contend the original co-mortgagee Akaji acquired title as a sole mortgagee.

BASANTRAO *v.* NARAYAN

The present suit is for the recovery of the last five instalments and their interest subject to the rule of *Damdupat*. It was filed on 20th November 1919. The defendant No. 1 is the original mortgagor and Nos. 2 and 5 are his sons. The co-mortgagee Anyaji's heir Maroti having relinquished his interest as stated above and he having died before suit the plaintiffs did not think it necessary to join his heir as a party to the suit.

The defence which is relevant to this appeal, raised by the defendants Nos. 1 to 5, was that they did not know of the alleged release by Maroti of his interest in the mortgage-bond in suit in favour of Akaji, and that they continued making payments to one or the other of the mortgagees in the *bona fide* belief that Maroti had authority to receive payments and give valid discharge on behalf of all the mortgagees. As before, they pleaded two payments to Maroti,

(1) of Rs. 250 on 19th June 1913 as per receipt Exhibit D-7 signed by Maroti,

(2) of Rs. 500 on 23rd March 1914 as per receipt Exhibit D-8 signed by Maroti,

and claimed credit for them in full discharge of the plaintiff's claim in respect of three instalments which they repaid. So that if credit were given for them the plaintiff's claim will stand in respect of only two instalments. It appears Akaji survived long after the date of the last payment which he himself realised in 1912 as per Exhibit D-9 dated 8th June 1912, but did not file any suit during his life time ; the present suit is brought by his two sons one of whom had attained majority nearly three years before suit, as his age as put down in the plaint indicates. On plaintiff's behalf it was denied that Maroti had any express or implied authority to receive payments or to give valid discharge, on the ground that defendants were aware of the deed of relinquishment by Maroti in favour of Akaji. In view of the above defence of defendants Nos. 1 to 5 the plaintiffs thought fit to apply to the Court praying that Maroti's heir and sister Chidabai be joined as a co-defendant in order that an alternative relief of damages may be granted to plaintiffs as against Maroti's heir, in the event of the Court deciding to give credit to the mortgagor for payments made to Naroti. She was accordingly joined as a party defendant to the suit on 12th March 1920. In due course she was served some time before the date of her written statement dated 16th June 1920 in which she contended that the deed of release was only a bogus document not intended to be acted upon, and that it was only meant as a threat to Maroti in order to put some restraint on his wasteful habits. She admitted that Maroti received the payments and contended that he did so with the consent or acquiescence of Akaji. She thus denied the plaintiff's alternative claim laid as against her.

The only issues relevant to the only point raised in second appeal are :—

" 2. Did the defendant No. 1 really make payments as evidenced by receipts dated 19th June 1913 and 23rd March 1914, respectively, to Maroti towards the mortgage-debt ?

3. (*a*) Was defendant No. 1 justified in making payment to him ? Had he (Maroti) express or implied authority to receive payments on behalf of all the mortgagees, and was he able to give a valid discharge ?

(*b*) Had the defendant No. 1 knowledge of the deed of relinquishment and did he make the payments in spite of the deed ?

5. Can the plaintiffs ask for an alternative relief against defendant No. 6 in this suit ?"

The defendant No. 1 went into the witness-box to prove the *bona fides* of the payments he made to Maroti in ignorance of the relinquishment. Plaintiffs examined only plaintiff No. 1 as their witness. He admits he has no personal knowledge of the dealings. The Court of first instance held that the said repayments were proved and the receipts Exhibits D-7 and D-8 were genuine. It further held that there was no evidence to show that the mortgagors had notice of the partition or rather of the release. On the point of Maroti's authority, either express or implied, to receive the payment, the finding of that Court was that Maroti had none to give a valid discharge, and that there was no justification for the mortgagors to make the payments to Maroti ; and further that, even if Anyaji and Akaji had implied authority to receive payments for each other, the theory of agency had no application to their heirs. The

Court also held that the question of notice was immaterial on the ground that if a debtor pays to a person alleged to be the mortgagee's agent but without ascertaining the extent of his authority the payment is made at his own peril. It ultimately disallowed credit for the repayments on the ground that Maroti having on the date of those payments no interest in the mortgage-security could not give any discharge valid even to the extent of half. As regards issue No. 5 it was held that the alternative relief claimed against defendant No. 6 was not claimable in the mortgage-suit. In the end, a decree for the entire amount claimed was passed against defendants Nos. 1 to 5 and the claim was dismissed as against defendant No. 6.

Against this decree an appeal was preferred by the defendants Nos. 1 to 5 to the Court of the District Judge, Amroti, and defendant No. 6 was joined as a party respondent No. 3. It was, however, unsuccessful except as regards interest during the pendency of the suit. The Judge of the Court of appeal, in spite of what he states in paragraph 3 of his judgment that the plaintiffs-respondents practically admitted before him that the payment of Rs. 750 should be allowed, dismissed the appeal and upheld the findings of the Court of first instance. He found difficulty in giving effect to the position conceded by the plaintiffs-respondents because he thought he could not give relief to the plaintiffs as against defendant No. 6 in this mortgage-suit. Hence this appeal by defendants Nos. 1 to 5.

That both the Courts erred in the view they have taken about their inability to pass a decree against defendant No. 6 in a mortgage-suit is clear from the observations of Sir Bipin Krishna Bose, A. J. C., in *Joharmal* v. *Nainsukh* (1) and of those of Sir Henry Drake Brockman, J. C., in *Mahadeo* v. *Nago* (2), where joinder of such an alternative claim for damages was, on the analogy of the ruling in *Aiyathurai Ravuthan* v. *Santhu Meers Ravuthan* (3), permitted in order to avoid multiplicity of suits. As held by Sir Bose, A. J. C., it is open to a plaintiff to ask relief in the alternative, "dependent upon what might be found by the Court to be true facts of the case."

The only other point strenuously contended for on behalf of the appellants is that the lower Courts have not given full effect to the finding on issue No. 3 (b) and consequently the conclusion which they have drawn to the effect that payment to Maroti after he ceased to be a mortgagee was not a valid payment, does not legally follow therefrom, and further that the circumstances of the case and the previous conduct of the parties clearly made the payments good legal payments as against the plaintiffs. I see great force in this argument. The Court of Appeal does not appear to have fully realised the significance and bearing which the defendants' plea that their payments were made under the *bona fide* belief that Maroti continued to hold the authority he had to receive payments on behalf of both the mortgagees, had on the question of the validity of those payments.

The following table will show the previous uniform course of conduct on the part of the mortgagee in the matter of receiving payments from the mortgagor defendant No. 1. It establishes an implied agreement on the part of the mortgagees that payment to one was payment to all: –

No.	Exhibit No.	Date of receipt.	Amount paid.	By whom payment was received and receipt passed.	Name of the mortgagee or mortgagees on whose behalf receipt passed.
1	D-1	8-2-'03 ..	250 0 0	Anyaji's agent Zibal	In the name of Anya and Akaji.
2	D-2	24-3-'04 ..	..	Do	... In the name of Anyaji alone.
3	D-3	16-6-'05 ..	...	Maroti	.. In the name of Maroti.
4	D-4	27-6-'05 .	..	Akaji	.. In the name of Akaji and Maroti.
5	D-5	25-4-'07 ..	.	Maroti	. In his own name.
6	D-6	15-6-'10...	..	Akaji	.. In his own name.
7	D-7	19-6-'13...	250 0 0	Maroti	. In his own name.
8	D-8	28-3-'14...	500 0 0	Maroti	.... In his own name.
9	D-9	8-6-'12 ..	..	Akaji	... In his own name.

It will be seen that during the lifetime of Anyaji the payments were made to Anyaji and presumably he received for both, and

(1) 5 Ind. Cas. 745, 6 N. L. R. 33 at pp. 34, 35.
(2) 12 Ind. Cas. 357 ; 7 N. L. R. 130 at p. 133.
(3) 31 M. 252 ; 18 M. L. J. 288.

passed receipts either in the name of one or both the mortgagees. After his death, sometimes his son Maroti received payments, and at other times the other co-mortgagee Akaji received them, and each passed receipts in his own name and without reference to the other. This course of conduct naturally engendered a belief in the mind of the mortgagor that payment to one was a good and full payment to all, and that discharge by one was a good discharge in respect of the entire obligation. It relieved the mortgagor from the bother and inconvenience of seeking out or insisting upon the presence of each co-creditor to witness the payment and pass receipt of satisfaction, so that they all may know of the payment and may not contest the fact and validity of the payment received by one as payment to all. The principle underlying section 38 of the Indian Contract Act which enunciates that an offer to one of several joint promisees has the same legal consequence as an offer to all of them holds good here. The further principle that the performance of a promise if made in any manner which the promisee prescribes or sanctions was good performance within the meaning of section 50 of the Contract Act also is pertinently applicable to the facts of the case. The two co-mortgagees were joint at the date of the mortgage. The debtor knew them to be members of a joint family. In the absence of any evidence to fix him with knowledge that their joint family status has been disrupted, the debtor will be legally justified in believing in the continuance of the self-same jointness or community of interest between them or their representatives for the purposes of granting him discharge for payments made as existed before. Here the finding is that the mortgagor had no knowledge of the partition that took place or of the release deed executed by Maroti in favour of his uncle. This gives rise to a presumption which the debtor is entitled to act upon, that the mortgagees are joint and that payment to one is payment to all of them. It further shows that Akaji acquiesced in Maroti taking the place of Anyaji and, therefore, no question of the non-continuance of the agency in the case of heirs after the death of Anyaji really arises here. It has been brought to my notice that in Berar the system of preparing Records of Rights was introduced in 1912 and that in the Record of Rights a note of the existence of mortgages has to be made if they are disclosed in the course of the investigation and that in this particular case the mortgage is shown in those papers as being held by both Akaji and Maroti as late as 1912 ; see Exhibit P-4 on the record. This also supports the debtor's belief that both continued to be the owners of the mortgage-debt as before.

A passage from Sir Rash Behari Ghose's Law of Mortgage in India, 5th Edition, Vol. 1, page 353, was cited to me in support of the proposition that in a suit by an assignee of a mortgage the mortgagor is entitled to credit for the repayments he may have made to the original mortgagee after the assignment but without notice of the transfer, provided that there is no collusion, and it is argued that credit for the payments should, therefore, be allowed. It has, however, been contended on behalf of the respondents that sections 130 and 131 of the Transfer of Property Act do not contemplate service of any notice of assignment in the case of a transfer of a mortgage because a mortgage is not an actionable claim. It is, therefore, argued that the mortgagee was under no legal obligation to notify the partition to the mortgagor and warn him against making payments to Maroti who had parted with his own rights. The argument of the plaintiffs-respondents though plausible is fallacious. I am not impressed by that argument. It militates against the principle that every prudent man will be presumed to act for his own benefit and that he will not omit to perform a duty he owes to himself at least. If the law did not cast on him a duty to serve a notice on the mortgagor of the fact of the assignment, his own duty to himself did cast it on him. If he wanted to save himself from the effects of his own negligence in the observance of such a duty, or from being estopped on the ground of acquiescence in the continuance of the old practice deducible from his previous conduct which enable the other co-mortgagee to commit fraud as against him as also to be the mortgagor, prudence required that he ought to have given such a notice to the mortgagor. A mere omission very often involves a representation and silence or neglect under such circumstances gives rise to acquiescence and consequent

operation of the law of estoppel. But this depends more or less on the facts of each case.

No doubt, the definition of an "actionable claim" excludes from its scope a mortgage of immoveable property. Section 130 of the Transfer of Property Act does not, therefore, purport to lay down the mode in which a transfer of a mortgage could be effected. All that the Legislature appears to have been anxious to provide in framing that section was to lay down the conditions necessary for the validity of a transfer of an "actionable claim", as also the consequences of compliance or non-compliance therewith. It does not, as I understand the section, intend or purport to lay down any mode of transfer for making an assignment of a mortgage ; much less does it declare their assignments effective or ineffective for compliance or non-compliance with the requirements of that section. It does not also render invalid any dealing by the mortgagor having no notice of the assignment with the original mortgagee after the date of the assignment. All such questions arising out of such assignments are left for treatment under the general law. The rights, liabilities and equities arising as between the assignee and the mortgagor appear to me to have been expressly left out for treatment under the general law relating to contracts, transfers, estoppel and other laws, including the personal law of the parties. I am not, therefore, prepared to hold with the respondents that there was no duty cast on them to serve a notice of the assignment of the mortgage simply because a transfer of a mortgage is not a transfer of an actionable claim which requires such express notice.

I, therefore, differing from the lower Courts, hold that the mortgagee Akaji ought to have warned the mortgagor against making payments to Maroti after the date of the assignment and that, in the absence of such warning, the authority which Maroti exercised to the knowledge of Akaji after his father's death to receive payments and give discharge for himself and Akaji continued unrevoked and the manner of performance acted upon and sanctioned by the mortgagee in the past continued in full force, and that the payments made to Maroti being made *bona fide* without notice of the fact of assignment were legal and good payments in discharge of the obligation created by the mortgage so far as they went to satisfy the three instalments. The mortgagors (defendants Nos. 1 to 5) are, therefore, entitled to get credit for the same. This will necessarily confine the plaintiffs' claim to the remaining two instalments for Rs. 250 each, and the same will stand at Rs. 1,000 only being subject to the rule of *Damdupat* as regards interest so far as defendants Nos. 1 to 5 are concerned. The appeal, therefore, succeeds and is decreed with costs against plaintiffs-respondents. A preliminary decree for foreclosure for payment of Rs. 1,000 and proportionate costs in terms of O. XXXIV, r. 2, Civil Procedure Code, will accordingly be passed against defendants Nos. 1 to 5. The defendants Nos. 1 to 5 willget their proportionate costs on the dismissed portion of the claim from plaintiffs for all the Courts. I grant three months' time for payment.

As regards the alternative claim against defendant No. 6, I deem it necessary to say here that no question of limitation arises because the granting of that relief was dependent upon the finding of the Court as to the factum and validity of the payments to Maroti as against the plaintiff. The defendant No. 6 is admittedly a legal representative of the deceased Maroti and is ordinarily liable to make good the amount to plaintiff out of the assets of Maroti which may have reached her hands. The parties, however, did not make any statements as to the extent of such property. They simply fought on the question of law whether defendant No. 6 could be made liable in a mortgage suit and both the Courts below held that she could not be made liable in a mortgage suit, but that a separate suit should be filed against her. As I have, on the strength of the ruling in *Mahadeo* v. *Nago* (2), come to the conclusion that the rights of plaintiff can be worked out against defendant No. 6 in this mortgage-suit itself, I may here point out that for the right decision of the extent of defendant No. 6's liability, questions as to how far the act of Maroti was a tortious act, or whether he could have been made liable on the express or implied contract of indemnity in the deed of assignment, and how far the payments received enriched or benefitted his assets and whether the benefit so conferred is

traceable and the like, raised before me in the course of the argument are pertinent and will have to be decided in the Court of first instance. I, therefore, find that a further enquiry into facts is necessary. I, therefore, direct that the necessary pleadings of the parties may be recorded and necessary issues framed and an enquiry made as to the existence of the assets of Maroti in the hands of defendant No. 6, the liability of the latter being strictly limited in point of extent to such assets. If the assets prove insufficient to satisfy the whole of the liability for Rs. 750 there will be a personal decree for the balance against the defendant No. 6 to the extent of such assets as she may not have duly accounted for.

The case will be remanded for further trial with advertence to the above remarks so far as plaintiffs and defendant No. 6 are concerned. I do not make any order as to the costs of defendant No. 6, either in this or in the Courts below, as they must abide the event.

G. R. D. *Case remanded.*

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 706 AND 707 OF 1923.

January 4, 1924.

Present :—Mr. Justice Suhrawardy.

PROFULLA CHANDRA GHOSE AND OTHERS—PETITIONERS

versus

TARA CHAND GAIN AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against several defendants—Set aside on application of some—Set aside against all—Revision—Necessary parties.

An *ex parte* decree passed against a large number of defendants, if set aside on the application of two of them, is set aside against all and, therefore, all of them are necessary parties to a revision petition against the order setting aside the *ex parte* decree.

Rule against the order of the Munsif, 2nd Court, Satkhira, dated the 30th April 1923, in Mis. Cases Nos. 439 and 433 of 1922, and 421 and 420 of 1922, arising out of Rent Suits Nos. 686 and 687 of 1920.

Babu *Jogesh Chandra Roy* (with him Babu *Anilundra Nath Rai Chowdhuri*), for the Petitioner.

Babu *Hemendra Chandra Sen*, for the Opposite Parties.

JUDGMENT.—A preliminary objection is taken to the maintainability of this Rule on the ground that all the necessary parties are not before the Court. In my opinion the objection ought to prevail. The suit was brought by the petitioners against 18 tenants for rent and an *ex parte* decree was passed in that suit. Two of the tenants applied to have the *ex parte* decree set aside and the Court set aside the *ex parte* decree and passed the following order : "miscellaneous case be allowed on contest ; sale set aside, restore the suits in their original numbers." I observe that it was a suit for rent and under the proviso to r. 13 of O. IX, the whole suit was restored ; and in this Court a Rule was obtained only against two of the defendant who were the applicants in the Court below, and the other tenants in whose favour the *ex parte* decree was set aside and the suit restored were not made parties to this Rule. The effect of this omission is that, if this suit succeeds and the order of the Court below be set aisde and the suit decreed against two of the tenants, the order restoring suit in favour of the other 16 tenants will stand. This created an anomaly which cannot be allowed. In this view of the matter, the Rule cannot proceed and must be discharged with costs. I assess the hearing-fee at one gold mohur.

This order will govern the other Rule (707 of 1923) which is also discharged with costs—one gdd mohur.

S. D. *Rules discharged.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 46 OF 1922.
November 14, 1923.

Present:—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Waller

C. DURAIVELU MUDALIAR AND OTHERS —PLAINTIFFS—APPELLANTS.

versus

G. R. AUDIKESAVALU NAIDU, —DEFENDANT—RESPONDENT.

Receiver—Decree passed in scheme suit—Appeal—Receiver appointed pending appeal—Appeal substantially confirming scheme decree—Receiver if becomes functus officio*—Application to discharge Receiver—Remedies of parties.*

Pending an appeal against a decree framing a scheme in relation to a temple, a Receiver was appointed on allegations being made that the trustee did not act in accordance with the scheme. The original decree for scheme was confirmed by the Court of Appeal with slight modifications. On summons being then taken out by the trustee for the discharge of the Receiver on the sole ground of his having become *functus officio* after the order in appeal :

***Held*, that the effect of the order in appeal, which merely varied the scheme, was not *ipso facto* to discharge the Receiver but that it continued to be in force till it was duly put an end to. [p. 134, col. 1.]**

Remides of parties pointed out.

Appeal from the judgment and order, dated the 22nd day of February 1922, of Mr. Justice Kumaraswami Sastry, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 393 of 1915.

Mr. *V. Sivaprakasa Mudaliar*, for the Appellants.

Mr. *A. Doraiswamy Aiyar*—for the Respondent.

JUDGMENT.

The Chief Justice.—This is an appeal from an order of Kumaraswamy Sastry, J., in Chambers on Judge's summons to discharge the Receiver of certain temple property and to order the Receiver to put the hereditary trustee of that temple in possession of properties and documents relating to the temple. The facts are these. A suit was brought asking for a scheme to be framed in relation to the temple, which was tried by Kumaraswamy Sastry, J., and he in due course gave a decree and framed a scheme. An appeal was lodged against that decree and there was a cross-appeal. Before the case came on in appeal, an application was made before Phillips, J., for the appointment of a Receiver, there being allegations made that the trustee did not properly account, would not hand over or produce books, and was not behaving as a trustee should behave under the scheme as framed by Kumaraswamy Sastry, J., and, having heard the application on several occasions with the trustee before him, Phillips, J., ordered that a Receiver should be appointed. The appeal then came on and this Court confirmed the order of Kumaraswamy Sastry, J., but to some extent—not to a very great extent—modified the scheme as framed by him. The scheme stands in operation as from the date fixed by Mr. Justice Kumaraswamy Sastry's order with the modifications decreed by the Court of Appeal. After the order in appeal, this summons was issued and the case was put before the Court solely on the ground that the effect of the order of the Court of Appeal was to put an end to the Receivership and, in the words of the affidavit, "that the Receiver became *functus officio* and automatically ceases to be Receiver." The plaintiff and the Receiver, alleging, as I understand, that they were supported by the Advisory Board, opposed this summons and alleged that the trustee was still an unfit person to have control. The matter came before Kumaraswamy Sastry, J., again and he decided that the effect of the order of the Court of Appeal was *ipso facto* to discharge the Receiver, and declined to go into any question as to whether or not the trustee was a fit person to have charge, or to go into the question whether it was advisable in the interests of the temple that the Receiver should be continued.

In my judgment that is wrong. The order of Phillips, J., was quite irrespective of there being any appeal. His jurisdiction to make the order depended on one of two things, either on the scheme then in operation which provided that applications be made to the Court by summons, or by reason of his powers under O. XL, r. 1 of the Civil Procedure Code which gives the

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Court power to appoint a Receiver of any property whether before or after decree, where it appears to the Court to be just and convenient to do so, and that order continued until it was put an end to. It was not put an end to by the Court of Appeal which merely varied the scheme. That being so, this order, in my judment, is wrong and this appeal must be allowed and allowed with costs. The summons which was taken out before the learned Judge was taken out on entirely wrong grounds and must be dismissed with costs. But I wish to make it quite plain that this does not in any way dispose of the real question which both parties say they desire to have decided. It is perfectly open to the trustee, if he is so advised, to take out a fresh summons asking, among other things, for the discharge of the Receiver. It would be open to him on that application to contend that the scheme as framed by the Court of Appeal gives ample protection to those interested and that it is no longer necessary on the facts of this case to have a Receiver. It would also be open on that application for the plaintiff, the Receiver and the Board, if so advised, to bring any circumstance before the Court as to the conduct of the trustee or otherwise to enable it to arrive at a proper decision on that point. I think that it is unnecessary for me to point out that there are also ample powers under the scheme for the Board or other persons with the consent of the Advocate-General to take steps in reference to the conduct of the trustee, if he has been guilty of any misconduct in recent times as to which we say nothing and express no views.

The result is that this appeal should be allowed and the order of Kumaraswamy Sastry, J., set aside with the result that, pending any fresh proceedings, the Receiver will be reinstated.

Waller, J.—I agree and have nothing to add.

V. N. V. *Appeal allowed.*
S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 505 OF 1922.

November 14, 1923.

Present:—Mr. Baker, J. C.

KHETSINGH AND 3 OTHERS —PLAINTIFFS—APPELLANTS.

versus

MANMODSINGH AND 2 OTHERS — RESPONDENTS—DEFENDANTS—

Registration Act (*XVI of* 1908) s. 17—*Award*,—*Registration—Private partition—Agreement to collect rent—Powers of proprietor—C. P. Tenancy Act* (*of*) ss. 2, 89—*Surrender.*

An award of arbitrators is not compulsorily registrable. [p. 135, col. 1.]

Jagannath v. *Rambux*, 6 C. P. L. R. 95, followed

There is no distinction between a private partition and a partition effected under the Land Revenue Act. [p. 135, Col. 2.]

If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rent from those tenants whose lands fall within his share and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his *patti* within the meaning of the Tenancy Act and is alone entitled to take surrender of lands situated in his *patti* under section 89 of the Tenancy Act. [p. 135, Col. 2.]

Appeal against the decree of the District Judge, Hoshangabad,, in Civil Appeal No. 52 of 1922, decided on 22nd July 1922.

Mr. *M. Gupta*, for the Appellants.

Mr. J. *Sen*, for the Respondents.

JUDGMENT.—The facts of this case are fully set out in the judgments of the Courts below. Both Courts have found that the plaintiffs are entitled to joint possession of the fields in suit on payment of their proper proportion of the money paid by the defendant to the tenant for the surrender. The lower Appellate Court has correctly found that though the parties are *thekedars* under section 109 of the Land Revenue Act they can make a partition binding *inter se*. The

cases quoted by the lower Courts are all cases in which there was no partition. The lower Appellate Court holds that such an agreement would require registration and, apart from the fact that Exhibits P.11 and D.30 are not registered, they do not amount to more than an agreement for the collection of rent by the parties from certain tenants, and do not refer to surrenders, nor can any agreement as to surrenders be inferred from the statement that each will not interfere with the tenants of the other party. The learned District Judge is in error in supposing that Exhibit D.30 requires registration. It is an award of arbitrators and does not require registration: *Jagannath* v. *Rambux*, (1). The document distinctly provides for rental collections of 12 annas *patti* being made by plaintiffs, and of 4 annas *patti* by defendant, without interference by the other party.

Though the *jamabandis* for the most part show the tenants as tenants of both parties, with the exception of that for 1919-20, which is shortly before the present litigation, the Patwari (P. W. 1) deposes that the separate *pattis* are not shown in the village papers, as the division was a private one. But it has been admitted by the defendant in his written statement, paragraph 2, that plaintiffs used to realize the rent from the tenants in question, and it is also admitted by his witnesses Dhannalal (D.W. 1) and Jagannath (D. W. 2) that the tenants are divided and Nanhelal, from whom the surrender was taken, was the tenant of plaintiffs and was paying rent to them. It is quite clear, therefore, that the tenants were divided between the plaintiffs and defendant for the purpose of payment of rent, and, this being so, the case, in my opinion, is governed by *Chandrabhan* v. *Deo Rao* (2) in which it was held that there is no distinction between a private partition and a partition effected under the Land Revenue Act. If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share, and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his *patti* within the meaning of the Tenancy Act. This is what has happened in the present case. The relation of landlord and tenant subsisted between the plaintiffs and the tenant Nanhelal, and the surrender could only be made to them under section 89 of the Tenancy Act.

That this is so is shown by the definition of landlord and tenant in section 2 of the Tenancy Act. By virtue of the agreement between the plaintiffs and defendant, the tenant Nanhelal held his land from plaintiffs and was liable to pay rent to them for the land. Consequently, I am unable to agree with the view of the lower Courts that the agreement regarding the collection of rents does not in law connote an agreement about surrenders.

The result is that the tenant could only surrender his land to his landlords, the plaintiffs, and the surrender to defendant is not binding on plaintiffs, who are consequently entitled to possession of the land. Apart from this, the taking of the surrender by defendant is obviously against the agreement not to interfere with the tenants of the other party. The plaintiffs are, therefore, entitled to succeed. I set aside the decree of the lower Appellate Court and direct that plaintiffs should recover possession of the land in suit, with all costs.

G. R. D. *Appeal allowed.*

(1) 6 C. P. L. R. 95.
(2) 12 C. P. L. R. 66.

BIHARISINGH *v.* NEWALSINGH

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 27 OF 1923.

November 15, 1923.

Present :—Mr. Kindkhede, A. J. C.

BIHARISINGH—PLAINTIFF—APPLICANT

versus

NEWALSINGH—DEFENDANTS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), *s.* 47.—*Execution—Collusiveness of decree—Execution Court, power of—Hindu widow, decree against—Reversionary heirs, whether can impeach in execution.*

An executing Court cannot go behind the decree. Therefore, the question of the decree being a collusive one cannot be tried in execution proceedings. [p. 136, col. 2 ; p. 137 col.]

A personal decree against a widow may not bind the actual reversioners, but a decree passed against her in her representative character is not liable to be challenged on the execution side at the instance of the reversionary heir merely because it was passed on a confession. [p. 137, col. 2.]

Application for revision of the order of the Subordinate Judge, Seoni, in Civil Suit No. 15 of 1921, decided on 30th November 1922.

Messrs. *P. C. Dutt* and *W. R. Puranik*, for the Applicants.

Mr. *M. Gupta*, for the Non-Applicants.

ORDER.—One Dalbir Singh was the owner of certain property including a share in a *malguzari* village called Khairrangi in the Seoni District. He borrowed in 1917 some grain, and cash debt from Behari Singh, his maternal uncle, and agreed to repay the same by the 15th November 1919 but died without making any repayments. Behari Singh, therefore, on 13th May 1921 instituted this suit No, 15 of 1921 for the recovery of the grain and cash debt amounting to Rs. 2,477-6-0 out of the assets left by the deceased debtor in the hands of his daughter Rekhamati and mother Mt. Gaibania Before the date of the hearing (18th July 1921) the daughter died and the mother became the sole heiress to the estate of her deceased son and came into possession of the estate of the deceased debtor. She secured a remission in the grain portion of the claim by a compromise with the plaintiff and confessed judgment for the balance, that is, for Rs. 2,227-6-0. A decree was passed in the following terms : "defendant do pay to the plaintiff 70 *khandis* of *pissi*, or its value Rs. 1,680-at Rs. 24-per *khandi* and Rs. 547-6-0. Defendant's liability be limited to the assets of Dalbir Singh which have come to her and have not been duly disposed." Mt. Gaibania, the judgment-debtor, died before the decree could be executed. On 20th June 1922 the decree-holder applied for execution of the decree against the assets of the deceased Dalbir Singh which on Mt. Gaibania's death came into the hands of the non-applicants who inherited the same as the *Sapinda* relations of the last male holder. In their statement they admit that Dalbir Singh's share of village Khairrangi is held by them as his heirs and that they are at present the recorded proprietors thereof. They thus admit their character as the "legal representatives" of the deceased debtor or the deceased judgment-debtor as defined in section 2, clause (11), Civil Procedure Code. They have thus been rightly placed on the record as legal representatives in place of the deceased judgment-debtor. Their main contention, however, is that the decree cannot be executed as against the assets of Dalbir Singh in their hands on the ground that Dalbir Singh neither borrowed nor had any legal necessity to borrow any grain debt and on the further ground that Dalbir Singh was a minor in 1917. In short, the objection raised challenges the very basis and the validity of the contract of the loan which merged in the decree. It was also urged on their behalf that the compromise by Mt. Gaibania with her brother and the decree based thereon were collusive. The question for consideration, therefore, as formulated by the executing Court, was "whether the decree passed against the assets of the deceased Dalbir Singh can be re-opened on such allegations as have been made by the non-applicants." The executing Court upheld the contention and found that the non-applicants were entitled to impeach the decree in the execution proceedings and supported the view by the reasoning that a confession decree against a Hindu widow does not bind the reversioner. The question for consideration, therefore, is whether the Subordinate Judge's view is correct and whether it affords any ground for interference in revision.

The first and fundamental rule of law is that an executing Court cannot go behind the decree. The effect of

entertaining the objection as to the legality or correctness of the decree would be to reopen the decree, while, as a matter of fact, the Court executing the decree must take the decree as it stands. It has no power to go behind the decree, the reason being that a decree, though it may not be according to law, is binding and conclusive between the parties if it is not appealed from, and it is for these reasons that the Court executing a decree cannot alter, vary or add to, the terms of that decree. Section 47 of the Civil Procedure Code lays down that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. It was held in *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*, (1), which is a case on all fours with the present case, that where it is alleged that a mortgage decree was obtained by the mortgagee in collusion with the mother (the holder of the life estate) of the last male owner of the property on the ground that the debt itself was purely fictitious, and a declaration was sought for, old section 244, corresponding to new section 47, Civil Procedure Code' did not bar a fresh suit as the decree itself was impeached. It was also held there that no appeal lay from an order dealing with the objection of a reversioner in possession of the property of the last male holder on the ground that the decree itself was not binding on him, and that an order disposing of such objection against the reversioner was not a bar to a subsequent suit for the declaration by the reversioner.

3. If a judgment-debtor or a legal representative objects to the execution of a decree on the ground that the decree is not valid because it is collusive the question as to validity of the decree is not one relating to the execution, discharge or satisfaction of the decree and cannot, therefore, be tried in execution proceedings, under section 47 of the Civil Procedure Code. Such a question can only be tried in a regular suit brought for the purpose. If the debt was really incurred by the deceased Dalbir Singh his assets in the hands of his mother or of the present non-applicants must necessarily be liable for its satisfaction whether the decree be passed on confession or otherwise. The decree in question has declared liability of such assets in the hands of the representatives of the deceased debtor. If the non-applicants object to the enforcement of that liability against the assets on the ground that the debt itself was non-existent the objection challenges the very foundation of the decree. I am, therefore, of opinion that in deciding to entertain the objection which went behind the decree the executing Court went out of its way, and exercised a jurisdiction not vested in it by law.

4. It will thus be noticed that the whole of the discussion of the case law indulged in by the executing Court as regards the binding character of a decree passed against a Hindu widow is beside the point. There is always a distinction between a decree passed against a Hindu widow as representative of the last male holder in respect of a debt due by the last male holder, and a decree passed against her in respect of a debt incurred by herself. In the first case she is sued in her representative character, in the second she is before the Court in her personal capacity. A decree which directs recovery of the debt out of the assets of the deceased in the hands of the holder of the life estate, though based on the confession of the widow, cannot therefore be treated as being a decree against the widow personally. Although a personal decree against the widow may not bind the actual reversioner for very good reasons, a decree passed against her in her representative character would not be liable to be challenged on the execution side at the instance of the reversionary heir merely because a decree was passed on a confession.

5. The order of the executing Court is, therefore, set aside and it is directed to execute the decree as it stands against the assets of the deceased Dalbir Singh in the hands of the non-applicants. The applicant will get his costs of this application.

S. D. *Application allowed.*

(1) 30 M. 402; 17 M. L. J. 288 ; 2 M. L. T. 360.

SURAJ NARAYAN SINGH *v.* BISHAMBAR NATH BHAN

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 183 OF 1923.

January 29, 1924

Present :—Mr. Wazir Hasan, A. J. C.

Th. SURAJ NARAYAN SINGH—
APPLICANT

versus

Pt. BISHAMBHAR NATH BHAN—
OPPOSITE PARTY.

Guardians and Wards Act (*VIII of* 1890), *ss.* 22, 39, 47, 48—*Civil Procedure Code* (*Act V of* 1908), *s.* 115—*Guardian, removal of—Special allowance, grant of—Jurisdiction—Appeal—Revision.*

A right of appeal must always be founded upon an express rule to that effect or a rule by unavoidable implication. [p. 188, Col. 2.]

The words " removing a guardian " in clause (g) of section 47 of the Guardians and Wards Act are not descriptive of the section but of the order against which appeal is provided for. Therefore, the only appeal permissible with reference to an order under section 39 of the Guardians and Wards Act is one against an order removing a guardian under that section. [p. 188, Col. 2.]

Section 48 of the Guardians and Wards Act attaches finality to orders made under the Act except when they can be challenged either by way of an appeal under section 47 of the Act or by way of an application for revision under section 115 of the Code of Civil Procedure. [p. 189, Col. 1.]

Under section 22 of the Guardian's and Wards Act a District Judge has jurisdiction to grant an allowance to the guardian. [p. 189, Col. 1.]

An order made by a District Judge granting a special allowance to a guardian on his removal for services rendered to the estate is not open to appeal or revision. [p. 189, Col. 1]

Appeal and application against the order of the District Judge, Rai Bareli, dated 28th November 1923.

Messers. *M. Wasim* and *M. H. Kidwai*, for the Applicants.

B. Bisheshar Nath Srivastava, for the Opposite party.

JUDGMENT.—The respondent was appointed guardian of two minors and of their property in the year 1917. The order of appointment provided for 5 per cent. allowance on the net income of the estate to the guardian. The respondent made efforts from time to time for increment in his allowance. He also asked for legal fees to be allowed to him in respect of cases which he had prosecuted or defended on behalf of the estate, he himself being a legal practitioner. This prayer was also always refused. Finally, the District Judge agreed that the legal fees could be allowed over and above the sanctioned allowance in special cases under an express order of the Court to that effect. One of the two minors has now come of age. They both form a joint Hindu family and on the application of the one who has come of age, the guardian has been removed under section 39, clause (j) of the Guardians and Wards Act (VIII of 1890). In the course of the proceedings relating to the removal of the guardian the respondent asked for further remuneration under two heads. First, for his general services to the estate over a period of six years and, secondly, for the work which he had done in certain cases in the capacity of a lawyer. The Court, while removing him, has awarded Rs. 3,000 under the first head and Rs. 1,000 under the second. The order under both the heads is the subject-matter of controversy before me.

An appeal was filed to this Court against that order purporting to be permissible by clause (g) of section 47 of the Act mentioned above. The learned Judge of this Court who received the memorandum of appeal refused to admit it as such. He issued notices with reference to a separate application under section 115 of the Code of Civil Procedure presented by the appellant. I am satisfied that no appeal lies from the order to which reference has already been made. The right of appeal must always be founded upon an express rule to that effect or a rule by unavoidable implication. The only appeal permissible with reference to an order under section 39 of the Act is one against an order removing a guardian under that section. The words " removing a guardian " under clause (g) of section 47 are not descriptive of the section but of the order against which appeal is provided for. This is borne out by reference to the language of clause (a) of section 47 where we find, with reference to section 7, an appeal permitted from an order refusing to appoint a guardian, though section 7 does not in terms provide for such an order. There is also authority that an order refusing to remove a guardian is not appeal-

able, though obviously such an order shall ordinarily be passed in proceedings falling under section 39 of the Act: See *Pakhwanti Dai* v. *Indra Narain Singh*, (1) and *In re Bai Harkha*, (2) The appellant is not aggrieved with the order removing the respondent from the guardianship. There is, therefore, no appeal before me in terms of clause (*g*) of section 47. In my opinion the present appeal is not maintainable.

It is, however, argued that the matter may be considered on the merits under the provision of section 115 of the Code of Civil Procedure. I am not prepared to accede to that argument. Section 48 of the Guardians and Wards Act attaches finality to orders made under that Act except when they can be challenged either by way of an appeal under section 47 of the Act or by way of an application for revision under section 115 of the Code of Civil Procedure. I have already held that no appeal lies and I am further of opinion that the case does not fulfil the requirements of section 115 of the Code. The learned Judge of the Court below had certainly jurisdiction to grant an allowance to the guardian under section 22 of the Guardians and Wards Act. It is conceded that the order originally fixing the allowance at 5 per cent. on the net income of the estate could be modified by the Judge either by increasing or reducing the allowance which was previously fixed. It follows that he could do all this at any time when opportunity arose for taking action under section 22. He has, therefore, acted within his jurisdiction in passing the order complained against. He has also not acted with any illegality or material irregularity in relation to the exercise of his jurisdiction. It is not shown that the order under consideration is wholly arbitrary. What is insisted upon is that the learned Judge had no power to make rewards out of other people's property and in this case he has simply acted on an impulse of generosity at the expense of the appellant.

This argument finds some support from the language used by the learned Judge at some places of his order but the real intention of the order is clear to my mind. All that the Judge has done, or intended to do, was to act within his jurisdiction with which he was invested by section 22 of the Guardians and Wards Act.

The application is dismissed with costs. The appeal is also dismissed but I make no order as to costs.

Z. K. *Appeal and application dismissed.*

(1) 23 C. 201; 12 Ind. Dec. (N.S.) 131.
(2) 20 B. 667; 10 Ind. Dec. (N.S.) 1018.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 664 OF 1923.
January 21, 1924.

Present:—Mr. Justice Rankin and Mr. Justice M. Mukerjee

KSHITISH CHANDRA DAS AND OTHERS—PETITIONERS

versus

UMED MONDAL—OPPOSITE PARTY.

Limitation Act, (*IX of* 1908), *s.* 19—Mablakbandi—*Acknowledgment*—*Contract Act*, (*IX of* 1872), *s.* 25.

A *mablakbandi* is a good acknowledgment under section 19 of the Limitation Act and will preserve any debt due which was not barred at the time when the Mablakbandi was made. It is not a promise to pay under section 25 of the Contract Act so as to revive any debt which was barred at the date it was made.

Rule against the decision of the Munsif, First Court, Krishnagar, exercising the powers of a Court of Small Causes, in S. C. C. Suit No. 1258 of 1922, dated the 8th March 1923.

Babu *Mritunjoy Chatterjee* (with him Babu *Jogneswar Mazumdar*), for the Petitioners.

Babu *Manmatha Nath Roy*, for the Opposite Party.

JUDGMENT.— We think this Rule succeeds to this extent that the case must go back to the Small Cause Court to be dealt with on the footing that the *Mablakbandi* is a good acknowledgment under section 19 of the Limitation Act and, therefore, will preserve any debt due which was not at that time barred by limitation. But, in dealing with this matter, the learned Judge must also proceed upon the view that the *Mablakbandi* is not a promise to pay under section 25 of the Contract Act so as to revive any debt, which was

barred at the date of the *Mahlakbandi*. The view taken by the learned Judge to the effect that the plaint was presented one day out of time is also negatived. From that point of view, the case must go back to be dealt with afresh. Costs of this Rule will abide the result. We assess the hearing fee at one gold mohur.

M. B. *Rule made absolute.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 319 OF 1922.

November 3, 1923.

Present :—Mr. Baker, J. C.

SETH SHEOLAL—APPELLANT.

versus

GIRDHARILAL—RESPONDENT.

Provincial Insolvency Act (*Act* V *of* 1920). *ss.* 28, 53, 75—*Second Appeal* — *Insolvent* — *Receiver not appointed*—*Powers of Court*—*Creditors' remedy for recovery of debts.*

A Second Appeal will lie against an order under section 53 of the Provincial Insolvency Act (V of 1920,) under section 75 of the Act, but only on a point of law as provided in sub-section (1) of section 100 of the Code of Civil Procedure. [p. 141, col. 1.]

If no Receiver is appointed in an insolvency case, the Insolvency Court can itself move under section 53 of the Provincial Insolvency Act on the matter being brought to its notice by a creditor. [p. 141, col. 1.]

A creditor of an insolvent has no remedy against his property in respect of the debt other than that provided by section 23 of the Act. [p. 142, col. 2.]

Appeal against the decree of the District Judge, Chhindwara, in Civil Appeal No. 18 of 1922, 29th March 1923.

Messrs *G. V. Trivedi* and *A. V. Wazalwar* for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—These three appeals are closely connected and all can be disposed of together. The facts are stated in the remanding judgment of the District Judge, Chhindwara, dated 29th March 1922. They may be shortly summarised as follows.

Seth Sheolal filed a Civil suit against Govinda on 25th April 1919, applying at the same time for attachment of his property before judgment. Notices were issued to the defendant and 27th June 1919 was fixed for hearing both the suit and application. On 14th June 1919 Govinda and his sons Sonba and Jairam executed a sale-deed in respect of absolute occupancy field No. 222 in favour of Seth Girdharilal for a consideration of Rs. 4,000, of which Rs. 1,200 were to be kept in deposit by Girdharilal for payment to Sheolal; Rs. 400 were credited to debts due by Govinda to Girdharilal and Rs. 2,400 were paid in cash. On the same date Girdharilal executed a deed in favour of Govinda's minor son Jairam through his guardian mother Mt. Jani in respect of an absolute occupancy field in another village for a consideration of Rs 1,500. The application for attachment before judgment of Govinda's property was not pressed by Sheolal. He obtained a decree against Govinda and Sanba on 21st October 1919 and subsequently applied for attachment of the sum of Rs. 1,200 which, according to the sale-deed, remained in deposit with Girdharilal but which was stated to have been taken away by Govinda. He also applied for attachment of Govinda's absolute occupancy field No. 222, but Girdharilal filed an objection on the ground that the field had been sold to him and was in his possession as owner and this objection was allowed on 3rd December 1919. On 13th January 1920 Govinda applied under the Provincial Insolvency Act of 1907 to be declared an insolvent and an order of adjudication was passed on 8th April 1920. On 4th August 1920 Sheolal applied under section 53 of Act V of 1920, to have the transfer declared void against him, as the transfer of absolute occupancy field No. 222 to Girdharilal had not been made in good faith. The Subordinate Judge held that the transaction was wholly fraudulent and without consideration and that the sale was void. Both Girdharilal and the insolvent Govinda appealed against this order to the District Judge, Chhindwara, who, finding that the burden of proof had been wrongly placed by the first Court, remanded the case.

After remand the first Court came to the same conclusion. On appeal the District Judge confirmed the decision and appeals Nos. 449 and 427 are appeals from this order by Girdharilal, the transferee, and Govinda, the insolvent, respectively and are both based on similar grounds.

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Besides making an application under the Insolvency Act, the creditor Seth Sheolal brought a suit in view of the provisions of O. XIX, r. 63, Civil Procedure Code, to have it declared that the property was liable to attachment and sale in execution of his decree. That suit was dismissed and on appeal the decision was confirmed by the District Judge, and Second Appeal No. 319 is an appeal against that decision by Seth Sheolal.

It has been contended on behalf of the respondent that no Second Appeal will lie against an order passed under section 53 of the Provincial Insolvency Act V of 1920. The question is, however, one under section 4 of the Act, which is in very wide terms and, therefore, a second appeal will lie under section 75 of the Act, but only on a point of law as provided in sub-section (1) of section 100 of the Code of Civil Procedure. This has already been held by this Court in *K. S. Abdul Kadir* v. *Sayad Lal* (Second Appeal No. 372-B of 1922).

Counsel for the appellant Girdharilal has raised several points of law as well as of fact. It is argued that an application by the creditor under section 53 of the Provincial Insolvency Act will not lie because such an application can only be made by the Receiver. This point has been considered by the learned District Judge. In this case no Receiver has been appointed ; the case is covered by *Bansilal Agarwala* v. *Ranglal Agarwala* (1) in which it was held that if no Receiver is appointed, the Insolvency Court can itself move on the matter being brought to its notice by any other creditor.

It is next contended that the transfer was not under section 53 but under section 54 of the Provincial Insolvency Act. That, however, was not the case of the transferee in the lower Court and it is entirely inconsistent with the case now put forward that the transfer was *bona fide*, that is to say, it was not made with the object of favouring Girdharilal at the expense of the other creditors since he as a creditor of Govinda got only a small amount and the bulk of the consideration was given to the other creditors. This theory is altogether untenable.

(1) 71 Ind. Cas. 418 ; 19 N. L. R. 82 ; 6 N L. J. 47; 1923) A. I. R. (N.) 97.

Then it is contended that as the objection of Girdharilal to the attachment of the property was upheld, the order under O. XXI, r. 63, Civil Procedure Code, is conclusive unless it is upset by a suit, and this not having been done it is conclusive as against Seth Sheolal and it cannot be urged that the transfer was fraudulent. As a matter of fact, a suit was brought by Seth Sheolal and has been decided not on the merits but on the ground that no such suit will lie when once the debtor has been declared an insolvent, as under section 28 of the Provincial Insolvency Act no such suit could be brought without the leave of the Insolvency Court. But the application under section 53 of the Act may be considered as a suit to establish the right which the creditor claims and it would be wholly inequitable to dismiss the suit on the ground that the property was vested in an Insolvency Court and to prevent him from raising his plea in the Insolvency Court. In this case both the suit and the application were filed in the same Court, though no formal permission of the Insolvency Court was obtained before filing the suit. The matter is not *res judicata*, and is still *sub judice*.

As to the *bona fides* of the transfer by Govinda to Girdharilal, I do not think that this is a matter which can be raised in second appeal. Both the Courts below, after considering the evidence, have found that the transfer was not *bona fide*. In the case already quoted, where the two Courts concurrently found that the present applicant failed to establish their *bona fides*, the matter was not allowed to be further considered. In any case, it will appear that the insolvent got rid of his absolute occupancy land which was liable to attachment and sale, and the same day his transferee transferred other absolute occupancy land to the insolvent's minor son. All the evidence has been considered at length by the Courts below. The whole consideration was not paid and though an offer of payment of part of the debt was made to Sheolal there is no evidence that there was any actual tender of the money. I need not refer to the improbability of the accounts regarding this transaction, which has been referred to at length by the lower Court. It cannot be said that there is any illegality in the finding so as to justify its being disturbed in second appeal. The

transfer, therefore, by the insolvent to Girdharilal being made within two years from the date of adjudication and not being proved to be in good faith cannot stand. The result is that the order of the lower Appellate Court as regards this must be confirmed and the appeals of Govinda and Girdharilal (Second Appeals Nos. 427 and 449) be dismissed with costs.

As regards Sheolal's Appeal No. 319, there is little to be said. No leave of the Court was obtained for the suit and as the insolvent's property was vested in the Court, the creditor has no remedy against the property in respect of the debt other than that provided by section 28 of Act V of 1920. The order of the lower appellate Court is therefore correct and this appeal must also be dismissed with costs.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 783, 893 AND 894 OF 1922.

November 23, 1923.

Present:—Mr. Justice Kumaraswamy Sastri.

In C .R. P. No. 783 *of* 1922.

C. ADIMOOLA MUDALIAR—PETITIONER

versus

N. C. MANICKA MUDALIAR—RESPONDENT

In C. R. P. No. 893 *of* 1922.

T. SUBBARAYA MUDALIAR—PETITIONER

versus

VISALAKSHI AMMAL—RESPONDENT

In C. R. P. No. 894 *of* 1922.

NALLATHAMBI MUDALIAR—PETITIONER

versus

M. MANICKA MUDALIAR—RESPONDENT

Madras Estates Land Act (I of 1908), *s.* 131—*Application to set aside sale—Full amount not paid within* 30 *days—Figure given by Court misleading—Subsequent payment of deficiency, effect of—Civil Procedure Code (Act V of* 1908), *s.* 115—*Finding that party was misled by information given by Court.*

If in pursuance of an application to set aside a sale under S. 131 of the Estates Land Act (corresponding to O. XXI, r. 89, Civil Procedure Code), the petitioner applies to the Court ordering the sale, for ascertainment of the amount payable by him and pays within 30 days from the date of sale the amount he is asked to pay, the sale will be set aside even if the amount thus paid is less than the full amount and the deficiency is paid after 30 days.

No party should be prejudiced by the act of a Court or by mistake that is attributable to that act. What constitutes an act of Court must, however, depend on the circumstances of each case.

Quaere, **whether the sale of a raiyat's holding can be set aside on the ground of irregularity under the Madras Estates Land Act.**

Petitions under s. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the orders of the Court of the Deputy Collector, Tiruvallur, dated 27th July 1922 in M. P. No. 130 of 1922, in M. P. No. 132 of 1922 and in M. P. No. 133 of 1922.

Messrs *T. P. Ramachandra Iyer* and *S. Krishnamachariar*, for the Petitioner.

Messrs. *S. Varadachariar* and *S. Rangachariar*, for the Respondent.

JUDGMENT.—These petitions arise out of applications filed before the Deputy Collector under s. 131 of the Estates Land Act for setting aside the sales for arrears of rent. The sales were on the 13th of March 1922. On the 6th of April an application was put in for the purpose of setting aside the sale on the ground of irregularity. The Deputy Collector, probably being under the impression that no application would lie to set aside the sale on the ground of irregularity, advised that the petitioner may if so inclined, apply to set aside the sale under section 131 of the Estates Land Act, which corresponds to O. XXI, r. 89, Civil Procedure Code. An application was put in for that purpose and a sum of Rs. 150 was deposited at the time. The petitioner was asked to come on the 10th of April for the purpose of ascertaining the balance to be deposited. On the 10th of April, it appears from the record, the petitioner appeared and wanted to know how much he was to pay. The Deputy Collector endorsed on his application "Find out how much he has to pay" and sent it to the Office, and Rs. 15-8-0 was received on that day. Having paid

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Rs. 15-8-0 the petitioner went away and did nothing further. On the 20th of April the purchaser, who was himself the *Izaradar* applied to the Court for payment of the money paid in by him as purchase-money and in his petition he states that he is informed that the judgment-debtor paid into Court the decree-amount with 5 per cent. and poundage and applied for getting rid of the sale under section 131 of the Estates Land Act, that he has no objection to the sale being set aside ; and he applied for payment of the money to him. Apparently no notice was taken of this application and on the 2nd of June a notice was sent by Mr. Krishnamachariar, a Vakil of the High Court, to the Deputy Collector wherein the application made by his client on the 20th of April 1922 for payment of the money due to him was referred to. The notice proceeds as follows :—Though they did so even without any formal notice of the petition by the other side for the disposal of expediting payment of the said large amount to them and their request was made so early as 20th of April last and a reminder was sent by my clients by registered post dated the 6th May and registered on the 9th idem and received by the Head Clerk on the 11th of the said month and though my clients subsequently went and requested the said clerk to send the refund order by post, which he said would soon be done, nothing has been done as yet." After receipt of the application by the purchaser, the reminder referred to in the notice and the lawyer's notice, a notice was issued on the 15th of June by the Deputy Collector calling upon the petitioner to pay Rs 138-6 3. I find a calculation made by the Deputy Collector's office which shows that the arrears were Rs. 168-14-3 and the commission was Rs. 135 making up a total of Rs. 303 14-3 that Rs. 165-8-0 had already been paid and that Rs. 138-6 3 was the balance that he had to pay. On receiving information to pay, this amount was actually paid by the petitioner. Notice was issued by the Deputy Collector informing the parties that the petition for setting aside the sale would be disposed of. Both parties appeared and the Deputy Collector set aside the sale.

Objection was taken before the Deputy Collector that, as the amount required under section 131 of the Estates Land Act was not paid within the time limited by the Act, namely, 30 days from the date of sale, the sale ought not to be set aside. The Deputy Collector set aside the sale on three grounds. He held that the non-payment of the proper sum within 30 days was due to the fact that, owing to want of records, a sum was asked to be paid which did not represent the full amount payable under section 131. He states that the petitioner acted on the statement made by the Deputy Collector as to the amount payable and that, if there was a mistake, the mistake, being that of the office, ought not to prejudice the petitioner. The Deputy Collector also set aside the sale on the ground that the purchaser having agreed to the sale being set aside and to the deposit being paid over to him he is estopped from contending that the sale ought not to be set aside because of the payment being not in accordance with the section. The third ground which he sets out is that there were irregularities in the sale which rendered the sale invalid. He also refers to the contention raised that being an *inam* it could not be brought to sale before enfranchisement.

These petitions are filed under section 115, Civil Procedure Code, and section 107 of the Government of India Act. Before I can interfere it has to be shown that the Court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally or with material irregularity. The contention of Mr. Ramachandra Iyer for the purchaser is that the amount which had to be paid being an amount which had to be arrived at merely by arithmetical calculation the petitioner was fully competent to have known what the amount was when he himself states the amount of the sale in his petition and that, even assuming that there was some error in calculation or an error made in the Deputy Collector's office, it is not a ground for excusing the non-payment of the full amount required ; secondly, that there is nothing on the record to show that the Deputy Collector fixed the amount that was payable or told him to pay a particular sum and that he was misled by such order ; thirdly, that there can be no question of estoppel because the petition to refund the purchase-money proceeded on a statement that if the amount due and payable as required by the section had been paid, the amount ought to be paid

over to the purchaser. He states that the Deputy Collector assumed a jurisdiction to set aside the sale on grounds which are not warranted by the very facts which he sets out and that, consequently, he has acted without jurisdiction by misdirecting himself upon the question of law. The contention for the respondent is that there is sufficient material on record to show that the petitioner before the Deputy Collector's Court was not aware of the exact amount payable; that he applied for information to the Deputy Collector; that the Deputy Collector who might have refused information or assistance did render the assistance that was required, and that the question, therefore, as to whether the party was misled is a question of fact which was within the competence of the Deputy Collector to decide and, having decided it in favour of the applicant, there is no want of jurisdiction or irregularity in procedure. It is also contended that the question as to whether the purchaser is estopped or not is a question of fact which it was in the competence of the Deputy Collector to decide. Questions were also raised as to whether section 131 of the Estates Land Act precludes an application to set aside a sale for irregularity. It was argued that having regard to section 192 of the Act which makes section 311 of the Civil Procedure Code inapplicable (owing to its not being included in the category of the sections enumerated), it was open to the Deputy Collector to go into the question of irregularity also. The question as to whether a sale could be set aside on the ground of irregularity under the Estates Land Act is not free from doubt but I think it is unnecessary to decide that question in this application because, if the sections of the Code are applicable, the present application being only to set aside the sale under section 131 of the Estates Land Act, which corresponds to section 310 (*a*) of the Civil Procedure Code, it is not competent to the Court to go into any question of irregularity in the sale. I do not, therefore, say anything further on this point.

As regards the question as to whether the petitioner in the lower Court was misled by an act of Court, I agree with the contention raised by Mr Varadachariar. I have already stated the facts attending on the payment of the money. There can be little doubt that the Deputy Collector on the 10th of April, when the petitioner applied and asked to know how much the actual amount payable by him, asked the office to find out the amount due and that Rs. 15-8-0 was paid, as appears from the record, on that date. I think it is a fair inference to draw from this fact that Rs. 15-8-0 was paid in consequence of the office informing the petitioner that Rs. 15-8-0 was the amount that was due and which he had to pay to make up the amount payable under the Code. It, therefore, seems to me that the amount which the petitioner paid was the amount which he paid on information given by the Court as to the amount payable. In his petition to set aside the sale he says that he was not served with any papers before the sale and if this statement is true—and there is nothing in the record to show that it is not so—he could not have known the exact amount payable except from what he heard ; so that he would have had to apply to somebody for assistance in ascertaining the amount. He chose the person most competent to give details, namely, the Deputy Collector, and the Deputy Collector helped him in ascertaining the amount. It cannot be said that he had any reason to believe that the office had given an amount which was incorrect and, even assuming that he had any doubts, he was justified in acting on the statement of the office in preference to what he might have thought was the amount that was payable.

On these facts, the question is whether the delay ought to be excused. Mr. Ramachandra Iyer concedes that, if the mistake was a mistake of the Court and if the party was misled, then it will be a ground for excusing the payment after time ; but he states that there is nothing to show that the Deputy Collector gave the petitioner any information by which he was misled. I have given my reasons for holding that the petitioner was misled by the figures given on application by him to the Deputy Collector. This is not a case where the petitioner applies to an irresponsible officer for information but where he applies to the Court which ordered the sale for ascertainment of the amount payable by him, and such information was given by the Court. Under these circumstances, I think that the principle in *Abdul Latif Moonshi* v. *Judub*

AMLA NAND *v.* NANDA

Chandra Mitter (1) and *Makbool Ahmed Chowdhury* v. *Bayle Sabhan Chowdhury* (2) applies. Reference has been made by Mr. Ramachandra Iyer to *Chundi Charan Mundal* v. *Banke Behary Lal Mandal* (3), but there is nothing in that case which overrules the principle of the decisions in 25 Calcutta referred to above. Maclean, C. J., begins his judgment by stating that he "did not intend to lay down, as an absolutely hard and fast rule, that, if the 5 per cent on the purchase-money and the amount specified in the proclamation of sale were not paid within the thirty days, the Court was powerless to set aside the sale."

He also states that he is "not prepared to say that, if the judgment-debtor has been misled by a mistake of the Court, the consequences of that mistake ought to fall upon him." The other Judges also take the same position. Jenkins, J., observes that "it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributive to that act;" and he states that "what constitutes an act of the Court must depend on the circumstances of each case."

If I am right in holding that the petitioner in the lower Court depended upon the statements made by the Deputy Collector, I think that the present case falls within the ruling enunciated and there can be no want of jurisdiction or error which will entitle me to set aside the order of the lower Court. I do not, therefore, think it necessary to go into the other question of estoppel.

In my opinion, there is no ground for interference with the order which also I think is right on the merits. C. R. P. Nos. 783 and 894 of 1922 are dismissed with costs, and C. R.P. No. 893 of 1922 is also dismissed but without costs.

S. D. *Petitions dismissed.*

(1) 25 C. 216 ; 13 Ind. Dec. (N. S.) 145.
(2) 25 C. 609 ; 13 Ind. Dec. (N. S.) 400.
(3) 26 C. 449 ; 3 C. W. N. 283 ; 13 Ind. Dec. (N. S.) 890.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANOUS REFERENCE.

December 20, 1923.

Present:—Mr. Justice Lindsay, and Mr. Justice Sulaiman.

AMLA NAND, AND OTHERS—APPLICANTS,

versus

NANDU—OPPOSITE PARTY.

Custom—Pre emption—Proof of custom—Change in custom, whether permissible.

A right of pre-emption must, in the absence of a Statute, be based either on contract or custom. [p. 146 col. 2]

In the absence of a statutory enactment or an entry in a public Record of Rights, the custom may be deduced from a long series of cases. [p. 146, col. 2.]

When a rule of custom is deduced from previous judgments, it should not in any way be departed from merely on the ground that it is now thought more equitable or convenient that a new rule should prevail [p. 146, col. 2.]

Miscellaneous Reference from the Deputy Secretary to Government, United Provinces, dated the 9th August 1923, under rule 4 of the Rules and Orders relating to the Kumaon Division.

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

Mr. *Bhargova*, for the Opposite party.

JUDGMENT.—This references raises a somewhat difficult question but, as we understand the matter, we are asked to say whether the law relating to pre-emption, as laid down in a ruling of Mr. Giles, officiating Commissioner of Kumaon, in the case of *Datt Ram* v. *Raghunath*, decided on the 11th July 1892, is or is not to be applied to the case with which we are concerned.

It seems that both the Deputy Commissioner and the Commissioner sitting in appeal have differentiated this case from the one which was considered by Mr. Giles in the ruling just referred to.

Taking the law to have been correctly laid down in Mr. Giles' judgment, we find it stated as follows :—

> "For the purposes of pre-emption the *asl* village and the *laga* village are one. A *hissedar* of a *laga* village has no right of pre-emption against a purchaser who is a *hissedar* of the *asl* village."

If this ruling is to be applied literally to the facts of the case with which we are now dealing, it seems to us that the claim of the pre-emptor in this case must be disallowed, for his status, at best, appears to be merely that of a *hissedar* of a *laga* village whereas the person who is now the purchaser of the property, namely, Amla Nand. is a *hissedar* of the *asl* village.

We have been referred to a tittle book called, the Manual of Land Tenures in the Kumaon Division compiled by Mr. Stowell.

In this book we find an *asl mauza* defined as being the chief or parent village to which the *lagas* or subsidiary villages, are attached. The definition winds up by saying that the *asl* village and *lagas* are held under one revenue enagement

Reading the judgment of Mr. Giles in the light of this definition, we take it as laying down, therefore, that where the *asl* village and the *laga* village are held under one revenue enagement the *hissedar* of the *laga* village is not entitled to pre-empt against the *hissedar* of the *asl* village.

It is said, however, in the present case that the village Rauthiya, in which the property sold is situated, does not really stand to Khandoli, the village in which the purchaser Amla Nand resides, in the relation of a *laga* to an *asl* village. In the judgment of the first Appellate Court this village Rauthiya is described as *pakka khaikar laga* and it is said that it has its own separate Settlement map and "*phant.*" Mr. Mason, the Deputy Commissioner, (District Judge), describes Rauthiya as being really a separate fiscal unit

It is not clear from this description whether the learned District Judge intended to find that Rauthiya was separately assessed to revenue and was not included in the same revenue engagement as the other village Khandoli.

The Commissioner, as Judge of the High Court of Kumaon, agrees with the opinion of the first Appellate Court. Indeed, his judgment would lead us to believe that he intended to find that this village of Rauthiya is not at all a *alaga* village but a village quite independent of the other village of Khandoli. In his judgment the learned Commissioner is unable to say how this village came to be recorded in the revenue papers as a *laga* or off-shoot of Khandoli. He certainly seems to think that it can be nothing of the sort.

It appears to us that the whole question of the right of pre emption in this case turns upon the relation which is to be traced between these two villages Rauthiya and Khandoli. If they stand to each other in the true relationship of *asl* and *laga* villages, that is to say, if they are both held under one revenue engagement, then we are of opinion that the customary law as found by Mr. Giles in his judgment in *Datt Ram* v, *Raghunath* ought to be followed in this case. In other words, the claim of the pre-emptor ought to fail and ought to be dismissed.

On the other hand, if it be the fact that these villages are not truly related as *asl* and *laga* villages but that the village of Rauthiya is a separate fiscal unit as described in the judgment of the first Appellate Court, then we are of opinion that the pre-emptor in this case has a better right than the purchaser Amla Nand.

We should like to add that a right of pre-emption must, in the absence of Statute, be based either on contract or custom. No contract has been suggested in this case. Presumably, the right claimed is based on customary law. In the absence of any statutory enactment or any entry in a public record of right, the custom may be deduced from a long series of decisions. When a rule of custom is deduced from previous judgments we are of opinion that the rule deduced therefrom should in no way be departed from merely on the ground because it is now thought more equitable or convenient that a new rule should prevail.

As regards costs in this, Court we leave the parties to bear their own.

Z. K. *Reference answered.*

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(1) 64 Ind. Cas. 186 ; 19 A. L. J. 887 ; 22 Cr. L. J. 714.

GIRJABAI *v.* PURUSHOTTAMDAS

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 172 OF 1922.

November 3, 1923.

Present:—Mr. Baker, J. C.

Mst. GIRJABAI—PLAINTIFF—APPELLANT

versus

PURUSHOTTAMDAS AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s 11—*Res judicata—Suit dismissed—Findings adverse to defendant.*

A decision cannot be said to be based on a finding unless an appeal can lie against that finding and it cannot operate as *res judicata* unless the decision upon such a finding is appealed against. [p. 148, Col. 1.]

A suit for ejectment against a sub-tenant was dismissed on the ground that the defendant was not served with a valid notice under law. It was pleaded that the defendant was an occupancy tenant not a sub-tenant as alleged and the plea was found against defendant. In a subsequent suit for ejectment the defendant is not be precluded byreason of *res judicata* from pleading that he is an occupancy tenant. [p. 148, Col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 91 of 1921, dated on 11th January 1922.

Dr. *H. S. Gour* and Mr. *S. B. Gokhale*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The plaintiff, who is the owner of the Malik Makbuza fields in suit, sued to eject the defendants on the ground that they were sub-tenants. The defendants pleaded that they were occupancy tenants and not liable to ejectment. The first Court held that the defendants were occupancy tenants and could not be ejected. On appeal the District Judge of Nimar held that the defendants were sub-tenants but they could not be ejected by virtue of an agreement between them and the plaintiff, constituting a permanent tenancy. The suit was, therefore, dismissed.

The plaintiff makes this second appeal, and the respondents (defendants) have put in a cross-objection against the finding of the lower Appellate Court that they are sub-tenants.

The principal contention of the appellant in this appeal is that the question as to the nature of the defendants' tenancy is *res judicata* by reason of the judgment in case No. 78 of 1917, between the same parties, in which it was held that the defendants were sub-tenants, but the suit was dismissed on the ground of want of notice. The plaintiff then, after giving notices, brought the present suit. The learned District Judge was of opinion that the findings about the status of the defendants in suit No. 78 were not necessary for the determination of the case because the plaintiff's suit was bound to fail in any case for want of notice; hence the issue about the status of the defendants was not material. It is contended on behalf of the appellant that the issue was material because if the defendants were occupancy tenants they could not be ejected in any case and the question of notice did not arise, hence the ruling quoted by the lower Appellate Court, *Deodhar* v. *Thakur Nihalsingh* does not apply.

The appellant relies on *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (2). In that case, however, the facts were the converse of the present case because the plaintiff, whose suit was dismissed, had a right to appeal against all the findings of which he did not avail himself and consequently in his second suit the finding on all issues was held to be *res judicata*. The present case is on all fours with *Thakur Magundeo* v. *Thakur Mahadeo Singh* (3). In that case the plaintiff brought a suit to eject the defendant from certain lands, which he claimed as *majhes* land, or land which is ordinarily cultivated by the landlord himself or by the *ticcadar*. The defendant pleaded his right of occupancy. The Court found that the land was *majhes* land, but dismissed the suit on the ground that the plaintiff had failed to prove notice to quit. Afterwards, the plaintiff brought a suit against the defendant for ejectment from the same land. The defendant again pleaded his right of occupancy. It was held that the defendant was not precluded from raising the same plea, inasmuch as the finding in the previous suit upon the issue whether the defendant was an occupancy tenant was not conclusive against him; nor could that issue be said to have been "finally decided" in that suit within the meaning of section 13 of the Civil Procedure Code. This is precisely similar to the

(1) 64 Ind Cas. 186; 19 A. L. J. 887; 22 Cr. L. J. 744.

(1) 47 Ind. Cas. 909; 16 N. L. R. 206.
(2) 34 C. 00; 12 Ind Dec. (N. S) 1269.
(3) 18 C. 647; 9 Ind. Dec. (N. S.) 482.

present case. The plaintiff sued the defendants alleging that the defendants were the sub-tenants. The defendants set up their occupancy right. This issue was found against them but the suit was dismissed because the plaintiff failed to prove notice to quit. Now, when the plaintiff, after giving notice, again sues for ejectment, the defendants are not precluded from setting up their right as occupancy tenants, the reason being that the decision in suit No 78 was not based on the finding that the defendants were sub-tenants but on want of notice. A decision cannot be said to be based on a finding unless an appeal can lie against that finding, for the suit having been altogether dismissed the defendants could not have appealed against the finding regarding their tenancy as the plaintiff did not himself appeal against the decree in that suit. The same principle has been followed in *Parbati Debi* v. *Mathura Nath Banerjee* (4). I hold, therefore, that the question of the defendants being sub-tenants is not *res judicata*.

With regard to the right of the plaintiff to eject the defendants the plaintiff has put in Exhibits P-6 and P-7, of which Exhibit P-6, dated 6th December 1888, recites that at the expiration of 17 years' lease (Ex. P-7) the defendants are to remain in possession on payment of the stipulated rent as long as they please, and are only liable to ejectment on failure to pay rent. So long, therefore, as the defendants pay their rent, they cannot be ejected, being permanent tenants.

It is now contended that this lease was executed by the Mukhtyar of the plaintiff's predecessors in title who were *parda nashin* ladies and the guardians of the minor and that not being in the interest of the minor it is not binding on the present plaintiff. It has not been contended in the Courts below that it was fraudulent and no such plea can be considered now. The plaintiff's suit must, therefore, fail.

As regards the cross-objection, it is contended that the evidence shows that the defendants were in possession of the land in suit, which is situated in the Nimar District, on the 1st January 1884 when C. P. Act IX of 1883 came into force and, therefore, they were occupancy tenants. The leading case on this point is *Tejsingh* v. *Lalji* (5), in which it was held that, under section 41 of Act IX of 1883, every person in Nimar who was already a tenant of land of any kind, was an occupancy tenant irrespective of the period for which he had been a tenant. If he became a tenant after the Act came into force, then, too, he would at once become an occupancy tenant if he was not a sub-tenant. But a person who became tenant of a *malik makbuza* after the 1st January 1881, would be a sub-tenant under section 51 (1) of the said Act. But even in Nimar, this right of occupancy in a *malik makbuza* holding is further subject to the proviso that the tenancy is not held under a written lease of the kind mentioned in proviso (c) to section 41. Assuming, however, that the defendants were occupancy tenants under the Statute on the date of the coming into force of Act IX of 1883, they cannot now claim that status because in Exhibit P-6 it is laid down that the occupancy rights in the land vest in the landlord, and whatever rights the defendants possessed, they must be considered to have surrendered them to the landlord in consideration of the execution of the permanent lease (Exh. P-6). The result is that the decree of the lower Appellate Court is confirmed and the cross-objection is dismissed with costs.

G. R. D. *Decree confirmed.*

(4) 15 Ind. Cas 453; 40 C. 29 ; 16 C. L. J. 9; 16 C. W. N. 877.

(5) Ind. Cas. 788 ; 8 N. L. R. 89.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2026 OF 1923.

February 11, 1924.

Present :—Mr. Justice Martineau.

RAM KISHEN, AND OTHERS—PLAINTIFFS—APPELLANTS

versus.

KHIALI, AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Money borrowed to carry on trade—Brahmins.

The rule prevailing among Jats who have been agriculturists from time immemorial, that an alien-

ation of ancestral land for the purpose of raising money to be invested in trade is not permissible, cannot properly be applied to a community of Brahmins who have taken to agriculture comparatively recently and among whom agriculture is not the only means of earning a livelihood.

Santa Singh v. *Waryam Singh*, 24 Ind Cas. 361 ; 19 P. R. 1915; 207 P. L. R. 1914 ; 147 P. W. R. 1914, **distinguished.**

Second appeal from the decree of the District Judge of Rawalpindi, dated the 4th July 1912.

Mr. *Sagar Chand*, for Mr. *Anant Ram*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiffs contest a sale of land situate at Bamlot in the Kahuta Tahsil of the Rawalpindi District, which was effected by their cousins in 1909. Their suit has been dismissed, the Courts below having concurred in finding that the sale was effected for necessity. The plaintiffs have filed a second appeal.

The sale was for Rs. 500 and the payment of the full price is found to have been proved.

The learned District Judge is wrong in saying in his judgment that the sale was effected by three persons, namely Khiali, his brother Maulu and their cousin Hari Chand, for the sale-deed shows that the sellers were only Khiali and Hari Chand and not Maulu. Consequently, the argument advanced on behalf of the appellants that there was no necessity for the sale so far as Maulu was concerned has no force.

With regard to Hari Chand, the finding of the lower Appellate Court is that he was a cripple and incapable of working, and that his share of the price was required for his personal necessities.

This is a finding of fact and cannot be contested in second appeal. As to Khiali it is found that he took the money in order to put it into the plaintiff Ram Kishen's shop at Muktsar in which he had joined or was going to join. It is contended for the appellants that this was not a necessary purpose, and reliance is placed on *Santa Singh* v. *Waryam Singh* (1) but I think the learned District Judge is right in holding that that ruling is not applicable to the present case. The case relied upon related to an alienation by a Jat, and the learned Judges who decided it remarked that they had no doubt that village custom would not look with favour upon the conversion of a Jat agriculturist into a shop-keeping trader and would not countenance an alienation of ancestral land in order to enable such agriculturist to carry on the business of the shop. The parties in the present case are Brahmins and, although it has been found that the members of their community cultivate land and follow custom, it appears that they have been settled in the village in which the land in suit is situate only since about 1805. The rule prevailing among Jats, who have been agriculturists from time immemorial, that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible, cannot, I think, properly be applied to the community of Brahmins to which the parties belong. Moreover, neither of the vendors in this case cultivated land. Hari Chand, as already stated, did no work and Khiali is employed in the police. It is also in evidence that land in the Kahuta Tahsil is inferior and that crops are very uncertain.

I agree with the learned District Judge that the sale by Khiali was for necessity.

The appeal, therefore, fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 24 Ind. Cas. 361 ; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 959 OF 1923.

January 17, 1924.

Present :—Mr. Justice Suhrawardy.

GIRIBALA DASI, AND OTHERS — PETITIONERS

versus

TARAK NATH JATAN, AND OTHERS — OPPOSITE PARTIES.

Civil Procedure Code, (Act V of 1908), s. 115—Equities equal—Revision.

Where equities are equal on both sides the High Court will interfere in revision under s. 115, Civil Procedure Code. [p. 150, col. 2.]

Kailash Chandra Haldar v. *Biswanath Pramanik*, 1 C. W. N. 67 **relied on.**

BISHNATH SARAN SINGH *v.* UMA DAT

Rule against an order of the District Judge, 24 Parganas.

Babu *Sitaram Banerjee*, for the Petitioners

Babu *Girijaprasanna Roy Chowdhry*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the District Judge, 24 Parganas, setting aside a sale held in execution of a decree of the petitioner. The sale was held so far back as the 7th October 1915 and the present application was presented by the opposite party for setting aside the sale under O. XXI, r. 90, on the 20th April 1922. The Court of first instance found that the property was sold for an inadequate price, that the decree-holder was the purchaser, that the sale processes were duly served, and that the judgment-debtor had given up possession of the land to the decree-holder by an amicable arrangement On appeal, the learned District Judge has recorded his finding in the following words: "I am inclined to hold that the petitioners are still in possession and that they were not aware of the sale proceedings. The sale proceedings were irregular. The properties were misdescribed and sold for an inadequate price. The decree-holders were the purchasers. The appeal will be allowed and the sale set aside." It is argued that these findings are not sufficient. In my judgment, this objection ought to prevail. The sale was held seven years ago. The judgment-debtors came to Court with the allegation that they were kept back from the knowledge of the sale by the fraud of the decree-holder. The case can only be taken out of the bar imposed by the law of limitation by proof of such fraud. The finding that the judgment-debtors were not aware of the sale proceedinges is not enough to attract the operation of section 18 of the Indian Limitation Act. There should be a further finding that they were kept back from the knowledge of the sale by the fraud of the decree-holder. It is clear that such fraud must be distinctly and clearly found in order to extend the period of limitation prescribed under the Limitation Act. The judgment of the learned District Judge is so short and laconic that it is difficult to ascertain if he had directed his mind to the entire evidence in the case and the points arising in it; for instance, the Munsif has found that there was a due publication of the sale proclamation. The learned Judge has not said a word with reference to that finding though it may be very important in determining the question whether the judgment-debtors were aware of the sale or not.

It is next contended by the opposite party that it is not a proper case in which I should interfere under section 115, Civil Procedure Code. Speaking for myself, I am always reluctant to interfere in such matters. But I consider this case to be an exceptional one in that the result of the setting aside of the sale would be that the petitioners would lose all the benefit that they have got under their decree the execution of which would now be barred by limitation. Equities being equal on both sides, I think it is a proper case to exercise my discretion. In support of the view I have expressed and of the course I have adopted I may refer to the case of *Kailash Chandra Haldar* v. *Biswanath Pramanic* (1).

The result is that this Rule is made absolute, the order of the Court below set aside and the case sent back to the Court of appeal below for rehearing of the appeal and the determination of the matter in dispute according to law. The costs will abide the result. I assess the hearing fee at two gold mohurs.

M. B. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 58 OF 1922.

January 25, 1924.

Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

RAJA BISHNATH SARAN SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

UMA DAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886) *ss.* 107 *H*, 108 (5) (5*A*)—*Suit for enhancement of rent—Declaration made by Revenue Court that tenants are under-proprietors—Suit in Civil Court to challenge decision of Revenue Court, maintainability of—Jurisdiction of Civil and Revenue Courts.*

(1) C.W.N. 67.

BISHNATH SARAN SINGH *v.* UMA DAT

When a Revenue Court, dealing with a proceeding for the enhancement of rent under section 108 (5) of the Oudh Rent Act, makes a declaration under-section 107 H of the Act that the tenants are under proprietors in relation to the land in dispute, a Civil Court has no jurisdiction to entertain a suit by the *Zemindar* for a declaration that the presons declared to be under-proprietors by the Revenue Court are not under-proprietors. The jurisdiction to make such a declartion is vested exclusively in the Revenue Courts. [p. 152, col. 2.]

Appeal against a decree of the Subordinate Judge, Partabgarh, dated 27th May 1922.

Mr. *Radha Kishan*, for the Appellant.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Partabgarh, dated the 27th May 1922. The appellant was the plaintiff in the Court below. His suit has been dismissed. The relief for which he prayed was a declaration that the defendants were not under-proprietors of the lands in suit. These lands are specified with reference to their number and area at the foot of the plaint and are situate in Mauza Oripur Nangir, Pargana Ateha, District Partabgarh. The plaintiff is the *taluqdar* and, consequently, the superior proprietor of the village. The defendants are admittedly in possession of the lands in question measuring 75 *bighas*, 16 *biswas* and 2 *biswansis* in all. They pay to the plaintiff rent for the occupation of those lands at the rate of Rs. 86 per annum.

The estate of the plaintiff was under the management of the Court of Wards on account of his minority when in 1907 the Court of Wards instituted proceedings for enhancement of rent against the defendants and their predecessors in interest under section 108, clause (5), of the Oudh Rent Act (XXII of 1886). In answer to the claim for enhancement of rent the defendants set up a *patta* dated Asarh, Badi 5th, 1251 Fasli in favour of one Durga Prasad who, they alleged, was their ancestor, and executed by one Sarabjit Singh. On the basis of his *patta* they claimed to be the under-proprietors of the lands in suit. These proceedings finally terminated with the order of the Board of Revenue, dated the 28th May 1909. The effect of that order was a declaration of the defendants' status as under-proprietors in relation to the lands in dispute. The Board further proceeded to assess rent by making an addition of 40 per cent. on the land revenue to the existing rent. The plaintiff is aggrieved with this order of the Board of Revenue and the object of the present suit is to get rid of it. The only defence with which we are concerned is that the Civil Courts have no jurisdiction to entertain a suit of the nature of which the present suit is. These pleadings gave rise to the preliminary issue - "Is the suit not cognizable by the Civil Court for reasons specified in para. 13 of written statement?" With the consent of the parties the lower Court has decided this issue only and has answered it against the plaintiff and in favour of the defendants. This decision of the Court below has been challenged in appeal before us.

We are of opinion that the decree of the Court below is correct and should be maintained. The decision of the Board of Revenue, to which reference has already been made is specifically founded on section 107 of the Oudh Rent Act (XXII of 1886). Under that section the Rent Court is invested with the jurisdiction of making a declaration that the holder of the land is the under-proprietor thereof if the Court finds that it has been held in terms of the conditions stated in that section. It is desirable to quote the exact words of the Board's order :— "If this lease be accepted as creating a valid tenure, the land was acquired in perpetuity by a written instrument and for a valuable consideration and section 107H, therefore, applies." The Board further found "that Sarabjit Singh was competent to grant the lease under which the respondent has held since and that, therefore, the second paragraph of section 107H. applies." (Ex. 11). *Prima facie*, therefore, the Board of Revenue was competent to grant the declaration in respect of the status of the defendants as under-proprietors of the lands in suit in proceedings under section 107H. already mentioned. It is argued, however, that the jurisdiction conferred on the Rent Courts by the terms of section 107H. is controlled by the proviso mentioned in section 107B. of the same Act and that the present case falls under the last proviso, which is as follows :— "Provided also that nothing in this section shall apply to any grants to which the provisions of section 79 of the United Provinces Land Revenue Act, 1901, are applic-

able." The contention is that the present case falls within section 79 of the U. P. Land Revenue Act, 1901, and consequently the Board of Revenue had no jurisdiction to make the declaration which they have made. The line on which the argument proceeds is that the entire Chapter VIIA of the Oudh Rent Act deals with three classes of suits alone: (1) suits to resume possession of, (2) to have rent assessed on, and (3) to enhance the rent of, any land held rent free or at a favourable rate of rent, *vide* section 107A. Under section 107B. a suit of any of the three classes mentioned above is barred if it involves any grant to which the provisions of section 79 of the U. P. Land Revenue Act, 1901, are applicable.

This line of argument seems to us to be perfectly sound so far as it goes. But the exception contained in the proviso mentioned above relates to the three classes of suits already mentioned as the opening clause of sectiod 107B. clearly shows, "all land held rent free or at a favourable rate of rent shall be liable to resumption or assessment or enhancement of rent." The provisions of section 107H., however, specifically provide for a proceeding which is neither of resumption, nor of assessment, nor of enhancement of rent and for an order founded on that proceeding. It relates to a case where land is not liable to resumption under section 107E. and necessitates an inquiry as to whether it "has been held rent free or at a favourable rate since the 13th day of February 1856, or for fifty years, and by two successors to the original grantee, and land which was acquired, in perpetuity, in consideration of the loss or surrender of a right previously vested in the grantee, or by written instrument and for a valuable consideration." If on inquiry the conditions stated above are found to exist, the Court is enjoined to make a declaration that the holder of such land is the under-proprietor thereof.

Section 108 provides that, "except in the way of appeal as herein provided, Courts other than Courts of Revenue shall not take cognizance of the following description of suits, and those suits shall be heard and determined in Courts of Revenue in the manner provided in this Act and not otherwise." In the Schedule relating to the description of suits, the cognizance of which is barred by any Court other than the Court of Revenue, occurs the following clause (5A): "Suit for resumption of, or assessment or enhancement of rent on land held rent free or at a favourable rate of rent or for declaration of any right under section 107G, or section 107H." It would follow from the above that the Board of Revenue had the exclusive jurisdiction for making the declaration which they have made in favour of the defendants in respect of the lands in suit and that the cognizance of the present suit by the Civil Court is barred.

We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1988 OF 1923.

February 7, 1924.

Present:—Mr. Justice Martineau.

MANGAT RAM - PLAINTIFF—APPELLANT.

versus

DR. SIRAJ-UL-HASAN, AND OTHERS—DEFENDANTS—RESPONDENTS.

Dispossession—Burying dead bodies in land belonging to another—Injunction—Recurring right—Easement—Prescription.

An owner of waste land cannot be held to have been dispossessed by the mere fact that certain persons have been burying dead bodies in the land. At any rate, the possession of the owners is not affected in respect of that portion of the land in which there are no graves.

The right of the owner of land to restrain persons from burying dead bodies therein is a continually recurring right.

The right to bury dead bodies in land belonging to another is not an easement recognised by the law and cannot be acquired by prescription.

ADIMOOLA MUDALIAR *v.* MANICK MUDALIAR

Mr. *Shamair Chand*, for the Appellants.

Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—In this case the plaintiffs, as members of the proprietary body of Karnal, sued for an injunction to restrain defendants 1 to 3 from burying their dead in a certain plot of land 4 bighas, 12 biswas in area, which the plaintiffs said was *Shamilat*, as well as for a mandatory injunction for the removal of dead bodies already buried there.

The defendants pleaded that they had been in possession of the land for a long time and had always been using it as a graveyard.

The first Court found that the land belonged to the plaintiffs, that it was not a public graveyard and that the existing graves were not more than 10 years old. It granted an injunction forbidding defendants 1 to 3 to inter their dead in the land in future.

The District Judge on appeal found that the place had been used for burying purposes for probably about 20 years. He held that the plaintiffs had not proved any circumstances beyond bare ownership entitling them to an injunction and he accordingly dismissed the suit. The plaintiffs have presented a second appeal to this Court.

It is contended for the respondents that the lower Appellate Court has given no finding on the question of the title to the land, but this is not correct. The learned District Judge clearly means to find that the land is *Shamilat*, and as the land is recorded as "*abadi deh*" there can be no doubt that it belongs to the whole of the proprietary body.

It is next urged for the respondents that they have been in adverse possession for more than 12 years, but this contention also I cannot agree with. The land is waste, and the owners have not been dispossessed merely because the defendants have been burying their dead there. At any rate, the possession of the owners is not affected in respect of that portion of the land in which there are no graves.

Another argument advanced is that the suit should have been brought within six years from the time when the defendants began using the land as a burial ground, and that, not having been brought within that period, it is time-barred. This argument has no force as the plaintiffs are not pressing their claim for an injunction for the removal of the bodies which have been buried in the disputed land. Their right to sue to restrain the defendants from burying bodies there in future is a continually recurring right, and this claim is not barred.

The reasons given by the learned District Judge for refusing an injunction are that the land is of no use to the owners and that the advantage to them in granting the injunction is out of all proportion to the distress that it would inflict on the defendants. But there is a regular graveyard elsewhere, and when it has been found that the land in dispute is not a regular graveyard, that it has been used by the defendants for burying their dead for only about 20 years and that it belongs to the proprietary body of Karnal and not to the defendants, the fact that the latter would be distressed or annoyed at being forbidden to bury their dead there in future is immaterial. An injunction prohibiting them from doing what they have no right to do is not to be refused merely because it would distress them. The learned District Judge has remarked at the end of his judgment that if the case were remanded the defendants might be able to prove that they had used the land for burying purposes for more than the statutory period, but his view that they could acquire by prescription a right to bury the dead in land belonging to other persons is not correct. In *Gopal Krishna Sil* v. *Abdul Sinad Chaudhuri* (1), cited by Counsel for the appellants, it was held that such an easement is unknown to the law.

The fact that the proprietors have no present use for the land is also not a reason for refusing an injunction. The land is just outside the town of Karnal, and it is impossible to say that the proprietors might not require it at some time for building or other purposes. At any rate, they are entitled to protect their rights, and to prevent persons to whom the land does not belong from using it as a graveyard, and they are not precluded from doing so by the fact that they did not object to bodies being buried there on previous

(1) 66 Ind. Cas. 640; 34 C. L. J. 319.

occasions. To refuse an injunction in this case would be tantamount to extinguishing the owners' rights in the land altogether.

I accordingly accept the appeal, reverse the decree of the lower Appellate, Court, and restore that of the first Court. Defendants 1 to 3 will pay the plaintiffs' costs in this Court and the lower Appellate Court. Costs in the first Court will be paid as directed by that Court.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 22-B. of 1923.

November 3, 1923.

Present :—Mr. Prideaux, A. J. C., and Mr. Kinkhede, A. J. C.

PADAMRAJ PHULCHAND AND ANOTHER —PLAINTIFFS—APPLICANTS

versus

MITSUIE BHUSHAN KESHA, LTD. BRANCH AMRAOTI, AND ANOTHER— DEFENDANTS—NON-APPLICANTS.

Limitation Act (IX of 1908) s. 5-A—Wrong legal advice, whether sufficient ground for extension—Discretion in allowing time-barred appeals, when to be exercised.

A wrong legal advice about the period of limitation is not a sufficient ground for extension of period under s. 5-A of the Limitation Act. [p. 155, col. 1.]

When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained. [p. 155, col. 2.]

Application for leave to appeal to His Majesty in Council against the decision of the Bench in First Appeal No. 57-B of 1921, dated 23rd February 1923.

Mr. *M. B. Niyogi*, for the Applicants.

Messrs. *P. N. Rudra* and *R. R. Jaywant*, for the Non-Applicants.

ORDER.—This is an application for leave to appeal to His Majesty in the Privy Council against the judgment, dated 23rd February, 1923, of a Bench of this Court in F.A. No. 57-B of 1921. The petition was presented on 16th July 1923, *i.e.*, on the 143rd day counted from the date of the judgment. The applicants have, therefore, to account for a delay of 52 days, but as on the 90th day the Court was closed on account of Civil Vacation and it reopened on 16th June 1923 the actual period of delay to be accounted for was 29 days, *i.e.*, between the 16th of June and 16th of July 1923. Originally, the period as prescribed by Article 179 of the Schedule attached to the Limitation Act was 6 months. By amendment Act XXVI of 1920, which came into force on 1st January 1921, the period was curtailed to 90 days. Hence the application is *prima facie* barred by limitation.

The applicants have stated in the petition and the affidavit of applicant No. 2, Dharamchand, filed along with it, that the cause of the delay was the mistaken advice which Dharamchand got from some pleader of the Amraoti District Court, to the effect that the application could be made in 6 months. The applicants submitted that, being misled by the ill advice, they could not file the petition in time and that the delay may, under the circumstance, be therefore condoned, and the application treated as presented within time by extending limitation under the powers vested in this Court under section 5-A of the Limitation Act. On behalf of the non-applicants it is strenuously contended that they acquired a very valuable right as soon as the limitation period expired and that that right should not be taken away from them unless very strong and cogent reasons are assigned for the delay. It is also urged that the bad legal advice does not constitute sufficient cause for excusing the delay.

We have scrutinized the terms of the affidavit filed, and we find that it does not clearly state the several facts that were necessary to convince us as to the *bona fides* of the belief alleged to have been generated in the mind of the applicant No. 2 by the ill

advice he got from a District Court Pleader. The applicants were represented in the First Appeal by an eminent Counsel practising in this Court who, we presume, was conversant with the provisions of the new amended Act (XXVI of 1920), and, if the applicants instead of consulting him or any other lawyer practising in this Court who had frequent occasions to deal with petitions for leave to appeal to His Majesty in the Privy Council, go and consult a District Court practitioner, who may not have had occasion to deal with the matter, they must thank themselves for the mistake. We think that the mistake was one which, with due care and attention, the applicants could have avoided. The applicants do not, for reasons best known to themselves, like to disclose the name of the pleader whose ill advice they say had misled them. We cannot, therefore, accept the statement of facts alleged in the affidavit as a true statement of facts that really prevented the applicants from making this petition within the time limited by the amended law of limitation.

We think that the non-applicants' contention that this valuable right should not be lightly taken away, has great force, supported as it is by a long series of decisions both English and Indian.

In *In re Coles and Ravenshear* (1), Collins, M. R., held that "where through a mistake of Counsel as to the effect of certain provisions of law an appeal was not brought until after the expiration of the time thereby allowed for appealing there was no sufficient ground for granting special leave to appeal." That learned Judge quoted, at page 5 of the report, what Lord Halsbury, L. C, said in the case of *In re Helsby* (2) "The rule gives the Court power under special circumstances to extend the time for appealing. Here there are in my opinion no special circumstances. A mistake was made by a clerk of the appellants' Solicitors. If that is a 'special circumstance' then in every case in which a blunder has been made about the time for appealing the time ought to be extended. I do not think that is the meaning of the rule." The following observations of late James, L. J., were also quoted with approval: "that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules unless there has been on his part some conduct raising an equity against him, or in a case of inevitable accident. I cannot see that a mistake made by the Solicitor of the party who is applying for an extension of time is a sufficient ground for extending it." It will thus be seen that whether the mistake be of the clerk or of the Counsel, that does not make any difference in principle.

This principle has received ample recognition at the hands of the Indian Courts also, and we would only cite *Babu Ganesh Deshmukh* v. *Sitaram Martand* (3), *Karsandas Dharmasey* v. *Bai Gangabai* (4), where Sir Lawrence Jenkins pointed out that, "when the time for appealing is once passed a very valuable right is secured to the successful litigant, and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained."

We entirely concur in this statement of the law. Particularly as we are not satisfied as to the truth of the allegations in the affidavit much less of the *bona fides* thereof, we decline to exercise our discretion in favour of the applicants who seem to be negligent in the extreme. Compare *Vithia* v. *Suya* (5), *Kedarnath* v. *Zumberlal*, (6)

The application stands dismissed with costs. We fix Rs 50 as Counsel's fee in this petition for each of the non-applicants.

G. R. D. *Application dismissed.*

(1) (1907) 1 K.B. 1 ; 76 L. J. K. B. 27 ; 95 L. T. 750 ; 23 T. L. R. 32.
(2) (1894) 1 Q. B. 742 ; 63 L. J. Q. B. 265 ; 9 R. 189 70 L. T. 144 ; 42 W. R. 218 ; 1 Manson 4.
(3) 86 Ind. Cas. 439 ; 41 B. 15; 18 Bom. L. R. 751.
(4) B, 329 at p. 330 ; 7 Bom. L. R. 965.
(5) 1 Ind. Cas. 904; 5 N. L R. 25.
(6) 87 Ind. Cas. 503; 12 N. L. R. 171.

VENKATACHALAM CHETTY *v.* GOVINDASWAMY NAICKER

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 106 OF 1922.

November 14, 1923.

Present :—Sir. Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Waller.

P. VENKATACHALAM CHETTY—DEFENDANT—APPELLANT

versus

P. S. GOVINDASWAMI NAICKER—PLAINTIFF—RESPONDENT.

Will—Gift—Construction of document—Will or gift.

If, under a document purporting to be a gift and handed over to the alleged donee, the donee gets nothing until the death of the donor, there is no disposal of any immediate rights of possession or any immediate interest in the property, the document is a Will and not a deed of gift.

The fact that the document purports to reserve a life interest in the property to the donor is not a decisive circumstance against its being a Will.

Appeal against the judgment of Mr. Justice Kumaraswami Sastry, dated the 30th day of August, 1922, in the exercise of Ordinary Original Testamentary Jurisdiction of the High Court in T. O. S. No. 11 of 1921.

Messrs. *B. Sitarama Rao*, *K. P. Ramakrishna Iyer* and *K. B. Ranganada Iyer*, for the Appellant.

Mr. *M. K. Doraisawmy Aiyer*, for the Respondent.

JUDGMENT.

The Chief Justice.—This is an appeal from a judgment of Kumaraswami Sastry, J., in which he found that a document dated November 10th, 1913, described as a gift-deed was in fact a Will. He found that it was duly executed and declined to go into the question whether certain property which passed under that document had been disposed of between the date of the Will and that of the death of the testatrix. There was ample evidence as to the execution of the document, three witnesses being called who swore that they saw the testatrix affix her mark in their presence. He believed that evidence and I can find no reason for suggesting that that decision is wrong. The question whether the document is a Will or a gift is more difficult. It is contended that it is in effect a deed of gift operating *in presenti* and not a Will at all, and that as it is a deed of gift in respect of immoveable property which has not been registered, it is void and has no effect. A Will is defined in section 3 of the Probate and Administration Act, V of 1881, as,—

> "the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death."

This document which, as I have said, is described as a gift deed, purports to dispose of part of a house. The relevant portions of the document are as follows :—

> " You shall yourself after my life-time, use and enjoy the two rooms built on the ground of the house Municipal No. 11 * * * I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my life-time that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange, and sale. No one has any right to or interest in those rooms. To this effect is the gift-deed document executed and given in respect of the aforesaid two rooms and their ground."

In form it is a deed of gift and not a Will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be carried into effect after her death, because there is no disposal of any immediate rights of possession or any immediate interest in the property. The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a Will, but, as was pointed out by the Privy Council in *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1), no great attention need be paid to that, because it is a frequent thing in this country to find

(1) 10 C. 792 at p. 802 ; 11 I A. 185 ; 8 Ind. Jur. 831 ; 4 Sar. P. C. J. 528; Rafique and Jackson's P. C. N. W. 79; 5 Ind. Dec. (N. S.) 531 (P.C.)

documents which are in fact Wills in terms making clear that the person disposing of the property reserves a life or immediate interest in the property. The various things to consider in arriving at a decision as to whether a document is a Will or a gift are discussed in that judgment on page 800. The document before their Lordships was different to this, but there were certain matters in common between the two which were relied upon by their Lordships, and, in particular, the fact that the document in that case did not purport to give to anybody any possessory or present interest until the death of the donor. A clear instance of a document which should be held to be a gift or a deed of settlement, and not a Will, is to be found in the case of *Rajammal* v. *Authiammal* (2), where the donor gave to his wife and daughter-in-law, the latter of whom was claiming maintenance, some property and provided that that property during his life time should be held by the donees for him, that they should receive Rs. 5 per month until his death and that after his death they should have the property absolutely. It was held that that was a deed of gift and not a Will. We have to consider the proper interpretation of this document, and I have come to the conclusion that it is really a Will and not a deed of gift, and I mainly base that view on the fact that the donee gets nothing until the death of the doner. It is true that the document was handed over to the donee, but I find nothing inconsistent with its being a Will in that fact.

Lastly, it is contended that the legacy granted by this Will has been redeemed by reason of the property having been sold after the date of the Will to the defendant. I am not clear on the judgment whether the learned Judge intended to give any decision on that point. It is said that it is covered by the sale-deed Ex. II whereby the testatrix sold certain property to the defendant. I am not satisfied that it is covered by it; in fact, on an examination of the documents and the further evidence, it seems clear that it is not. But that is a matter which it is not necessary to decide now. If and when the legatee tries to obtain possession of the property, there is nothing in this judgment or in the judgment of the Court below to prevent the defendant, if so advised, from setting up that this legacy has been in fact redeemed.

The appeal will be dismissed with costs.

Waller, J.— I agree. I would only add that in my opinion the question whether the testatrix had power to dispose of the property does not arise in a proceeding of this kind.

S. D. *Appeal dismissed.*

(2) 7 Ind. Cas. 357; 33 M. 304; 20 M. L. J. 519; 8 M. L. T. 195.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 29 of 1923.

January 29, 1924.

Present :—Mr. Wazir Hassan, A. J. C.

MANNI LAL—PLAINTIFF—APPELLANT

versus

SHEO BARAN AND OTHERS—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r 9— Dismissal of suit for default—Restoration, application for—Sufficient cause—Duty of Court—Rules of procedure, object of.

Where a suit is dismissed in default and an application is made for the restoration of the suit, the Court ought to institute an enquiry into the merits of the application and should not surrender its jurisdiction to the dictation of the defendant.

On a suit being called on for hearing plaintiff's agent after informing the Reader of the Court, went to call Counsel who was present in the compound of the Court, but before the agent or Counsel could return to the Court-room the suit was dismissed for default. On an application for restoration of the suit being made the defendant agreed to the restoration of the suit provided the plaintiff paid Rs. 800 to him The Court made an order in accordance with the terms proposed by the defendant;

MANNI LAL *v.* SHEO BARAN

Held (1) that the suit should not have been dismissed without waiting for plaintiff's agent or Counsel;

(2) that the Court should not have passed the order for restoration at the dictation of the defendant;

(3) that there was sufficient cause for restoration of the suit without imposing any conditions on the plaintiff.

Rules of procedure are not made for the purpose of hindering justice.

Indrajit Pratap Bahadar Sahi v. *Awar Singh*, 74 Ind. Cas. 747 ; 50 I. A. 183 at p. 191 ; 21 A. L. J. 554 ; 4 P. L. T. 447 ; (1923) A. L. R. (P. C.) 128 ; 1 P. L. R. 845 ; 2 Pat. 676 ; 38 M. L. T. 223 ; 45 M. L. J. 578 ; 18 L. W. 728 ; 25 Bom. L. R. 1259 ; 28 C. W. N. 277 (P. C.), followed.

Appeal against the decree of the Sub-Judge, Fyzabad, dated the 6th April, 1923.

Mr. *J. K. Banerji*, holding brief of Mr. *Basdeo Lal*, for the Appellant.

Mr. *Ghulam Husain*, for the Respondents Nos. 3 and 4.

Order.—This is a plaintiff's appeal. It arises out of a suit for the recovery of possession of certain immoveable property. The suit was instituted on the 30th May 1921 and was valued at Rs. 6,000. After many adjournments due to the absence of the defendants, issues came to be framed on the 22nd November 1921. The first issue was as to limitation and involved questions as to the date of the plaintiff's birth. The 17th December 1921 was fixed for the plaintiff's evidence on that issue. The evidence, however, began on the 31st January 1922. On that date the plaintiff examined three witnesses. The case was again adjourned. On the 23rd February 1922 the plaintiff examined one more witness and closed his evidence. On the same day the defendants examined three witnesses on their side. The case was then adjourned to the 27th March 1922 when the defendants examined one more witness. It was again adjourned for the 26th April 1922. On that date the defendants examined more witnesses and the 5th July 1922 was fixed for further evidence. When the case came up for hearing on that date the plaintiff was found to be absent. His suit was dismissed for default. The Court professed to have acted under O. XVII, r. 2, of the Code of Civil Procedure. On the following day the plaintiff applied for restoration of his suit to its original number. This application was accompanied with an affidavit. It came to be decided on the 25th November 1922. The defendants expressed their consent to the restoration of the plaintiff's suit provided he paid them a sum of Rs. 300. The Court without exercising its own judgment accepted the defendants' terms and ordered the restoration of the suit on condition of the plaintiff's paying the sum mentioned above at any time previous to the date of hearing following the order. The 15th January 1923 was then fixed for the defendants' further evidence. On that date the plaintiff asked for time for payment of the sum which he had been ordered to pay on the 25th November 1922. Time was granted to him and the 26th February 1923 was fixed in the case. The plaintiff paid Rs. 90 to the defendants and the case was adjourned to the 6th April 1923. On the last mentioned date the plaintiff asked for more time. The Court refused the prayer and dismissed the suit for the reason that the plaintiff had failed to pay the costs as previously ordered.

Now the real question for determination is whether the Court below was right in passing its order of the 25th November 1922. I am of opinion that it was not. It should have instituted an inquiry into the merits of the application of the 5th July 1922 and not surrendered its jurisdiction to the dictation of the defendants. Indeed, the order of the Court to the 25th November 1922 discloses the fact that the Court was prepared to accept the truth of the allegations in the affidavit accompanying the application. The affidavit was a short and simple one. It stated that the plaintiff's Counsel appeared in the Court-room several times and was awaiting for the call of his case in the compound of the Court buildings, that as soon as the case was called up the *pairokar* informed the Reader of the Court, went out to bring his pleader and brought him back and finally that as soon as the pleader appeared it was found that the case had been dismissed in default. The Court says: "The applicant swears that his Vakil was somewhere outside the Court buildings but did not appear when the case was called.".

The plaintiff had throughout been diligent in the prosecution of his suit. He gave evi-

dence and appeared all through while the evidence of the defendants' witnesses was being recorded and the case was at that stage when on the 5th July 1922 this unfortunate order was passed. The plaintiff had engaged a Counsel who, according to the affidavit, was present for the most part of the time in the Court-room itself but at the precise moment when this particular case was called up for hearing he happened to be outside the Court. The plaintiff's *pairokar* rushes out of the Court-room to fetch him. He comes back but finds that the suit had been dismissed in default. To my mind, the facts stated above are proved by the record and by the affidavit. There is no counter-affidavit and, as pointed out above, the Court below seems to be of the opinion that the affidavit filed on behalf of the plaintiff is not untrue It should always be borne in mind that, " rules of procedure are not made for the purpose of hindering justice :" *Indrajit Pratap Bahadar Sahi* v. *Amar Singh.* (1)

It was argued on behalf of the respondents that the plaintiff accepted the order of the 25th November 1922 and offered to comply with it by paying a portion of the amount of costs awarded against him by the Court below. In the circumstances in which the plaintiff was placed by the order of the Court, he had no choice left. In any event, an order which to my mind was wholly improper and is now being challenged before me cannot be condoned by reason of the plaintiff's acquiescence in it for some time and, in the circumstances, over which he had no control.

I, therefore, allow the appeal, set aside the decree of the lower Court and remand the case to that Court with directions that it be restored in the register of the pending suits in that Court and be decided according to law. The appellant will have his costs from the respondents in this Court. The other costs will abide the event

Z. K. *Appeal allowed.*

(1) 74 Ind. 747 ; 50 I. A. 183 ; C. R. P. 191 ; 21 A. L. J. 554; 4 P. L T. 447 (1923) A. I. R. (P. C) 128 1 P. L. R. 845 ; 2 Pat. 676; 83 M. L. T. 238 ; 45 M. L. J. 578 ; 18 L W. 728 ; 25 Bom. L. R 1259 ; 28 C. W. N. 277 (P. C.)

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1589 OF 1923.

February 1, 1924.

Present:—Mr. Justice Moti Sagar.

UDI—DEFENDANT—APPELLANT

versus

MARU MAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Co-sharers—Transferee from co-sharer, suit by, to recover possession—Limitation.

In the case of co sharers the possession of one co-sharer is the possession of all, and if one of them sets up a prescriptive title against the others, he must prove that his possession was openly hostile to the latter and that it could not be lawfully referred to a legal title as co-sharer.

But a transferee or an assignee from a co-sharer does not by the mere fact of transfer or assignment become a co-sharer if his rights as such are denied by the other co-sharers A suit by such transferee or asignee to recover possession of the share transferred to him from the co sharers of his transferor or assignor must, therefore, be brought within twelve years of the date of the transfer or assignment in his favour.

Second Appeal against the decree of the Senior Sub-Judge, Karnal, dated the 12th May 19 3.

Mr. *Shamair Chand*, for the Appellant.

Lala *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT.—After hearing arguments on both sides I am of opinion that this apppeal must succeed. The suit was one for possession of a 1/10th share in a certin house at Panipat which the plaintiff claimed to have purchased from one Taiji by a sale-deed executed by the latter in his favour on the 23rd of February 1897. The defendants who are the other co sharers, denied that Taiji had any share in the house or that he had sold it to the plaintiff. It was further contedned that the suit was barred by limitation, inasmuch as the plaintiff had

never been in possession of the share in dispute from the date of its purchase. The trial Court did not give any findings on the merits but dismissed the suit on the preliminary ground that it was barred by limitation. On appeal the learned Senior Sub-Judge came to a contrary finding and held that it had been proved that the plaintiff had been in joint possession of another 1/5th share in this house with the defendants and that consequently no question of limitation arose in this case. He further held that if Taiji was a co-sharer the plaintiff, as his assignee, would also be a co-sharer and the fact that he had not been in possession from the date of the sale would not be of much consequence. He accordingly accepted the appeal and remanded the case to the Court of first instance for decision on the merits. Against this decision the defendants have come up in second appeal to this Court through Mr. Shamair Chand and I have heard Mr. Mehr Chand Mahajan on behalf of the respondent.

It is argued by Mr. Shamair Chand that the finding of the learned Senior Sub-Judge that the plaintiff was in joint possession of a 1/5th share in this house with the other co-sharers is not based on any evidence and must, therefore, be set aside. Mr Mehr Chand Mahajan, on the other hand, contends that there is evidence on record in support of this finding and that the finding being one of fact cannot be impugned in Second appeal. I have carefully read the evidence on which reliance has been placed by Mr. Mehr Chand and I am unable to agree with him that it supports his contention. It is true that some witnesses have stated that the plaintiff sold a 1/5th share in the house to one Sultan Singh and that the latter sold it in turn to Ramji Lal and Moti, defendants; but it is not at all clear how the plaintiff acquired this share. It is stated that this share originally belonged to one Khairati, and that he transferred it to the plaintff. There is neither any sale deed on the record, nor any other oral evidence from which the fact of this alleged sale could be deduced. In any case, the evidence relied on in no way proves the plaintiff's contention that he or his successors in interest have ever been in possession of this 1/5th share. I must, therefore, hold that the finding of the learned Senior Sub-Judge is not based on any evidence and that it has not been established that the plaintiff has been in possession of any portion of the house in dispute since the date of his purchase.

No authority has been cited by the learned Vakil for the respondents in support of his next contention that the plaintiff, as an assignee, has the same rights and privileges which his assignor had in the property. It is true that in the case of co sharers the possession of one co-sharer is the possession of all and that if one of them sets up a prescriptive title against the others he must prove that his possession was openly hostile and that it could not be lawfully referred to a legal title as co-sharer; but I fail to understand how a transferee or an assignee can, by the mere fact of transfer or assignment, become a co-sharer if his rights as such are denied by the other co-sharers. It is beyond doubt that if the assignor has not transferred possession of the property assigned to his assignee the latter, in order to succeed in a suit for possession, must sue within 12 years from the date of his assignment, and that a suit against his assignor would be barred if he comes into Court after that period. It would be absurd to hold that the claim which would obviously be barred against the assignor would be within limitation if brought against the other co-sharers, who do not even recognize the right of the assignor to assign in favour of a third party. In my opinion there is no force in this contention, and I must overrule it

Finally, it was contended by Mr. Mehr Chand that the site in dispute was a vacant piece of land and that the case was, therefore, governed by the principle that possession went with title. This contention, however, is negatived by the plaintiffs' own allegation in the plaint where he stated that the property in suit was not a vacant site, but a residential house. In my opinion the plaintiff has entirely failed to prove his possession within 12 years prior to the institution of the suit, and the claim is clearly barred by limitation.

I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Z. K. *Appeal allowed.*

CHHANGA *v.* JAI LAL

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1000 of 1923.
January 15, 1922.

Present :—Mr. Justice Zafar Ali.

CHHANGA, AND HARNA—PLAINTIFFS —APPELLANTS

versus

JAI LAL,—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Adopted son, whether divested of property inherited from natural father—Only son of deceased father, whether can be adopted.

The rule of Hindu Law according to which an adopted son is deprived of the right of succession in his natural family does not apply where succession to the natural father's estate precedes the adoption.

Obiter :—**The adoption of a married orphan who is the only son of his natural father is not valid according to Hindu Law.**

Second Appeal from the decree of the District Judge, Karnal, dated the 29th January 1923, affirming that of the Munsif, 1st class, Sonepat, District Rohtak, dated the 30th October 1922, dismissing the claim with costs.

Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *Shamair Chand*, Advocate for the Respondent.

JUDGMENT.—It can hardly be said that a question of law is involved in this second apppeal and if there is a question of custom, the appeal is not competent as there is no certificate. The facts are few and simple, and are briefly as below:—

The plaintiffs who are Jat agriculturists are the surviving brothers of Hira, the father of the defendant Jai Lal. On the death of Hira, Jai Lal, his only son, succeeded to his estate which was duly mutated in his name. Sometime after that, Nihal, a first cousin of Hira, adopted Jai Lal as his son by a registered deed dated the 19th April 1917. Jai Lal's uncles, the plaintiffs, then moved the Revenue authorities for mutating his land in their names stating that he had lost his right to his natural father's inheritance in consequence of adoption by Nihal, but the mutation was refused. In the order refusing the mutation Jai Lal's reply to his uncle's claim was stated to be that he could give up Hira's land on succeeding to Nihal's estate which he had not so far done. Nihal died in 1921 and Jai Lal then succeeded to his estate. The plaintiffs brought this suit for possession of Hira's land on the old ground that Jai Lal had lost his right to succeed to it. But he had succeeded to it before the adoption and, therefore, there was no question of losing the right of succession. The real question was whether, by virtue of the adoption which took place subsequently to the succession, he could be divested of the property which had already devolved upon him on the death of his natural father. The rule of Hindu Law or custom according to which an adopted son is deprived of the right of inheritance in his natural family cannot apply where succession to the natural father's estate precedes the adoption. The plaintiffs in order to succeed in their suit should have established a special custom by which the defendant was liable to be divested of the property that had devolved upon him before the adoption. On this point they examined only two witnesses neither of whom had been adopted after the death of his natural father and deposed that he gave up the lands of his natural father on being adopted. This evidence, coupled with Jai Lal's own statement before the Revenue Officer cited in the order of mutation, has been considered by the Courts below insufficient to establish a general rule of custom and that finding cannot be interfered with. Further, it may be remarked that the adoption of a married orphan who was the only son of his natural father was not valid according to Hindu Law.

The appeal fails and is dismissed with costs.

Z. K.

GOLAK CHANDRA NUNDY *v.* NISHI CHANDRA SIL

CALCUTTA HIGH COURT.

CIVIL RULE No. 949 OF 1923.

January 17, 1924.

Present :—Mr. Justice Suhrawardy.

GOLAK CHANDRA NUNDY—DEFENDANT No. 1—PETITIONER

versus

NISHI CHANDRA SIL AND OTHERS OPPOSITE PARTIES.

Pleadings—Decree can be given only on case made by plaintiff—Amendment.

No Judge should give a decree to a plaintiff on a case which is not made in the plaint. If the Judge disbelieves the case as made in the plaint he should dismiss the suit; or in the interest of justice he may give the plaintiff an opportunity to amend the plaint.

Babu *Chandra Sekhar Sen*, for the Petitioner.

Babu *Narendra Kumar Das*, for the Opposite Parties.

JUDGMENT.—Two grounds have been taken in this case. The first is that the learned Judge was wrong in giving a decree to the plaintiff on a case which was not made in the plaint. This has prejudiced the defendant as he was unable to meet the plaintiff's case as placed before the Judge and accepted by him. The allegations in the plaint are to the effect that the plaintiff had some money deposited with defendant No. 2 and that the plaintiff had taken Rs. 100 out of the money in order to pay certain taxes on timber cut by him. With regard to this case the Judge observes as follows: "This Rs. 100 described as plaintiff's money kept in deposit with defendant No. 2, but defendant No. 1 took that as a loan from defendant No. 2 and then promises to pay to the plaintiff. This of course is not proved." Having disbelieved the plaintiff's case as set out in the plaint, the learned Judge proceeds to determine whether anything is due to the plaintiff from defendant No. 1 and he finds that Rs. 100 was due from the defendant No 1 to the plaintiff on account of taxes on timber cut from the forest belonging jointly to the plaintiff and one Latifa Khatun. His further finding is that the defendant promised to pay this Rs. 100 to the plaintiff and he gave the plaintiff a decree. In my opinion, this is not the correct procedure to follow. If the Judge disbelieved the case as made in the plaint, his course was to dismiss the suit; or, if he was of opinion that in the interest of justice the plaintiff should be given an opportunity to amend the plaint, he should have given that permission so that the defendant might have notice of the case alleged against him and opportunity to meet it.

The second point is that on the findings of the Judge the suit is not cognizable by the Small Cause Court. The Judge has found that the money was payable to the plaintiff on account of taxes on timber cut. On the authority of the decision of this Court in the cases of *Abdulah Sarkar* v. *Asraf Ali Mandal* (1) and *Bande Ali Fakir* v. *Amud Sarkar* (2) it is contended that a suit for recovery of royalty on timber cut is not cognizable by a Court of Small Causes. I do not know what the real contest between the parties was as it has not been disclosed on account of the plaintiff not making out this case in the plaint. This point really depends upon the first contention of the petitioner. I think that the proper order that should be passed in this case is that the case should be remitted to the Court below with a direction that if the the Court is of opinion that the plaintiff has not proved his case as made in the plaint, he should dismiss the suit, or if it be of opinion that the plaintiff should be given an opportunity for amending his plaint, he should give such leave and give the defendant an opportunity of taking all objections that he may be advised to take in respect of the amendment so made.

The Rule is made absolute. Costs will abide the result. I assess the hearing fee at one gold mohur.

S. D. *Rule made absolute.*

(1) 7 C. L. J. 151.
(2) 26 Ind. Cas. 380; 19 C. W. N. 415; 20 C. L. J. 227.

NANAK CHAND KISHORI LAL *v.* RAM SARUP GUJAR MAL

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1950 OF 1923.
January 14 1924.

Present : —Mr. Justice Moti Sagar.

FIRM NANAK CHAND—KISHORI LAL—PLAINTIFF—APPELLANT,

versus

FIRM RAM SARUP —GUJAR MAL—
—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (*XXVI of* 1881) s. 4—*Pro-note—Acknowledgment of debt—Assignment, what is.*

Plaintiff sued to recover a sum of money on the basis of a document which was in the following terms:—

"We have Rs. 900 of yours in deposit with us. We shall pay interest on it at the rate of ten annas per cent:"

***Held*, that the document did not contain any un-conditional undertaking to pay the principal sum of money and the only undertaking given was to pay interest at the rate of ten annas per cent. coupled with an acknowledgment of the debt ; it was not, therefore, a promissory-note within the meaning of section 4 of the Negotiable Instruments Act.**

Assignment is a transfer of an estate or interest in property, and no particular words are necessary to effect an assignment, provided the intention to transfer is clear from the language used.

Rama Iyer **v.** *Venkatachallam Patter*, 30 M. 75 ; 1 M. L. T. 329 ; 16 M. L. J. 564, relied on.

The words "I have sold the document" are sufficient to effect a complete assignment of the debt represented by the document.

Second appeal from the decree of the District Judge of Hissar, dated the 18th September, 1923.

Mr. *Shamair Chand*, for the Appellant.

Lala *Nawal Kishore*, for the Respondents.

JUDGMENT.—One Prabhu Dayal borrowed a sum of Rs. 900 from one Bishambar Dyal and executed a pro-note in his favour on the 23rd of December 1913. On the 3rd of October 1916 he paid a sum of Rs. 275 to Bishambar Dyal and the latter on the 31st of August 1922 is alleged to have assigned the document to the present plaintiff who brought a suit on the basis thereof on the 3rd of October 1922, impleading both Prabhu Dyal and Bishembar Dyal as defendants. The suit was resisted by Prabhu Dyal on the ground that he had paid off the money due on this document to Bishambar Dyal and that nothing now remained due. He further contended that the document was not a pro-note and, therefore, not negotiable. The validity of the assignment was also challenged and it was contended that the plaintiff had no *locus standi* to sue. Bishambar Dyal at first admitted the claim but susequently, after the issues had been framed, resiled from his previous statement and contended that the alleged assignment was not for valid consideration. The trial Court decreed the suit, holding that the alleged repayment of the loan by Prabhu Dyal to Bishambar Dyal had not been established, that the document was a pro-note, and that the assignment was valid.

On appeal the learned District Judge agreed with the Sub-Judge's finding that the evidence as to repayment was not at all convincing and that the defence subsequently put forward by Bishambar Dyal was false. On the other two questions, however, the finding of the learned District Judge was in favour of the defendants and it was held that the document was not a pro-note and that it had not been validly assigned to the plaintiff. As a result of this finding the suit was dismissed.

Plaintiff has now come up in second appeal to this Court. I agree with the finding of the learned District Judge that the document is not a pro-note. A promissory-note is defined in section 4 of the Negotiable Instruments Act as an instrument in writing containing an unconditional undertaking signed by the maker to pay a certain sum of money to or to the order of the said person. The document in question in the present case is in the following terms :—"*Age rupai nau sau tumhare hamare pas jama hainge. Biyaj dar das anne sainkra denge.*" There can be no doubt that the document does not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given is to pay interest at the rate of ten annas per cent. per mensem. The document clearly seems to be an acknowledgment of a debt and not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act.

The next question for consideration is whether the assignment was valid or not. On this point I am unable to agree with the finding of the learned Judge of the Court below that the words on the back of the document

amount merely to an endorsement and that they do not constitute a valid assignment in favour of the plaintiff. The endorsement in question is worded as follows :—"*Is ruqqa ko wasul karne ka malik Nanak Chand haiga. Main ne ruqqa ko Nanak Chand hath baichdia haiga. Dastkhat Bishamber Dyal. Miti Bhadon Sudi* 9, *Samat* 1979." Immediately after follows another endorsement to the following effect: "*Is ruqqa ke rupai biyaj Nanak Chand Kishori Lal seti le lie. Dastkhat Bishambar Dyal. Rupai Sab our biyaj le lie. Dastkhat Bishambar Dayal. Bhadon Sudi*, 9 *Sambat* 1979." The endorsement is also thumb-marked by Bishambar Dyal. In Wharton's Law Lexicon an assignment is defined as a transfer of an estate or interest in property and it is stated that the usual operative verb is "assign", but any other word indicating an intention to make a complete transfer, for example, " convey " will also amount to an assignment. In *Rama Iyer* v. *Venkatachellam Patter* (1) the learned Judges observe that no particular words are necessary to effect a transfer if the intention to transfer is clear from the language used. In section 130 of the Transfer of Property Act a transfer of an actionable claim can be effected by the execution of an instrument in writing signed by the transferror and shall be considered to be complete and effectual upon the execution of such instrument. In the present case the words "*ruqqa ko Nanak Chand hath baich diya haiga*" clearly indicate that a complete assignment has been effected. In my opinion the assignment in writing was valid and it did give the plaintiff a right of suit upon the document in question.

I accept the appeal and, setting aside the order of the Court below, decree the plaintiff's suit with costs throughout.

Z. K.

(1) 30 M. 75 ; 1 M. L. T. 329 ; 16 M. L. J. 564.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1082 OF 1922.

January 21, 1924.

Present :—Mr. Justice Stuart.

Pandit ISH NARAIN UPADHIA—PLAINTIFF—APPELLANT

versus

RAMESHAR LOHAR AND ANOTHER—DEFENDANTS,—RESPONDENTS.

Allahabad High Court Rules, Ch. III. r. 3—Appeal—Evidence, absence of—Certificate not filed—Ground, whether can be argued—Custom—Blacksmith, additions made by, to dwelling—Zemindar, failure of, to object—Acquiescence—Renewal of additions.

Rule 3 of Chapter III of the Allahabad High Court Rules is imperative, and unless the certificate required by the rule is present, the ground referred to in the rule cannot be argued in spite of the fact that the appeal has been admitted to a hearing. [p. 165, Col. 1]

When an addition made by a blacksmith to his dwelling is allowed to exist by the *Zemindar* without any objection for several years, the presumption is not only that the *Zemindar* has acquiesced in the addition being made but that he has accepted it as a reasonable appurtenance of the blacksmith's dwelling, and if the construction comes to an end the latter has a right to replace it. [p. 165, Col. 2]

Second Appeal from a decree of the Subordinate Judge of Jaunpur, dated the 17th of March 1922.

Messrs. *Haribans Sahai* and *S. S. Sastry*, for the Appellant.

Mr. *Kumuda Prasad*, for the Respondents.

JUDGMENT.—The plaintiff-appellant is the *zemindar* of village Sari. The defendants-respondents are two blacksmiths living in the same village. The plaintiff sued to eject the defendants from a *saiban*, a *dalan* and a shed on the allegation that these were recent constructions upon his land. The defendants are tenants and residents in the village in which they have a house. They carry on business as blacksmiths there. The Munsif found that one of these structures was an old one and dismissed the suit in respect of it. He decreed the blacksmith's ejectment from the two others. The blacksmiths appealed to the learned Subordinate Judge. The *zemindar* did not appeal in respect of the dismissal of the portion of his suit. The learned Subordinate Judge decided as follows:—He found that the two structures from which the Munsif had ordered the defendants' ejectment

were at least eight years old. He continued, "I am satisfied that these constructions were in the place of the old ones and so the plaintiff did not protest when the new ones were built in place of the old ones and now owing to a criminal case he has lodged the suit." What he meant by the latter part of his finding was that the blacksmiths had got themselves disliked by the *zemindar* by giving evidence in a criminal case contrary to his views. The learned Subordinate Judge then dismissed the whole of the suit. The *zemindar* has appealed in respect of the two buildings from which the Munsif ordered the blacksmiths to be ejected. He takes the position that there was no evidence on the record to support the finding that these two structures were made in the place of old ones. This ground of appeal is not open to him under the High Court rules—see Rule 3, Chapter III, as no certificate is filed.

"If the ground of appeal is that there is in fact on the record no evidence or admission to support the decree, the ground shall so state, and shall further state specifically the material finding in support of which there is no evidence or admission on the record.

"No appeal from an appellate decree presented by an Advocate, Attorney or Vakil shall be admitted on any such ground as is in this rule referred to, unless such Advocate, Attorney or Vakil certifies under his hand the memorandum of appeal that he has examined the record and that, in his opinion, such ground is well founded in fact."

Now it is urged to me that as the appeal was admitted for hearing by a learned Judge of this Court it is not open to me to apply that rule and that, in any circumstances, I could permit the certificate to be filed now. I read the rule as imperative. Unless the certificate is present the matter cannot be argued in spite of the fact that the appeal has been admitted to a hearing. It does not follow that the appeal was admitted on this ground, for there are other grounds which have been argued. In respect of the second point that I might allow the certificate to be filed now I note that this appeal was filed on the 10th of July 1922. The certificate should have been filed within, at the most, a few months. I hold a strong view that it is no use making rules unless one keeps them and that if a rule of this Court is disobeyed and the Court allows it, as I am asked to do, to be complied with some 18 months afterwards, the rule is not likely to be very effective, for it will always be possible to break the rule at first, and to comply with it two or three years afterwards.

I now take the appeal upon the other points. It is urged by the learned Counsel for the appellant that on the finding of fact the appeal should succeed. His case is that acquiescence gives no title. This argument is beside the point. What I find the Subordinate Judge to have concluded is this, that constructions similar to these had existed for some twelve years for the convenience of these blacksmiths upon the sites on which they now stand, and the only conclusions to be drawn from the fact that the blacksmiths worked in the village are that these constructions were for their use in carrying on their trade or business or in some way accessory to it. As the original constructions had been made many years ago the obvious presumption is that the *zemindar*, not only had acquiesced in their having been made but accepted them as reasonable appurtenances of the blacksmiths' dwellings and when those constructions came to an end the blacksmiths had every right to replace them as they were before. I find that they have replaced them as they were before on the finding of the learned Subordinate Judge. His conclusion is, therefore, correct and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 3470 OF 1923.

November 15, 1923.

Present:—Sir Walter Salis Schwabe, K. C., Chief Justice and Mr. Justice Ramesam.

ANANTA LAL DAMANI—PETITIONER

versus

SURJIMULL MURLIDHAR CHANDICK AND ANOTHER—RESPONDENTS

Civil Procedure Code (*Act* V *of* 1908) s. 109 (c)—*Certificate—Question whether an acknowledgment was*

ALLAH DIA *v.* RAHIMUDDIN

evidence of debt within the meaning of Art. 1, *Sch. I of Stamp Act—Value of subject-matter less than Rs.* 10,000.

The question whether a certain acknowledgment which was given of a debt was given in order to supply evidence of such debt within the meaning of Art. 1, Sch. I, of the Stamp Act and, if so, whether it would be admissible in evidence without being stamped is not one of public importance or of great private importance, nor can a decision on the point be regarded as an important precedent governing numerous other cases, so as to render it a fit one for granting leave to appeal to His Majesty in Council under section 109 (c), where the value of the subject-matter of the appeal is less than Rs. 10,000.

Petition praying that, in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner to appeal to His Majesty in Council, against the judgment and order of the High Court, dated 23rd April 1923 in O. S. A. No. 53 of 1922, preferred against the judgment of the Honourable Mr. Justice Phillips, dated 28th February 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 824 of 1920.

Mr. *R. N. Aingar, instructed by* Messrs. *Grant* and *Greaterex*, for the Petitioner.

Messrs. *K. V. Sesha Aiyengar* and *R. Purushothama Iyengar*, for the Respondents.

JUDGMENT.

The Chief Justice.—This is an application for leave to appeal to the Privy Council in a case which is under Rs. 10,000. The question, therefore is whether, under section 109 (c) of the C. P. C. we can certify it to be a fit case for appeal to His Majesty in Council.

To quote my own words in *Raja Rajeswara Sethupathi* v. *Tiruncelakandam Servai* (1): "What is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance." The point in dispute in this case is whether a certain acknowledgment which was given of a debt was given in order to supply evidence of such debt within the meaning of Art. 1 of Sch. I of the Stamp Act, because, if so, not having been properly stamped, it would not be admissible in evidence at all. We held, following other cases, that the question for determination was whether the dominant intention of giving that acknowledgment was to supply evidence of the debt or something else; and we held that, under the circumstances of this particular case, it was not the dominant intention and, therefore, the acknowledgment was admissible. This may be right or may be wrong in law, or it may be the right or wrong view of the facts of the case. But I cannot think that it is a case of public importance or of great private importance; nor do I think that it is an important precedent which would govern numerous other cases. The point has been decided before, and most of the cases on the subject are on the same lines as this judgment. I do not think that this is a case within the meaning of the section. If it is desired to litigate this point before the Privy Council we still have to wait until a case of sufficient magnitude and importance to make it appealable has arisen.

This application must be dismissed with costs.

Ramesam, J.—I agree.

V. N. V. *Application dismissed.*

(1) 72 Ind. Cas. 260; 44 M. L. J. 217; 32 M. L. T. 126; (1923) A. I. R. (M) 282; (1923) M. W. N. 415; 17 L. W. 775.

ALLAHABAD HIGH COURT.

° CIVIL REVISION NO. 151 OF 1922.

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

January 16, 1924.

ALLAH DIA AND ANOTHER—APPLICANTS *versus* RAHIMUDDIN AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908) *s.* 152—*Amendment of decree—Clerical error—Mistake due to party, whether can be corrected.*

A mistake in the final form of an order or decree may be due to an original mistake made by the party or his lawyer in the application or pleadings, but that is no reason for refusing to correct the mistake. [p. 167, Col. 1]

Civil Revision from an order of the Subordinate Judge of Saharanpur, dated the 14th October 1922.

BRIJ BALLAB DAS *v.* MAHABIR PRASAD

Mr. *Mushtaq Ahmad*, for the Applicants.

The opposite parties were not represented.

JUDGMENT.—We think that this application in revision ought to succeed. We do not think that the learned Judge was justified in rejecting the application on any ground, and he certainly was not justified in rejecting it on the ground which he has given. A mistake in the final form of an order may well be due to an original mistake made by the party or his lawyer in making the application. That is not a reason for refusing to correct a mistake, otherwise there would be no object in the legislature giving the Courts jurisdiction to correct mistakes. Mistakes of the kind which may be described as clerical, or due to an oversight between a decree *nisi* and a decree absolute, are in the majority of cases the mistake or slip of the party who sets the Court in motion. The application made to the learned Judge was a very ordinary one for amendment, and it ought to have been decided on the merits. We take it that the learned Judge was satisfied that there had been a mistake. He says that if there was one, it was in the application, which looks as though he thought there was one. The result was that the order which followed the application was in a mistaken form, and the decree which followed the order, followed the same mistake. It might happen in a suit that a claim for Rs. 100,000 in a plaint was said to be Rs. 200,000 by a slip of the pen, which nobody noticed and which is carried throughout the whole suit from the plaint down to the decree. Nobody can doubt, and it has been decided over and over again, that a mistake of that sort begun in the plaint and carried right through the proceedings without being discovered, can be corrected in the decree. We, therefore, think that the learned Judge ought to have made the amendment. We are not prepared ourselves to make it, because in addition to the verbal alterations necessary, we are asked to direct a resale. A resale seems necessarily to follow from what we are directing to be done. But to prevent any possibility of further mistake, we prefer to indicate what we think ought to be done, and leave the Court below to do in the presence of anybody who chooses to come and object. If the purchasers, as we are told, themselves asked for a correction of the decree, they cannot be heard to object to it now. But the Court, before making any order for resale, ought to give the purchasers an opportunity of being heard. We direct the case to be returned to the lower Court and to be taken up forthwith as a miscellaneous application after notice to the parties, and we direct the lower Court to entertain the application for inserting into the decree absolute the names of Hoshyar Singh and Chhajju Mal so as to bring the decree in this respect into conformity with the decree *nisi*. Secondly, to strike out one of the 2-3rds. That is to say, to direct in the decree absolute that 2-3rds of the property, and not 2-3rds of 2 3rds shall be sold, as recorded in the new *khewat* No. 25, and, lastly, to make such order for resale as appears to the Court below to be right, and to be such as the Court below would have made, if it made the decree absolute in the form which we now direct it to be made. The applicant must have the costs of these proceedings in the Court below up to the present date and of the proceedings which we have directed further to be taken.

Z. K. *Application allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 63 of 1923.

January 15, 1924.

Present :—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

BRIJ BALLAB DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHABIR PRASAD—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), ss. 12, 21—Contract to grant lease—Specific performance Compensation in money, whether adequate—Intention of Legislature.

The Legislature did not intend that persons who entered into contracts to transfer or lease immoveable property should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made could be compensated in money. The explanation to section 12 of the Specific Relief Act requires the Court to presume that such compensation cannot be adequate unless and until the contrary is presumed. [p. 168, col. 1 and 2.]

Appeal from an order of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Allahabad, dated the 22nd December 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *L. P. Zutshi*, for the Respondent.

JUDGMENT.—The learned Judge has gone wrong over this case. The language may be, to persons to whom it is not familiar, somewhat difficult to apply, and it is useful to have a complete knowledge of the whole Act before selecting one passage from a particular section, and construing that by itself. The learned Judge seems to think that the fact that the plaintiffs were able to put into the terms of a money sum, the compensation for the loss which they would probably suffer if they could not get the lease that they wanted, was in itself equivalent to saying that such sum was adequate compensation. It is quite clear that the plaintiffs did not say that. In fact, the plaintiffs really said just the reverse. They asked for specific performance, and it was only in the final alternative that they claimed a sum to recoup their loss as estimated by them as damages if their claim for specific performance was not allowed. But the plaintiffs were claiming what they were *prima facie* entitled to, namely, a lease of a particular shop, and there may be many reasons why they desire and are willing to pay for a particular shop, and why they are unable to do more than give a rough statement of the loss which they will suffer if they do not get it, preferring the shop to any form of pecuniary compensation. If the matter, or rather the meaning of the word "adequate," is to be judged from their point of view, then it is clear that they do not consider it adequate, otherwise they would ask for the money and not for specific performance. The foregoing reasoning seems to show that the word "adequate" in section 21 must be adequate in the mind of the Court, for some reason found as a fact and stated by the Court for holding it to be adequate, in spite of the opinion of the plaintiffs that it is inadequate. The illustration in section 12 is a useful guide to what is meant. If one looks first at the illustration to section 21, sub-section (a), which the learned Judge was construing, one will see that it deals with moveable property and with contracts of a commercial nature. But turning back to the explanation to section 12, it is clear that the Legislature did not intend that persons who entered into contracts to transfer or lease immoveable property, should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made, could be compensated in money, because that explanation requires the Court to presume that such compensation cannot be adequate unless and until the contrary is proved. There is really no suggestion in the judgment of the learned Judge that he approached this point of view. If he had done so, he would probably have hesitated to make the order which he has done. He only refers to the fact that similar shops are available for which the plaintiffs would have to pay higher rent. The plaintiffs' answer to this is, that they do not want them unless they are compelled to take them, or one of them. We should have preferred to hear the case argued by the respondent representing the view which the learned Judge has taken, but we have no doubt that the appeal must be allowed and the judgment of the first Court restored with costs here and below, with costs in this Court on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 764 OF 1921.

November 16, 1923.

Present:—Mr. Justice Spencer.

V. R. M. RAMASWAMI CHETTIAR—PETITIONER

versus

ADAPPA CHETTIAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Suit for dissolution of partnership—Death of defendant—Son's application to be brought on record out of time on account of amendment of Limitation Act—Parties, adding of.

In a suit for dissolution of partnership after the preliminary decree was passed, the defendant died on 30th September 1920 and his son applied on 6th January 1921 to be brought on the record. Meanwhile, the Limitation Act was amended so as to reduce the period of limitation for applications under Art. 177, from 6 months to 90 days:

***Held*, that, in the circumstances of the case, and in the interests of justice, all parties interested should be added under O. I, r. 10 Civil Procedure Code.**

RAKIMJAN *v.* AMAR KRISHNA CHOUDHURY

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 21st March 1921, of the Court of the District Munsif of Devakotta, in I. A. No. 102 of 1921, followed in O. S. No. 526 of 1919.

Mr. *T. R. Srinivasa Rajagopala Iyengar*, for the Petitioner.

Mr. *T. R. Srinivasa Iyengar*, for Mr. *E. Doraiswamy Aiyar*, for the Respondent.

JUDGMENT.—The suit was one for dissolution of partnership. A preliminary decree had been passed and all that remained to be done was to take accounts and pass a final decree. At this stage the defendant died on the 30th September 1920. One of his sons applied on the 6th January 1921 that he and his brother might be brought on the record. He would have been in time if the Limitation Act in force at the commencement of the action, had not been amended by the alteration of the period prescribed under Art. 177, Limitation Act, from six months to ninety days. The Court was closed for Christmas holidays and, a few days after it reopened, the petitioner made this appliation. In a suit of this nature the distinction between plaintiffs and defendants is not so marked as in suits where only the defendant must pay if the plaintiff obtains a decree.

It was essential that all parties concerned should be on the record and the Court could have, under O. I, r. 10 of the Code of Civil Procedure, added any person whose presence was necessary for finally determining the matters in issue (Vide *Lakshmichand Rewachan* v. *Kachubhai Gulabchand* (1). The petitioner was two days late in his application.

He might reasonably have expected that the plaintiff or the Court would have taken steps to bring the representatives of the deceased defendant on the record. There was also the circumstance that the limitation period had been reduced, a fact of which it is not shown that he was aware.

Under all these circumstances, I cannot regard the action of the lower Court in dismissing both the application and the subsequent petition to set aside abatement as taken with a due exercise of discretion and in the interests of justice.

I set aside the order in question and direct the District Munsif to add the legal representatives of the deceased defendant and proceed with the suit.

The respondent will pay the petitioner's costs in this Court and bear his own.

S. D. *Order set aside.*

(1) 11 Ind. Cas. 559; 35 B 393; 13 Bom. L. R. 517.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLAT DECREE NO. 1767 OF 1921.

January 23, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Page.

Sreemati RAKIMJAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMAR KRISHNA CHOUDHURY—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Ch. X, s. 103 B (3)—Suit for rent—Non-agricultural land—Record of Rights, entry in, whether admissible in evidence.

Although non-agricultural lands are not subject to the provisions of Chapter X of the Bengal Tenancy Act, an entry in the Record of Rights with respect to the amount of rent of such land, is admissible in evidence, in a suit for the recovery of rent, as corroborative of other evidence in the suit, although the weight to be attached to such entry would depend on the circumstances of each particular case.

Appeal against the decree of the Additional Subordinate Judge of Zillah Chittagong, dated the 13th of May 1921, reversing that of

the Additional Munsif at that place, dated the 29th April 1920.

Babu *Narendra Kumar Dass*, for the Appellants.

Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.

Page, J.—In this second appeal the only question that arises is as to the amount of rent for which the decree ought to have been passed in favour of the landlord. The landlord claimed that the rent in respect of the tenancy in question was fixed at the rate of Rs. 7 per annum. The tenant, on the other hand, claimed that the rent was Rs. 2-4. In the trial Court the plaintiff himself gave evidence orally to the effect that the rent was Rs 7 ; and among the documents filed in the trial Court in this case, was a Record of Rights in which, in respect of a particular plot which was specified by a particular number in the *Khatian*, and which the plaintiff claimed, was the land which is the subject-matter of the tenancy in question, the rent was entered as Rs 7. However, the learned trial Court came to the conclusion that there was a *pottah* and there was certain *dakhilas* which purported to show that rent was payable and had been paid in respect of a tenancy at the rate of Rs 2-4 as urged by the defendant, and he came to the conclusion that the *pottah* and the *dakhilas* referred to the premises in suit and passed a decree for rent at the lower rate. In the lower Appellate Court a different conclusion was arrived at, and the grounds upon which the learned Judge of the lower Appellate Court based his conclusion that the higher rate of Rs. 7 ought to be the rate at which rent should be recovered by the plaintiff were two-fold, the first ground being that whereas there were three different plots leased by the plaintiff to the defendant in respect of one of which the rent was Rs 7, with respect to another Rs 2-4 and with respect to a third Rs 2-2, the defendant had not attempted to identify the *pottah* and the *dakhilas* as being referable to the land in suit in the present case. He, therefore, came to the conclusion that that evidence was valueless for the purpose in hand, namely, for the purpose of discovering what was the rate at which rent was payable in respect of the premises in suit. I have been pressed by this fact that the defendant had applied before the trial that a local investigation should be held as to the area of the land in question. That application was rejected upon the ground that the predecessor-in-title of the defendant who had had an opportunity of making the application had refrained from doing so, and that, at the time when the application was made, it was too late and that it was unreasonable that it should be granted. I am not satisfied that that was the proper manner in which that application ought to have been treated. But if the local investigation was not permitted, it must have been obvious to the defendant that it had become all the more important for him satisfactorily to identify the plots in question in this suit, with the plots in respect of which the *pottah* and the *dakhilas* were created. The learned Judge in the lower Appellate Court, nevertheless, has come to the conclusion, to use his own words, that "the identity of the *pottah* land with the rent land was not even attempted to be established" and the *dakhilas*, even if genuine, do not contain anything to show that they were given in respect of the rent of land in suit. In these circumstances, I am not disposed to come to the conclusion that the decision at which he arrived on this matter was wrong.

The second ground upon which the learned Judge in the Court below based his disagreement with the decree passed in the trial Court was that if you look at those *khatians* to which the attention of the Court was not apparently drawn at the trial, it will appear that they were evidence which satisfactorily corroborated the oral evidence given by the plaintiff to the effect that rent was fixed at the rate of Rs. 7. As regards that matter the learned Vakil for the appellant has urged that the lands in question in this case being non-agricultural lands were lands which were not subject to the provisions of Chapter X of the Bengal Tenancy Act, and that, therefore, no entry in respect of such lands could properly be made in the Record of Rights and he contends, therefore, that the entry in the Record of Rights must be disregarded as being altogether inadmissible. In my opinion, this contention is not sound. Under section 103B (3) of the Bengal Tenancy Act "every entry in the Record of Rights so published," that is, pub-

lished in accordance with the provisions of the Act, "shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect." Now, this question arose for consideration in the case of *Sasi Kanta Acharjya* v. *Sandhya Moni Dasya* (1). In that case two points were taken—one, that the land in question being non-agricultural was not subject to the Bengal Tenancy Act and, therefore, no entry in the Record of Rights could properly be made with respect to it. The Court decided against that contention and held that the lands were subject to the Bengal Tenancy Act. The second question which was raised and decided in that case was that, assuming that the lands were not subject to the Bengal Tenancy Act and, therefore, no entry could properly be made in respect of them no presumption, as set out in section 103 B (3), as to the correctness of the entries could arise. It was not contended in that case that the entries were not admissible in evidence, but it was urged that, although they might be admissible, no presumption as to the correctness could be made. The learned Chief Justice at page 485 observes: "The learned Vakil for the defendant has supported his proposition that if an entry has been made in the Record of Rights with regard to land which does not come within the scope of the Bengal Tenancy Act and with regard to which the Revenue Officer had no jurisdiction to make the entry, no presumption arose under section 103B (3) Bengal Tenancy Act. I am not prepared to go so far as to say that in this case no presumption arose from the entry in the Record of Rights, but I am prepared to say that the presumption could not be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights." Now, applying the proposition laid down by the learned Chief Justice to the facts of this case, in my opinion, the fact that in the Record of Rights the rent of the land in suit is entered as being Rs. 7 was admissible in corroboration of the evidence given by the plaintiff that the rent of the premises had in fact been fixed at Rs 7. The weight to be attached to that corroborative evidence is a matter which, with all the other circumstances in the case, the learned Judge was entitled to take into consideration before deciding what was in fact the rate at which the rent of the premises had been fixed. In these circumstance, and for the reasons which I have given, the issue in this case in the end turns out to be one of fact as to whether, having regard to the evidence adduced on one side and on the other, the learned Judge in the lower Appellate Court could reasonably have reached the conclusion at which he arrived. In my opinion, there was evidence before him which would justify him in arriving at the conclusion to which he came and in my opinion, for these reasons, this appeal should be dismissed with costs.

Suhrawardy, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 65 Ind. Cas. 4; 26 C. W. N. 483; 34 C. L. J. 504.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 828 OF 1922.

January 4, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Musammat WASI FATIMA BIBI—PLAINTIFF—APPELLANT

versus

ABDUL GHAFFAR KHAN AND OTHERS—DEFENDANTS—RESPONDENTS—

Pre-emption—Construction of document—Sale—Mortgage by conditional sale—Option of re-purchase, whether immoveable property—Sale of option, whether can be pre-empted.

Two co-sharers in a village sold their shares by one sale-deed for a joint consideration. On the same day the vendee executed an agreement in favour of one of the vendors which provided that if the latter paid back a certain sum of money within a certain period he could get back his share of the property sold, and that if he paid back a certain further sum within the same period he could get back the share of the other vendor also;

***Held*, that the transaction was one of sale with an option of re-purchase and not one of mortgage by conditional sale. [p. 172, col. 2.]**

A mere option of re-purchase cannot be said to be immoveable property and the sale of such a right cannot, therefore, be pre-empted. [p. 172, col. 2.]

WASI FATIMA BIBI *v.* ABDUL GHAFFAR KHAN

Second appeal against the decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Allahabad, dated the 3rd March 1922.

Mr. *K. Verma*, for the Appellant.

Mr. *Zafar Medhi*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. On the 7th December 1905 Muhammad Amin and *Musammat* Shakira Bibi executed a deed of transfer in favour of one Lala Gur Dayal for a sum of Rs. 700. Under this document a two-annas *zemindari* share of the lady and eight-pies *zemindari* share of Muhammad Amin were transferred. On the same date a deed of agreement was executed by Lala Gur Dayal, the transferee, which recited that he had entered into a contract with Muhammad Amin, one of the two vendors, to the effect that in case a sum of Rs. 300 were paid by him within thirty years he would be entitled to get possession of his eight-pies share and if a further sum of Rs. 750 were paid he would get back possession of the two-annas share of *Musammat* Shakira Bibi also.

In 1919 the present defendant-vendee obtained a sale-deed of a certain share in the same village from a number of other co-sharers. The present plaintiff instituted a suit to pre-empt this sale-deed but while this suit was pending the defendant-vendee, namely, Abdul Ghaffar, obtained a document purporting to be a deed of gift from the said Muhammad Amin. On the strength of this deed he pleaded that he had become a co-sharer in the village and that, therefore, the suit for pre-emption was liable to be dismissed as against him. We have not been able to see the judgment which was pronounced in that case but we know this that that suit, on some ground or other, was actually decreed.

The plaintiff after that decree brought a second suit for pre-emption to recover the property covered by this ostensible deed of gift on the allegation that it really was a sale transaction.

The Courts below have found that a custom of pre-emption exists in favour of the plaintiff but have dismissed the suit on the ground that although the sale was for consideration, nevertheless it was not liable to pre-emption as the interest which it purported to pass could not be pre-empted.

The main question which arises in this appeal is whether the interest, if any, acquired by the vendee is capable of being pre-empted. The answer to the question depends on the further question whether the two documents of the 7th December 1905 taken together form one transaction of a mortgage by conditional sale or whether they represent two distinct and separate transactions, namely, one of a deed of sale by Muhammad Amin and *Musammat* Shakira Bibi and another a mere agreement by the vendee in favour of one of the vendors only. Both the Courts below have held that the transaction is not one of mortgage by conditional sale. We agree with the view taken by them. It is true that both these documents were executed on one and the same date which may create a suspicion in one's mind that they formed one transaction, but the Courts below have pointed out that it is not shown that the property which was transferred on that date was worth more than Rs 700 which represented the sale consideration, and have also pointed out that the agreement was with one of the vendors only, namely, Muhammad Amin, and in his favour only. No right to recover back the property was given to *Musammat* Shakira Bibi or her heirs. This is a very significant feature of the transaction. It is quite inconsistent with the transaction being merely a mortgage by conditional sale for in that case both Muhammad Amin and *Musammat* Shakira Bibi would have been entitled to redeem, if not the whole, at least their shares of the properties. We, therefore, think that the view taken by the Courts below on this point is correct.

This being so, no interest in the immoveable property has passed to the defendant-vendee under the document. There was a mere option of re-purchase arising out of the contract between Muhammad Amin and Lala Gur Dayal, which cannot be said to be immoveable property. Whether the vendee has or has not acquired any right to exercise this option we are of opinion that that right cannot be pre-empted. The suit accordingly must fail. The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed*

RUKMANI AMMAL *v.* NARASIMHACHARIAR

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 85 OF 1923.

December 7, 1923.

Present—Mr. Justice Krishnan

and Mr. Justice Waller.

RUKMANI AMMAL—APPELLANT

versus

NARASIMHACHARIAR AND ANOTHER—RESPONDENTS

Hindu Law—Partition—Construction of partition deed—Partition between two sisters—Succession—Survivorship.

Where two sisters, who had inherited the properties of their father after the death of his widow, effected a partition of their properties by a deed which referred to a prior division of the moveables, allotted a decree to one sister and a usufructuary mortgage to the other and divided the immoveable properties between them and closed with the sentence,—"Henceforth the only relationship between us will be one of friendship and not of property."

***Held*, that each sister renounced all rights to the other's share and on the death of one, the right of succession to her by the other by survivorship was excluded.**

Muttu Vaduganadha Tevar v. *Dosasinga Tevar* 3 M. 290; 8 I. A. 99; 4 Sar. P. C. J. 289; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757 (P. C.); *Gomathi Ammal* v. *Kupputhayi Ammal* 14 M. L. J. 175 and *Subbammal* v. *Lakshmana Aiyar* 26 M. L. J. 472; 22 Ind. Cas. 399, distinguished.

Appeal against the order of the District Court of Coimbatore, in Appeal No. 283 of 1921, dated 12th October 1922 (O. S. No. 720 of 1921 on the file of the Court of the District Munsif of Erode).

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.

Mr. *N. S. Rangaswamy Aiyengar*, for the Respondents.

JUDGMENT.

Waller, J.—The question for decision is as to the proper construction of a partition-deed executed by two step-sisters. They inherited the properties of their father after the death of his widow. The moveable properties they divided without a deed and the immoveable properties by the deed in question. Nine years later, one of them, Janaki by name, died leaving a Will in favour of the plaintiff. The Will is disputed by the other sister who claims the property by right of survivorship. The partition deed is Ex. A. It refers to the fact that the moveable properties had already been divided, allots a decree to one sister and an usufructuary mortgage to the other and divides the immoveable properties between them. It closes with the sentence,—

> "Henceforth the only relationship between us will be one of friendship and not of property."

The question is whether they intended by this expression to exclude the right of succession by survivorship. It is argued that their intention was merely to give up their present and their future rights.

The phrase used in Ex. A. is sometimes to be found in deeds of partition between males. In such cases there is no question of right of survivorship and the phrase would seem to carry no special significance. In a case like this, however, there is a question of right of survivorship and the phrase might well have been intended to carry a special significance.

Several rulings have been cited. The first is *Muttuvaduganadha Thevar* v. *Dosasinga Tevar* (1). A partition-deed was relied on in which occured precisely the same phrase as is now under consideration. The finding was (*vide* p. 339) that the right renounced in the partition-deed was absolutely different from the right in contest in the subsequent litigation. The decision does not, I think, help the appellant. Here each sister renounced "henceforth" all right to the other's share and they cannot but have had in contemplation the certainty that one of them would predecease the other.

The next ruling, *Gomathi Ammal* v. *Kupputhayi Ammal* (2), is of no greater service to the appellant, for the finding was that the sisters could not have had in contemplation the renunciation of the right of survivorship as they believed themselves to be entitled to an absolute estate. Had they known that their estate was limited, the language of the deed —that thereafter the connection between them was to be that of blood only—might have led the Court to a different conclusion. The Munsif in this case has entirely failed to grasp the real significance of the ruling.

(1) 3 M. 290; 8 I. A. 99; 4 Sar. P. C. J. 289; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757 (P. C.).
(2) 14 M. L. J. 175.

The last ruling is no more favourable to the appellant. It is *Subbammal* v. *Krishna Aiyar* (3). In that case certain expressions had been used in a deed which were not very apt to the occasion but had been interpreted by the lower Courts as excluding the right to succeed by survivorship. The High Court held that all doubt would have been set at rest had the more usual words that "the parties" henceforth had no connection of property but only of blood" been added. The Munsif interprets the ruling as meaning that it is essential that all the three expressions should be present in order to justify the inference that the right of survivorship had been renounced He is, I think, wrong. It seems to me clear that the High Court regarded the first two phrases as being of doubtful import and the third as quite conclusive.

In the result, I think that the learned District Judge rightly interpreted the partition deed and would dismiss the appeal with costs.

Krishnan, J.—I agree that the construction placed on Ex. A by the District Judge is correct and that this appeal fails ; it is dismissed with costs.

V. N. V. *Appeal dismissed.*

(3) 22 Ind. Cas. 399 ; 26 M. L. J. 479.

CALCUTTA HIGH COURT.

CIVIL RULE No. 987 OF 1923.

January 18, 1924.

Present :—Mr. Justice Suhrawardy.

SYED REZA ALI AND OTHERS —PETITIONERS

versus

KAZI NUR-UDDIN AHMED AND OTHERS —OPPOSITE PARTIES.

Muhammadan Law—Wakf—Marz-ul-maut— *Mutwalli's failure to act according to trust, effect of—Charitable and Religious Trusts Act (XIV of* 1920), *s.* 3 *—Proper party, who is.*

When there is no evidence that the *wakif* on the day he executed the *wakfnama* was under an apprehension of immediate death, the mere fact that he was suffering from phthisis or that he died a few days after the execution of the deed, is not enough to establish what in Muhammadan Law is technically called *marz-ul-maut*. In fact lingering diseases like phthisis remove the suspicion of apprehension of immediate death on the mind of the patient.

Fatima Bibi v. *Ahmed Bux*, 85 C. 171 ; 12 C. W. N. 240 ; 7 C. L. J. 122 ; 18 M. L. J. 6 ; 35 I. A. 67 ; 10 Bom. L. R. 50 (P. C) ; *Fatima Bibi* v. *Ahmed Bux* 31 C. 819, relied upon.

If a *mutwalli* does not act according to the trust imposed upon him by the *wakf* deed, that could not effect the character of the endowment. It cannot be said that a *wakf* is not good because it has not been acted upon.

The Charitable and Religious Trusts Act does not become inapplicable because the trustee has parted with the entire trust property.

A person who claims adversely to the trust and who is not liable under section 3 of the Charitable and Religious Trusts Act (XIV of 1920) is not a proper party to proceedings under the Act.

Rule against the order of the District Judge of 24-Parganahs, dated the 13th August 1923, in Miscellaneous non-Judicial Case No. 1 of 1923.

Babu *Amarendra Nath Bose*, with him Babu *Jatindra Mohan Chowdhury*, for the Petitioners.

Babu *Narendra Kumar Bose*, for the Opposite Party No. 2.

JUDGMENT.—This Rule is directed against an order of the District Judge of 24 Parganahs dated the 12th August 1323 dismissing an application of the petitioners under section 3 of the Charitable and Religious Trusts Act, XIV of 1920. That section authorizes any person having an interest in a trust of a charitable or religious nature to apply to Court for a direction on the trustee for certain information relating to the trust and for an examination and auditing of the accounts of the trust. The petitioners' application has been dismissed by the learned Judge as he has found that the *wakfnama* was executed during the death illness of the testator and that it was never acted upon.

With regard to the first ground the finding of the learned Judge is as follows : "It appears, however, that it was created when he was in death illness. He was suffering from phthisis. He may have been ill for a long time but death was near." The evidence on the record has been placed before me and the learned Vakil for the appellant assures me that there is no evidence that the *wakif* on the day he executed the *wakfnama* was under an apprehension

of immediate death. The mere fact that he was suffering from phthisis or that he died a few days after the execution of the deed is not enough to establish what in Muhammadan Law is technically called *Marz-ul-maut*. In fact lingering diseases like pthisis have been taken by Muhammadan lawyers to remove the suspicion of apprehension of immediate death on the mind of the patient. The attention of the learned Judge is drawn to the case of *Fatima Bibi* v. *Ahmed Bux* (1). In that case the deed was executed by the deceased one week before his death, but the Courts here, as well as Their Lordships of the Judicial Committee, did not think that it was vitiated by being executed during *Marz-ul-maut*. The law on this point is fully discussed in the judgment of this Court in the case of *Fatima Bibi* v. *Ahmed Bux* (2). The learned Judge, however, on this point found that the alienation is good to the extent of one-third. But he really throws out the petitioners' application on the ground that the document was not acted upon. By that deed the deceased *wakif* nominated himself *Mutwalli* during his lifetime and after his death the opposite party No. 1, Kazi Nuruddin Ahmed, as the *Mutwalli* of the trust. The learned Judge found that the trust on the face of it was good, that a substantial portion of the property was given to religious purposes and that there can be little doubt that it is a valid *wakf*. I cannot say how it can be held that the *wakf* was not good because it was not acted upon. It is nobody's case that during his lifetime the dedicator gave any indication of not acting upon this deed. After his death the opposite party No. 1 became *Mutwalli* of this trust by virtue of this deed, and if he did not act according to the trust imposed upon him by the deed, it would in no way affect the character of the endowment. The Judicial Committee has in several cases discussed this matter and in the recent case of *Vidya Varathi Thirtha* v. *Balusami Ayyar* (3), the Judicial Committee have laid down the power and limitations, of a trustee under the Muhammadan trust.

The learned Judge winds up his judgment by this remark: "It is the Charitable and Religious Trusts Act. It does seem to embrace a case where the trust was not acted upon and where the so-called trustee has committed so complete a breach of the trust that the trust properties have passed to a third party." I can well understand the first portion of this remark, which means that the trust when not acted upon cannot be regarded as a valid trust, but I fail to understand the latter portion of the sentence where the Judge seems to have been of opinion that, because the trustee has parted with the entire trust property, the Act becomes inapplicable. I refuse to assent to this proposition. I think that the learned Judge has not approached the case in the proper way, and that on account of the erroneous view he has taken of the law he has failed to exercise jurisdiction which was vested in him under the Charitable and Religious Trust Act.

The Rule is accordingly made absolute, the order of the District Judge dated the 13th August 1923 dismissing the plaintiffs' application under section 3 of the Act set aside and the case remitted to him for reconsideration in the light of the observations I have made above. The opposite party No. 2 (The Bengal Chemical and Pharmaceutical Company) asks for their costs. In proceedings under this Act I do not think that any person who has claims adversely to the trust and who is not liable under section 3 is a proper party. No doubt, any decision on an application made under the Act will not be binding upon persons claiming adversely to the trust. But that does not justify the Court in complicating matters by bringing persons who might raise questions outside the scope of the Act. The opposite party No. 2 is, therefore, entitled to his costs in this Court. I assess the hearing fee at one gold mohur. The costs of the lower Court will be at the discretion of that Court. The petitioners are entitled to their costs of this Court from opposite party No. 1. I assess the hearing fee at two gold mohurs.

M. B.
Z. K. *Rule made absolute.*

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(1) 35 C. 271 ; 12 C. W. N. 214 ; 7 C. L. J. 122 ; 18 M. L. J. 6; 35 I. A. 67 ; 10 Bom. L. R. 50 (P. C.).

(2) 31 C. 319.

(3) 65 Ind. Cas. 161 ; 48 I. A. 302 ; (1921) M. W. N. 449 ; 41 M. L. J. 346 ; 44 M. 831 ; 8 U. P. L. R. (P.C.) 62 ; 15 L. W. 78 ; 30 M. L T. 66 ; 8 P. L. T. 245 ; 26 C. W. N. 537 ; 24 Bom. L. R. 629 ; 20 A. L. J. 497 ; (1922) A. I. R. (P.C.) 128 (P. C.).

BOBBA BHAVAMMA *v.* BOBBA RAMAMMA

MADRAS HIGH COURT.

CIVIL APPEAL NO. 81 OF 1922

NOVEMBER 5, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

BOBBA BHAVAMMA AND OTHERS—APPELLANTS

versus

BOBBA RAMAMMA AND OTHERS—RESPONDENTS.

Evidence Act, (I of 1872), ss, 33 and 145—Deposition of one person in one proceeding, whether admissible in evidence to contradict another person.

Under section 33 of the Evidence Act, the deposition of a witness in a former proceeding is admissible as substantive evidence in a later proceeding if certain conditions prescribed by it are found to exist; but it cannot be used even with the consent of parties merely for the purpose of contradicting the statement of another person in such proceeding.

Under section 145 Evidence Act, a witness may be contradicted by previous inconsistent statements of himself, but not those of a third party.

Jainab Bibi Sahiba v. *Hyderally Sahib*, 56 Ind. Cas. 957; 38 M. L. J. 532; 28 M. L. J. 23; 1920 M. W. N. 360; 12 L. W. 64; 43 M. 609 (F. B.), distinguished.

Appeal against the decree of the Court of the Additional Subordinate Judge of Kistna, at Ellore, in Original Suit No. 14 of 1920.

Messrs *A. Krishnaswamy Iyer* and *Bapirazu*, for the Appellants.

Messrs. *C. V. Ananta Krishna* and *Rama Rao*, for the Respondents :—

JUDGMENT.—The plaintiff and the 1st defendant are the widows of one Janakiramiah who died on the 6th of October 1919 at his village Pandithavalloor leaving property of considerable value. The plaintiff claims a partition of the property and delivery to her of a moiety thereof. The 1st defendant resists the suit on the ground that the late Janakiramiah left a Will, and the question to be decided in this suit is whether the document put forward was the last Will of the deceased. The learned Subordinate Judge has come to the conclusion that it was not executed by Janakiramiah and that it was brought into existence by the 1st defendant and others some time subsequent to his death. We have carefully gone into the evidence, and we are satisfied that Janakiramiah did not make the Will in question and that the 1st defendant is bound to fail.

The learned Vakil for the appellant commented on the judgment and suggested that it did not show that the Subordinate Judge applied his mind to the evidence before recording his finding. The judgmet no doubt is far from satisfactory, but on the evidence and on the probabilities we are clearly of the opinion that the 1st defendant has signally failed to make her case.

[*After discussing the evidence their Lordships proceeded.*]

There is one further matter which requires notice, Ex. VI is the depositon of the plaintiff's father in the enquiry held by the Sub-Registrar in connection with the registering of the Will in question. That deposition was filed in the lower Court on behalf of the defendants and apparently without objection on the part of the plaintiff. Mr. A. Krishnaswami Iyer, the learned Vakil for the appellant, urged that he could rely upon this deposition and cited *Jainab Bibi Sahiba* v. *Hyderally Sahib* (1) in support of this contention. The argument is utterly untenable. Under section 33 of the Indian Evidence Act, the evidence given by a witness in a former proceeding is admissible in a later proceeding if certain conditions prescribed by it are found to exist; and it was held in the case above cited that the person against whom the evidence is sought to be used may waive the benefit of the provisions which are intended for his security and that the strict requirements of the section may be departed from by consent of the parties. We fail to see how this case can be of any use to the appellants. They do not seek to make the evidence given by the plaintiff's father in the previous proceeding substantive evidence in the case, indeed they do not desire to rely upon that deposition at all as on very essential points it is bound to be against them. But it is relied upon for the purpose of contradicting the plaintiff's statements in her deposition in the present case. Under section 145 of the Indian Evidence Act the credit of a witness may be impeached by proof of his former inconsistent statements, and before a witness can be so impeached he must be given an opportunity of making any explanation which is open to him. To hold that a witness may be contradicted by previous

(1) 56 Ind. Cas. 957; 43 M. 609; 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360; 12 L. W. 64 (F. B.).

inconsistent statements not of himself but of a third party would be against principle and opposed to this section.

Next, Mr. Krishnaswamy Iyer argued that Ex. VI would be admissible under section 11 of the Evidence Act. This section, in our opinion, is clearly inapplicable and the cases cited by him namely *G. Yannessa* v. *Mobara Kannessa* (2) and *Nara Vinayak Patvardhan* v. *Narahari Bin Raggunath* (3) do not seem to be any authority on the point.

It would appear that item 9 of Schedule A was alienated in the lifetime of Janakiramiah and it is excluded from partition by consent.

The extent of item 1 of B Schedule is not admitted by the appellant But as the identity of the property is not disputed it is unnecessary to decide the extent of the land. We accept the Sub-Judge's finding as to the rate of mesne profits.

In the result, the appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(2) 25 C. 210 at p. 213; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142.

(3) 16 B. 125; 8 Ind Dec. (N. S.) 559.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 228 OF 1922.

March 29, 1923.

Present :—Mr. Baker, J. C.

THAKURSA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BEHARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70—Person in possession under invalid title—Mortgage paid off—Payment, whether can be recovered from true owner—Subrogation.

Where a person *bona fide* believing himself to have a claim to property pays off charges on that property, he is entitled to recover the amount paid by him from the true owners of the property, who ultimately get the benefit of the payment, under sections 69 and 70 of the Contract Act. A purchaser of land who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off, on the principle of subrogation.

Case-law discussed.

Appeal from the decree of the District Judge, Nimar, dated the 20th February 1921.

Mr. *M. Gupta*, for the Appellants.

Messrs. *P. C. Dutt* and *V. R. Pandit*, for the Respondents.

JUDGMENT.—The facts of this case are at first sight somewhat complicated, but there is only one important point in the case. It will be necessary to state the facts *in extenso*.

Behari and Ramratan were brothers. The first Court has found that they were separate and the point has not been contested in appeal. Ramratan's property was inherited by his widow Mst. Bhikubai. The property mentioned in Schedule A belonged to Behari, defendant No. 1, and that in Schedule B to Ramratan. On the 23rd April 1901 Behari and Ramratan mortgaged the whole of the property to Bungaji and Onkar for Rs. 1,500. On the 29th October 1910 Bhikubai executed a sale-deed in favour of her sister Ratanbai in respect of the property in Schedule B. On 23rd June 1914 defendant No. 2 Phatusa purchased two houses out of Schedule B at an auction-sale held in execution of a decree obtained by one Dasrath against Bhikubai as legal representative of Ramratan. In the sale proceedings Ratanbai put in objections which were disallowed and she then filed a suit, No. 53 of 1914, against Dasrath which was dismissed on the ground that the sale by Bhikubai was bogus. In 1916 the mortgagees, Onkar and Bungaji, brought suit No. 51 of 1916 against the present defendant No. 1 Behari, Bhikubai, Ratanbai and the auction-purchaser Phatusa on the mortgage passed to them by Behari and Ramratan. On 23rd April 1917 a preliminary decree for sale was passed. On 13th January 1920 the plaintiffs purchased the entire property covered by Schedule B from Bhikubai for Rs. 3,100, and took possession, and before any final decree was passed in the mortgage suit, they paid Rs. 3,330 to the mortgagee decree-holders in satisfaction of the mortgage-debt. The present suit is for contribution against Behari and Phatusa, namely, Rs. 1,665 plus interest against defendant No. 1, and Rs. 777 against defendant No. 2, or for sale of the mortgage property.

Defendants contended that Behari and Ramratan were not divided, and, supposing they were, Bhikubai had already parted with all her interest in the property mentioned in Schedule B and, therefore, had none to convey to the plaintiffs.

The first Court held that Behari and Ramratan were divided, that the sale to Ratanbai

was nominal, that Mst. Bhikubai was competent to sell the *malik makbuza* field No. 338 to the plaintiffs but not the house, because it had already been sold to defendant No. 2 Phatusa; that plaintiffs had paid Rs. 3,330 to the mortgagees; that defendant No. 1 is liable to pay Rs. 1,665 with interest; that plaintiffs were not entitled to claim a charge as their payment did not fully satisfy the mortgage debt, and that, under section 69 of the Contract Act, plaintiffs were entitled to recover Rs. 777 from defendant No. 2.

On appeal by the defendants the District Judge of Khandwa set aside the decree of the lower Court and dismissed the plaintiffs' claim with costs throughout holding that they were strangers and interlopers with no right to pay off the mortgage-decree, and so cannot claim contribution from defendants. The principal question, therefore, in this appeal is whether, under section 69 of the Contract Act, the plaintiffs are persons interested in the payment of money which the defendants are bound by law to pay ; or whether, under section 70 of the same Act, the payment made by the plaintiffs for the defendants was made lawfully.

I have already referred to the finding that Behari and Ramratan were separate ; that has not been challenged in appeal, and it follows, therefore, that Bhikubai was competent to alienate the property.

This is a case in which the learned District Judge would have done well to have framed issues, as it would have made the judgment easier to follow.

There is a distinct finding of fact by the lower Appellate Court that the sale by Bhikubai to Ratanbai was valid and real. Consequently, the plaintiffs acquired no title by their purchase from Bhikubai. It has been argued in appeal that the finding in the mortgage-suit that the sale by Bhikubai to Ratanbai was not bogus is a finding on the pleadings only and not on evidence, and that the plea was only raised with reference to the question of marshalling. But in view of the finding of the lower Appellate Court, which is based partly on actual evidence of possession, I do not think it is open for this Court in second appeal to go behind this finding of fact, and I will, therefore, start by holding that the plaintiffs acquired no title from Bhikubai. This, however, does not, as the learned District Judge supposes, dispose of the case

Before proceeding to consider the numerous rulings quoted by the learned Counsel for the appellants, it must be pointed out that at the time of the purchase by the plaintiffs from Bhikubai in 1920, there were two contradictory judgments in existence, in one of which the sale by Bhikubai to Ratanbai had been held invalid, and one in the mortgage-suit in which it had been held valid. The plaintiffs got possession under their sale-deed of the mortgage-property mentioned in Schedule B. There was a mortgage-decree in existance against that property as well as the property in Schedule A, and if steps had been taken to make the decree final, the plaintiffs would have had to pay off the mortgagees or they would have lost the property. The defendant No. 1 Behari was a mortgagor along with his brother Ramratan of the whole property, and the mortgagees had obtained a decree, and in execution his property was liable to be sold As regards defendant No. 2, the position he has taken is undoubtedly inconsistent, as has been pointed out by the learned District Judge. He is a purchaser at an auction-sale held in execution of a decree against the legal representative of Ramratan. The property in his possession is also subject to the mortgage-charge, as he was a party to the decree on the mortgage.

The learned Counsel for the appellants has relied on *Bindubashini* v. *Harendra Lal Roy* (1), in which the plaintiff, who was a mortgagee of a Putni Taluk, obtained a consent decree on a mortgage-bond and paid arrears of revenue to prevent the Taluk being sold, and it was held that he was interested in the payment and was, therefore, entitled to recover the money. As he was a party to the decree that case is not on all fours with the present. There are, however, several decisions which show that when a person *bona fide* believing himself to have a claim to a property pays off the charges on the property, he is entitled to recover the amount, and *Nobin Krishna Bose* v. *Mon Mohun Bose* (2) is a case in point. In that case the plaintiffs, believing that they held

(1) 25 C. 306 ; 2 C. W. N. 150 ; 13 Ind. Dec. 205. (N. S.)

(2) 7 C. 578, 9 C. L. R. 182; 3 Ind. Dec. (N. S.) 91.

a share in a *patni*, paid a part of the arrear of rent. It was afterwards found that they had no share. It was held that the defendants had taken the benefit of the payment made by the plaintiffs, that the payment was not voluntary, and that the plaintiffs were entitled to recover the money. Again, in *Radha Madhub Samonta* v. *Sasti Ram Sen* (3) it was held that the payment of rent by a purchaser of a *putni taluk*, during a litigation involving his title, fell under section 69 of the Contract Act. In *Serafat Ali* v. *Issan Ali* (4) it was held that a payment in satisfaction of a decree, by a person who was a party to the decree and was bound thereby, was a payment lawfully made within the meaning of section 70 of the Indian Contract Act, although it was subsequently found that he had no interest in the property. The trend of these decisions seems to be that though a person's title in the property is subsequently found to be non-existent, he is still entitled to recover the money which he has paid for the preservation of the property, from the persons who are the actual owners, under sections 69|70 of the Contract Act.

Further, the case may be looked at from another point of view. In *Chamaswami* v. *Padala Anandu* (5) it was held that a purchaser of land, who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off. Here the doctrine of subrogation comes in. I may refer also to *Tangya Fala* v. *Trimbak Daga* (6). It is not possible in a case of this character to apply general principles of law without going into the facts, as each case must be judged on its own merits.

As regards the cases quoted by the learned Counsel for the respondents, *Desai Himatsingji* v. *Bhavabhai* (7) and *Janki Prasad* v. *Baldeo Prasad* (8), it was found, in the first case, that the payment was not made lawfully but dishonestly, and in the second, that the sale was fictitious. In the present case, as I have said, in view of the conflicting judgments, the plaintiffs may have been under a reasonable doubt as to the nature of the sale by Bhikubai to Ratanbai; they were actually in possession of the property against which the mortgage-decree had been passed, and they were justified in paying off that decree in order to protect themselves against any action by the mortgagees. The defendants were bound to pay this money. Defendant No. 2 took his share of the property subject to the mortgage-charge, and defendant No. 1 is himself one of the mortgagors. By the payment by the plaintiffs, both the defendants are relieved from their liability, at any rate, so far as regards the amount paid by the plaintiffs. I am aware that the payment has not been certified, but, in view of the receipt passed by the mortgagees, which is admitted by one of them, P. W. 5, they would be liable to a criminal prosecution if they attempted to recover this sum again. In these circumstances, I am of opinion that the case is covered by the rulings quoted above, *Nobin Krishna Bose* v *Mon Mohun Bose* (2) and *Radha Madhub Samonta* v. *Sasti Ram Sen* (3) as also by the principle laid down in *Chamaswami* v. *Padala Anandu* (5), and that the first Court was right in holding that the plaintiffs were entitled to recover this money.

As to the payment being in full or part satisfaction of the mortgage, from the receipt, Exhibit P. 2, it appears to be in full satisfaction, while P. W. 5, the mortgagor Onkar, says it was in part satisfaction. The first Court held that it was in part satisfaction only and so did not constitute a charge on the property under section 95 of the Transfer of Property Act.

The learned District Judge does not appear to have considered this point and, in view of the fact that the payment was not certified, and that one of the mortgagees denies the full payment, the finding of the first Court will stand.

The decree of the lower Appellate Court is set aside and that of the first Court restored with costs throughout on defendants.

G. R. D. *Appeal allowed.*

(3) 26 C. 826; 13 Ind. Dec. (N. S.) 1129.
(4) 42 Ind. Cas. 30; 45 C. 691; 22 C. W. N. 347; 27 C. L. J. 607.
(5) 31 M. 439; 3 M. L. J. 395; 18 M. L. J. 306.
(6) 35 Ind. Cas. 794; 40 B. 646 at p. 652; 18 Bom. L. R. 700.
(7) 4 B. 634; 2 Ind Dec. (N. S.) 935.
(8) 30 A. 167; 5 A. L. J. 163; A. W. N. (1908) 58.

AISHA *v.* MAHFUZ-UN-NISSA

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 201 OF 1921.

January 9, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Musammat AISHA BIBI—PLAINTIFF—APPELLANT

versus

Musammat MAHFUZ-UN-NISSA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Parda nashin *lady, Person claiming under transfer by, duty of—Burden of proof—Quantum of evidence—Transfer of Property Act (IV of 1882), s. 43—Mortgage executed by unauthorised person—Executant subsequently succeeding to portion of property—Mortgage, whether can be enforced against executant.*

It is incumbent on a person claiming property belonging to a *parda nashin* lady on the basis of a transfer in his favour effected by a person who purported to act under a power-of-attorney granted by the lady to give satisfactory evidence that the power-of-attorney had been explained to and was understood by the lady. [p. 182, col. 1.]

Sudisht Lal v. *Musammat Shobarat Koer*, 7 C. 245; 8 I. A. 89 4 Sar. P C. J. 222 ; 5 Ind Jur 270 ; 3 Ind. Dec. (N.S.) 707 (P. C.) ; *Shambati Koeri* v. *Jago Bibi*, 29 C. 749 ; 29 I. A. 127 ; 6 C. W. N. 682 ; 4 Bom. L.R. 444 ; 1 Sar. P C. J. 804 (P. C) ; *Sajjad Husain* v. *Wazir Ali Khan*, 16 Ind. Cas. 197 ; 34-A 455 ; 16 C. W. N. 889 ; 23 M. L. J. 210 ; 10 A. L. J. 364 ; 16 C. L J. 613 ; 14 Bom. L. R. 1055 ; 12 M. L. T. 361 ; (1912) M. W. N. 976 ; 15 O. C. 271 ; 39 I. A. 156 (P.C.), relied on.

No uniform standard of evidence which will satisfy the Court on this point can be laid down and each case must be decided on its own facts. [p. 182, col. 1.]

A mortgage-deed in respect of property belonging to defendant No. 1 was executed in favour of the plaintiff by defendant No. 2 purporting to act as the agent of defendant No. 1. On a suit on the mortgage it was held that defendant No. 1 was not bound by the mortgage. Defendant No. 2 admitted that he had received the mortgage-money and used it himself. During the pendency of the suit defendant No. 1 died and defendant No. 2 succeeded to one-fourth of the property;

***Held*, that the mortgagee was entitled to a decree for the full amount of the mortgage against defendant No. 2 and was entitled, on the principle laid down in section 43 of the Transfer of Property Act, to enforce it against the one-fourth of the property to which defendant No. 2 had succeeded. [p 183, col. 2.]**

First Appeal from the decree of the Subordinate Judge, Meerut, dated the 5th March 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for sale on a mortgage.

The mortgage was executed on the 11th of January 1909 in favour of Sheikh Shahab-ud-din, the husband of the plaintiff, since deceased.

This mortgage was executed by one Muhammad Aizaz Ali Khan, the second defendant in the case. He purported to execute this deed as the general attorney of his wife *Musammat* Mahfuz-un-nissa who was impleaded as the first defendant.

The sum borrowed under the mortgage was Rs. 3,000. There was a personal covenant to pay and a further covenant that, in the event of failure to pay, the mortgaged property might be brought to sale. The property, it may be remarked, was the property of *Musammat* Mahfuz-un-nissa.

The two defendants Mahfuz un-nissa and Muhammad Aizaz Ali Khan set up separate defences. The lady took the line of defence that she was no party to the mortgage-deed. She did not deny that her husband had executed the mortgage in question, although we find a statement to this effect in the judgment of the learned Subordinate Judge, a statement which, on our reading of the pleadings, appears to be erroneous.

The lady really sought to protect herself against the claim of the plaintiff by saying that her husband, defendant No. 2, had no authority to execute the mortgage-deed which was being sued upon. She stated that the power-of-attorney which was held by her husband had not been explained to her and was, therefore, not binding upon her.

The husband, defendant No. 2, did not deny the execution of the mortgage. He put forward a variety of pleas in order to show that the suit was not maintainable.

The learned Judge of the Court below dismissed the claim. He was of opinion, in the first place, that the plaintiff had failed to give due proof of the execution of the mortgage-deed in suit.

In the next place, he held that the plaintiff had failed to prove that the power-of-attorney, under colour of which the mortgage-deed had been executed, was a document binding on the lady. The Subordinate Judge states that there was no satisfactory proof for the purpose of showing that the document had been duly explained to the lady and that she was in a position to fully appreciate the legal consequences of her act when she executed the document.

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The plaintiff in the Court below also claimed to be entitled to a personal decree on the strength of a certain acknowledgment contained in the letter which was written by the second defendant on the 6th of April 1914. The learned Subordinate Judge, however, was of opinion that this acknowledgment could not affect either of the defendants and, consequently, he refused to order any personal decree.

The plaintiff now comes up in appeal and a variety of grounds are put forward upon which the judgment of the Court below is challenged. Before we proceed to discuss the question which arises for determination here, it is important to notice that since the appeal has been filed the first defendant *Mussammat* Mahfuz-un-nissa has died, her heirs have now been made parties to the record and one of these heirs is her own husband, the second defendant, Muhammad Aizaz Ali Khan, who, under the Muhammadan Law, has become entitled as one of his wife's heirs to a one-fourth share of the mortgaged property. That fact will have to be borne in mind later on when we come to announce our decision regarding the liability of Aizaz Ali Khan.

We begin with the finding of the Court below that execution of the document was not duly proved. Here, we have to record our disagreement with the view taken by the learned Judge of the Court below. It was never contended that *Musammat* Mahfuz-un-nissa herself had executed this deed of mortgage. The case for the plaintiff was that the deed was executed by her husband who was her duly constituted attorney. The husband never denied the execution of the deed and, in the circumstances, it seems to us that execution was duly proved and the plaintiff discharged all the onus which lay upon her in this respect. We refer, in this connection, to section 70 of the Indian Evidence Act. We pass on, therefore, to what is really the important question in the case, namely, whether the mortgage sued upon could be deemed to be binding upon the first defendant, Mahfuz-un-nissa.

It can only be so if we are satisfied that at the time the document was executed her husband had full authority to act on her behalf. This takes us back to the power-of-attorney from which that authority is said to be derived and that document is a document dated the 12th November 1898.

It is a fact that the original power-of-attorney was not produced in the Court below. Obviously, it was in the possession either of Mahfuz-un-nissa or of her husband. Notices were issued to them to produce it but it was not produced.

In order, therefore, to prove that such a document had been executed it became necessary to call the Sub-Registrar in whose Office the power-of-attorney had been registered. It was not possible for the plaintiff to produce a certified copy of the power-of-attorney for, according to the evidence of the Sub-Registrar and according to the rules on the subject, no stranger is entitled to obtain from the Registration Department a certified copy of a document of this nature.

The Sub-Registrar of Moradabad was called and brought with him the Registration Volume in which this power-of-attorney had been copied.

It may be noted that the Sub-Registrar who gave evidence was not the same Sub-Registrar who had registered the deed in the year 1898.

There can be no doubt from the entry in the register which was produced before the learned Subordinate Judge that, a power-of-attorney was executed on the 12th of November 1898 by *Musammat* Mahfuz-un-nissa in favour of her husband.

The contents of this power-of-attorney were read out in Court by the Sub-Registrar who quoted from the entries in this register. It appears that, amongst other things, the power-of-attorney gave the husband authority to borrow money for household and Court expenses, to pledge or hypothecate his wife's property in any way or to mortgage, sell the whole or any part of his wife's property, or to make a gift of his wife's property or a *waqf*, or to make an exchange of it.

It is thus obvious that the power-of-attorney which the lady executed in her husband's favour was couched in very wide language and gave him practically unlimited powers of disposal over his wife's estate.

This being so, it becomes necessary to consider whether the requirements of the law

with respect to deeds of this kind executed by *parda nashin* ladies have been met in this case. It has been laid down as the law by a string of rulings that, where a person relies on a document of this nature and is making a claim against a *parda nashin* woman, based upon a document of this kind, it is incumbent upon him to give satisfactory evidence that the document has been explained and understood by the lady. We may refer to the following cases in this connection :—

Sudisht Lal v. *Musammat Sheobarat Koer* (1), *Shambati Koeri* v. *Jago Bibi* (2) and *Sajjad Husain* v. *Wazir Ali Khan* (3).

The doctrine is well understood. The only difficulty which arises is as to its application to particular cases. No uniform standard of evidence which will satisfy the Court can be laid down, and each case must be decided on its own facts.

Turning to the evidence in this case, all we have is what was read out in Court by the Sub-Registrar from the volume of the register which he produced before the Subordinate Judge.

This register contains copies of the endorsements which were made upon the power-of-attorney at the time of its registration. We refer to the following endorsements which contain the only evidence regarding the question as to whether the document was duly explained to the lady and understood by her.

We begin with the following:—

" To day I went in person to the executant of this general power-of-attorney at 5 p.m. and satisfied myself that *Musammat* Mahfuz-un-nissa executed this power-of-attorney of her own free will and accord. The above-named executant affixed her signature to the power-of-attorney in my presence and she was identified by Ehsan Ali Khan and Muhammad Sarfaraz Ali Khan."

This endorsement, therefore, can be relied upon for the purpose of showing that, as a matter of fact, the lady executed a document in the presence of the Registering Officer and that he was satisfied that this execution had been made of her own free-will and accord.

A further endorsement in the following language is also proved to have been recorded on the power-of-attorney :—

" *Musammat* Mahfuz-un-nissa...after hearing all the contents of the document admitted it in a loud voice from behind the door at her dwelling house."

We observe here that the translation of this passage in the paper-book is not quite correct.

This is the whole of the evidence upon which we are asked to find that the document was read to the lady and explained to her so that she was thoroughly aware of the consequences which would follow in law from her act of execution.

It has been argued before us that the declaration made by the Sub-Registrar and embodied in the endorsement on the deed is sufficient proof that the document was read and explained to the lady.

It is to be noted, however, that while the language used by the Registering Officer would indicate that the document had been read out to the lady there is nothing expressly indicating that he explained the document to the lady; in other words, that he explained to the lady what the results of her actions would be. We have been referred to the Registration Rules which were issued in the year 1896 and which were, therefore, in force at the time this document was registered. Under rule 185 Registering Officers were directed, in the case of documents executed by *parda nashin* ladies, to obtain the admission of execution from the executant's own lips. The rule further lays down the necessity for having the lady properly identified, and a further direction is given that the terms of the document should be explained to the executant and if, while admitting execution, she objects to any of the terms, a note of such objection should be made.

We are asked to presume that the Sub-Registrar must have carried out the rule to which we have just referred and that, consequently, we ought to hold that the document was duly explained to the lady so as to be thoroughly understood by her.

(1) 7 C. 245 ; 8 I. A. 89 ; 4 Sar. P. C. J. 222 ; 5 Ind. Jur. 270 ; 3 Ind. Dec. (N. S.) 707 (P. C.).

(2) 29 C. 749 ; 29 I. A. 127 ; 6 C. W. N. 682 ; 4 Bom. L. R. 444 ; 1 Sar. P. C. J. 304 (P. C.)

(3) 16 Ind. Cas. 197 ; 34 A. 455 ; 16 C. W. N. 889 ; 23 M. L. J. 210 ; 10 A. L. J. 364 ; 16 C. L. J. 618 ; 14 Bom. L. R. 1055 ; 12 M. L. T. 361 ; (1912) M. W. N. 976 ; 15 O. C. 271 ; 39 I. A. 156 (P. C.).

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The case is no doubt a somewhat difficult one and it has been rendered more difficult by reason of both the lady and her husband keeping out of the witness-box. This is a circumstance which has to be weighed. But, making allowance for everything, we have in the end to decide whether there is before us that satisfactory evidence of explanation and understanding which the law requires.

All we can say is that, after giving the case our most careful consideration, we are not satisfied that the plaintiff has discharged the duty which the law cast upon her, and so, as regards this part of the case, we cannot disagree with the finding of the Court below.

There remains only one other question and that is with respect to the liability of the husband.

We have already referred to the fact that the husband admitted the execution of this document although his statement was that that the property which was being mortgaged was not his property. That was a true statement of course at the time it was made. But we have it now that a one-fourth share in the mortgaged property has come to the husband by inheritance and we have, therefore, to deal with the question of his liability as things now stand.

Mr. Iqbal Ahmad has, in this connection, relied upon the provisions of section 43 of the Transfer of Property Act and we think that plea is well taken. It is at the option of the plaintiff under this section to seek a remedy against the property which has come into the possession of Aizaz Ali Khan, and, therefore, if there is a debt owing from Aizaz Ali Khan in respect of the mortgage-deed in suit that debt may be enforced against this one-fourth share which has now become the property.

As regards the question of the indebtedness of Aizaz Ali Khan we think there can be no reasonable doubt. It is proved beyond all question that the money which was borrowed under the mortgage was delivered into his hands. Furthermore, in a letter which is on the record (Ex. 2, printed at p. 29 of the record) Aizaz Ali Khan, on the 6th of April 1914, admitted that he took this money to meet his own expenses, and he, further, in paragraph 4 of that letter, made a statement clearly indicating that at that date, the debt was still subsisting. This being so, and the acknowledgment having been within six years of the date of the mortgage and also within six years of the date of the suit, we think Aizaz Ali Khan is clearly bound and that, as against him, a decree can be passed by which the debt incurred under the document in suit can be enforced against a one-fourth share of the mortgaged property now belonging to Aizaz Ali Khan since the time of his wife's death.

We, therefore, give a decree for the full amouunt of the mortgage against Aizaz Ali Khan and we also give a decree for sale directing the sale of the one-fourth share of the mortgaged property which he has inherited from his wife. The usual decree for sale will be prepared. The plaintiff will be entitled to recover costs from Aizaz Ali Khan both in this Court and in the Court below. The costs in this Court will include fees on the higher scale.

As regards the respondents Nos. 1 to 6, the suit against them fails and is dismissed with costs in both Courts including in this Court fees on the higher scale.

Z. K. *Suit decreed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2374 OF 1918.

May 2, 1923.

Present :—Mr. Justice Martineau and Mr. Justice Moti Sagar.

KYAS MUHAMMAD—DEFENDANT—APPELLANT

versus

BANNA AND OTHERS—PLAINTIFFS, RUKANDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom —Will — Rajputs of Ganachaur, Tahsil Nawashahr, Jullundur District—Right to challenge alienation—Collaterals in 7th degree—Ancestral land —House situate in same village, character of—De-

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fendant not in possession of land—Declaration, suit for, whether competent.

Where a devisee under a Will is not in possession of the land devised to him, the reversioners of the testator are competent to challenge the validity of the Will in the form of declaratory suit, and it is immaterial that they are not themselves in possession.

A house owned by a person in the same village in which he owns ancestral land must be regarded as an appanage to the land. [p. 184, col. 2.]

Nur Hussain v. *Ali Sher*, 33 P. R. 1905 ; 88 P. L. R. 1905; 30 P. W. R. 1905, followed.

There is no presumption against the *locus standi* of agnates beyond a definite degree of relationship to challenge an alienation. [p. 185, col. 1.]

Surjan v *Jodha*, 34 P. R. 1891 ; *Wazira* v. *Pani*, 118 P. R. 1891; *Jiwan* v. *Rupa*, 180 P. R. 1893; *Arur Singh* v. *Lachmi*, 75 P. R. 1898 ; *Khasan Singh* v. *Relu*, 85 P. R. 1906; 2 P. W. R. 1906, followed.

When an alienation of ancestral land is challenged by the reversioners of the alienor the burden is on the alienee to justify the alienation even when the persons challenging it are related to the alienor in the seventh degree. [p. 184, col. 2; p. 185, col. 1.]

Pal Singh v. *Ganda Singh*, 22 Ind. Cas. 319 ; 37 P. R. 1914; 40 P. L. R 1914; 29 P. W. R. 1914, followed.

A Rajput of Guna Chaur in the Nawashahr Tahsil of the Jullundur District is not competent by custom to bequeath ancestral land in favour of a distant collateral in the presence of nearer collaterals.

First appeal from the decree of the Subordinate Judge, Jullundur, dated the 4th June 1918, decreeing the claim with costs.

Pandit *Sheo Narain, R. B.*, for the Appellant.

Lala *Badri Das, R. B.*, for the Respondents.

JUDGMENT.—This is an appeal from a decree declaring a Will made in Australia in 1915 by Rahmat Khan, a Rajput of Guna Chaur, in the Nawashahr, Tahsil of the Jullundur District, bequeathing all his property to Kyas Muhammad, defendant No. 1, to be invalid against the rights of the plaintiffs, who are Rahmat Khan's collaterals in the 7th degree. The defendant Kyas Muhammad is also a collateral of Rahmat Khan, but a more distant one.

The first ground of appeal as to the plaintiffs not being in possession of the property and not being competent to sue for a declaration of their rights is not pressed. The land has been cultivated by tenants and the appellant has not been exercising possession either of the land or of the houses in suit. As he was not in possession the plaintiffs could not sue him for possession, and they rightly asked for a declaratory decree.

The second ground of appeal as to the property not being ancestral is also not pressed so far as the land is concerned. As regards the houses, since they are in the village in which the land is situate we agree with the lower Court in holding, on the authority of *Nur Hussain* v. *Ali Sher* (1), that they are to be considered as an appanage to the land.

It is contended for the appellant that there have been many alienations in the village, that the original tribal bond has been broken by the introduction of persons of many different tribes in the proprietary body, and that, therefore, the *Rajputs* have unrestricted powers of alienation. But, in the first place, this was not the defence taken by the appellant in his pleas in which the only ground on which he urged that Rahmat Khan had an unrestricted power of alienation was that he had become a trader. In the second place, the *Rajputs* have been proprietors in the village for several centuries and are still, apparently, the predominating tribe there. The customary restrictions of their powers of alienation would not be affected by the fact that in recent years members of other tribes have acquired small areas of land in the village. Thirdly, although there have been many alienations, many have been contested, and the appellant's witness, Alla Bukhsh, says that several suits went up to the Chief Court and that while in some cases the alienations were upheld in others they were set aside. This admission would show that powers of alienation of the *Rajputs* of Guna Chaur are restricted and the appellant has failed to prove the contrary.

The main argument on the appellant's behalf is that it rests with the plaintiff to prove that collaterals in the 7th degree are competent to contest a Will. This argument is, however, opposed to the authorities. Although we do not agree with the learned Subordinate Judge that collaterals in the 7th degree have been held in *Pal Singh* v. *Ganda Singh* (2) to be entitled to impeach an alienation it has been laid down in several cases that the burden is on the alienee to justify

(1) 33 P. R. 1905; 88 P. L. R. 1905; 30 P. W. R., 1905.

(2) 22 Ind. Cas. 319; 37 P. R. 1914; 40 P. L. R 1914; 29 P. W. R. 1914.

the alienation even when the persons challenging it were collaterals in the 7th degree, and that there is no presumption against the *locus standi* of agnates beyond a definite degree of relationship to challenge an alienation, see, for instance, *Surjan* v. *Jodha* (3) and *Wazira* v. *Pani* (4) *Jiwan* v. *Rupa* (5) *Arrur Singh* v. *Lachmi* (6) and *Kha zan Singh* v. *Relu* (7). There are no doubt authorities for the view that there is a presumption against the right of collaterals on the 6th degree to exclude daughters from succession ; but the question as to the respective rights of inheritance of daughters and collaterals is quite distinct from the question of the right of distant collaterals to contest alienations. We hold that the onus in this case is on the appellant to prove that the plaintiffs are not entitled to contest Rahmat Khan's Will. That onus has not been in any way discharged.

A further contention on behalf of the appellant is that the Will is valid by reason of his having rendered services to the testator. But we agree with the lower Court that there is no satisfactory evidence that he performed any services, only two witnesses, Hira Singh and Amin Chand, profess to have any personal knowledge on the subject, and they merely say in a vague way that the appellant rendered services without stating their nature.

We affirm the decree of the lower Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(3) 34 P. R. 1891.
(4) 118 P. R 1891.
(5) 130 P. R. 1893.
(6) 75 P. R. 1898.
(7) 85 P. R. 1906 ; 2 P. W. R. 1906.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 75 OF 1922.
October 18, 1923.
Present :—Mr. Kinkhede, A J. C.
RAMNATH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SUKALSI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Gonds—Rajgonds—Succession—Adoption—Joint Family.

It is open to a Gond to prove that his family, or any general body of Gonds in which he is included, has adopted all the principles of Hindu Law, and that they are bound by those principles. [p. 181, col. 1].

Gonds are Rajgonds who are governed by Hindu Law. Therefore, the incidents of a joint family apply to Gonds, and a son among them takes interest by birth. [p. 183, col. 1].

In cases where status by adoption has to be established, evidence of repute and recognition by the community is admissible to prove that status. [p. 181 col. 2].

Appeal against the decree of the Subordinate Judge, Seoni, in Civil Suit No. 31 of 1920, dated the 10th April 1922.

Mr. *N. G. Bose*, for the Appellants.

Mr. *V. Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to enforce the mortgage, dated 3rd August 1908, executedby one Nandlal, Gond, the deceased father of the present defendants, in favour of the deceased father of the plaintiffs-appellants. The Court of first instance, while passing a decree for the entire claim on the basis of the mortgage, restricted its operation to only 4-annas 5-pies share out of the 8-annas share mortgaged and declared that the remaining 3-annas 6-pies share which represented the interests of the defendants was not affected by the mortgage. The reason for this exclusion of the defendants' share from liability under the mortgage was that the defendants, although Gonds, were governed by Hindu Law and the property covered by the mortgage was joint ancestral property in the hands of the mortgagor Nandlal and, in the absence of legal necessity, Nandlal was not legally competent to mortgage anything beyond his own interest therein. Against that decree an appeal was preferred by plaintiffs to this Court which was then presided over by Rao Bahadur W. R. Dhobley, Additional Judicial Commis-

decision on the merits with the following remarks, which I reproduce *in extenso* :—

> "According to the respondents' learned Advocate it is unnecessary for the purposes of his case to go into this much vexed and disputed question as to whether Gonds as such are or are not Hindus and are or are not governed by the Hindu Law, as the defendants assert that they and the particular tribe to which they belong have adopted the Hindu custom and the general Hindu Law in respect of inheritance and joint family and that the Courts are, therefore, bound to administer that law in their case. This particular aspect of the case was not gone into by the lower Court and the defendants' learned Advocate, therefore, says that it is necessary that an enquiry should be directed on this point. It is admitted by him that some of the Gonds in certain Districts in these Provinces may be governed by Hindu Law and others may not. The learned Advocate urges that the defendants base their claim to be governed by the principles of joint family and inheritance of the Hindu Law, because they assert that the tribe to which their family belongs have adopted those principles. The case shall have, therefore, to go back to the lower Court with directions that statements of the parties on this point should be taken and the case decided accordingly. I consider it unnecessary for the purposes of this case to decide the general question whether Gonds as such are or are not governed by the Hindu Law. If the principles of Hindu Law concerning joint family and inheritance have been accepted by the tribe to which the defendants' family belongs and these are followed by them, the mortgage would not be binding upon their interest and share in the ancestral property."

The pleadings of the defendants recorded after remand show that they claimed to belong to the tribe of Rajgonds who, according to them, are Hindus and are governed by the principles of Hindu Law in the matter of joint family property, inheritance, succession by survivorship, etc. They also claimed that they are Hindus for they adopted almost all Hindu customs, such as worship of Hindu Gods, and asserted that in matters of marriage, adoption and all other matters they followed Hindu Law and custom. They further contended that they had adopted Hindu Law and, therefore, even if they were not Hindus, still in matters of inheritance and succession they should be governed by the Hindu Law. The following additional issues were then framed :—

> "11. Whether the defendants are Rajgonds ?
>
> "12. Whether Rajgonds have adopted the rules which govern joint Hindu family property ? "

The parties were given opportunity to adduce additional evidence on these issues. The defendants examined seven witnesses, namely D. W 10—16 ; they are all Rajgonds excepting D. W. 13. The first Court finds on their evidence that the defendants are Rajgonds and that Rajgonds follow the rules of Hindu Law regarding joint family, succession and survivorship, etc. The evidence adduced by the plaintiffs, namely, that of P. Ws. 1, 3, 4 and 5, was considered worthless and very meagre and unsatisfactory. Both the additional issues were found in the affirmative and the result was that the decree passed after remand also excluded 3-annas 6-pies share of the defendants out of the 8-annas share mortgaged from the operation of the decree. It is against this decree that the plaintiffs have preferred this appeal, urging, firstly, that the defendants had not proved that they were Rajgonds and, further, that on the evidence on record it ought to have been held that the family of the defendants did not adopt the rules of Hindu Law regarding the joint family and inheritance.

At this stage of the argument the learned pleader for the appellants conceded that under the present state of the case-law Rajgonds are governed by Hindu Law, and that if, on the evidence, the defendants are held as having succeeded in establishing that they belonged to the community of Rajgonds, then there will be no question as to the law by which the defendants should be governed. He contends that the defendants have failed to prove that they are Rajgonds and that the evidence on record is insufficient to prove their so-called status as Rajgonds. In support of this contention of his he brings to my

notice the pleadings of the defendants prior to the order of remand. He points out that if the defendants were really Rajgonds and enjoyed that status in the community, they would certainly not have failed to style themselves as Rajgonds even in their first defence. The subsequent pleadings, where they assert that they are Rajgonds, are charaterized as an afterthought. In view of the express directions by this Court for recording the statements of the parties on the point of the tribe to which the defendants belonged, I am not prepared to uphold this contention. The learned Additional Judicial Commissioner, who remanded the case, thought that the pleadings already made by the parties were not complete, otherwise he would not have given express directions about taking the statements of the parties. It was with a view to afford a chance to both the parties to put their case clearly before the Court and to adduce such additional evidence in support of it as they may choose to examine, that the remand was ordered. I am not, therefore, impressed by the plaintiff's said argument.

It is next contended that the defendants style themselves as Hindus, but as it has been held in *Vithoba* v. *Lalsingh*, (1) that a Gond is not a Hindu and is not governed by the Hindu Law, the defendants' contention that they are Hindus and, therefore, governed by the Hindu Law cannot be upheld. They must be governed by the law of inheritance as laid down in the Indian Succession Act and not by usages and customs of Hindu Law. It is, however, pointed out in that ruling that it is open to any party to prove that his family or any general body of the Gonds in which he is included has adopted all the principles of Hindu Law, so that they could now be called as bound by those principles ; but this must be proved by the party which alleges it.

It is strenuously urged that the evidence adduced by the defendants is not what it should be. There is no evidence of instances to show that in the matters of succession, marriage, adoption and alienation the defendants' family has followed the principles of Hindu Law. My attention has been drawn to the judgment of Sir Henry Stanyon in Second Appeal No. 231 of 1916, dated 20th August 1917, and particularly to the passage which lays down the nature of evidence that is necessary to be adduced in such cases and also to certain passages in Bhattacharya's Tagore Law Lectures on Hindu Joint Family and Trevelyan's Hindu Law, 2nd edition, and it is urged that as the evidence on record does not satisfy the requirements laid down in them the finding of the Court of first instance that defendants are Rajgonds and, therefore, governed by Hindu Law is liable to be set aside as based on insufficient data. The learned Counsel for the respondents concedes that the evidence is not so thorough and full of instances as pointed out by Sir Henry Stanyon in his judgment as it ought to be. He, however, contends that the evidence, as it is, being given by members of the community of Rajgonds who admit that the defendants possess like themselves the status of Rajgonds, ought to be treated as sufficient. He contends, and I think rightly, that this recognition by the community is in itself good evidence to prove the defendants' status. In cases where status by adoption has to be established, evidence of repute and recognition by the community is held admissible to prove that status. There is no reliable evidence to the contrary adduced by the plaintiffs which would in any way disprove the status established for the defendants by their witnesses. The correctness of their assertion that they are Rajgonds and as such governed by the principles and usages of Hindu Law is thus beyond doubt. The only evidence of the plaintiffs' witness P. W. 5, examined before remand, does not, it is contended, negative the defendants' assertion that their father was a Rajgond. In the examination-in-chief the witnesses did assert that Nandlal was a Dhurgond and he did make a distinction between a Dhurgond and a Rajgond, but when asked in cross-examination whether the defendants were Rajgonds or Dhurgonds he said he did not know. This testimony is hardly sufficient to rebut the positive evidence to the contrary adduced by the defendants.

Reading the evidence on record as a whole, I think there is ample material to support the finding of the lower Court that the defendants are Rajgonds. That Raijgonds are governed by Hindu Law is concedred by the appellants. There is also evidence on re-

(1) 76 Ind. Cas. 980 ; 19 N. L. R. 104 ; (1923) A. I. R. (9) 917.

cord consisting of the testimony of defendants' witnesses as also of plaintiff's witness No. 1 after remand to prove that the incidents of a joint family do apply to these Gonds. Some of the witnesses do admit that amongst Raigonds a son takes interest by birth. This declaration or admission being a statement against the proprietary interest of the declarant, is clearly admissible in evidence like a declaration by a Jain that a Jain widow can adopt a son without her husband's authority. In any case, such statements are, in my opinion, admissible under sections 48 and 49 of the Indian Evidence Act, even though not supported by specific instances.

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

G. R. D.

S. D. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1737 OF 1921.

November 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

GULAB CHAND—APPELLANT

versus

DUKHI RAI AND OTHERS—RESPONDENTS

Jurisdiction of Civil Courts—Suit to fix liability of defendant for Government revenue, nature of.

A suit asking the Court to fix the liability of the defendants in regard to the Government revenue, for which the plaintiff is liable to the Collector, is a suit of a civil nature and is cognisable by the Civil Courts.

Appeal from the decision of the Additional District Judge of Saran, dated the 23rd July 1921.

Mr. *L. N. Singh*, for Mr. *B. N. Mitra*, for the Appellant.

Mr. *Jaganath Prasad*, for Mr. *Ram Prasad*, for the Respondents.

JUDGMENT.

Das, J.—Two questions have been argued before us; first, that the learned Additional District Judge erred in coming to the conclusion that the proper course for the plaintiff-appellant was to apply for partition before the Collector and, secondly, that the learned Additional District Judge erred in thinking that there were not sufficient materials on ther record for giving the plaintiff the appropriate relief in the circumstances of the case. So far as the first point is concerned, I have come to the conclusion that the argument of the learned Vakil for the appellant ought to prevail. This is not a suit for partition of revenue paying lands. The plaintiff does not ask the Court to separate the Government revenue as between the plaintiff and the defendant. He invites the Court to fix the liability of the defendants in regard to the Government revenue for which the plaintiff is liable to the Collector. This is a suit of a Civil nature and I know of no enactment which prevents the Civil Court from taking cognizance of a suit of this nature. The first contention of the learned Vakil for the appellant must prevail. But, so far as the other contention is concerned, I am of opinion that the finding of the learned District Judge is a finding of fact and is binding on us in second appeal. The learned Judge says: "there is no sufficient material for assessment of Government revenue on the basis of which the plaintiff has sued for contribution." We must assume that there were not materials on the record sufficient to enable the learned Judge to pass judgment in favour of the plaintiff. Mr. Lachmi Narain Singh contends that, in order to do complete justice between the parties, the learned Judge should have referred the matter to a Commissioner for taking evidence and coming to a proper conclusion on the point. But in my opinion it was not the duty of the learned Judge, on his own responsibility, to issue a commission. It was for the parties to make a proper application before the learned District Judge. That course was not adopted by the plaintiff and, in my opinion, it is quite impossible now to give him any relief, especially as he took no trouble to place proper materials before the Court below. The appeal accordingly fails and must be dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

ZAHUR HASAN *v.* SHAKER BANOO.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 509 OF 1922.

July 30, 1923.

Present :—Mr Justice Kanhaiya Lal.

Syed ZAHUR HASAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat SHAKER BANOO AND OTHERS—PLAINTIFFS—RSPONDENTS.

Landlord and tenant—Site occupied by tenant—Abandonment—Resumption—Grantee, whether can sue original licensor for possession—Sale of proprietary rights, effect of—Site of dwelling house, rights in.

Where a *Zemindar* resumes possession of a site abandoned by a former licensee and grants it to another, the latter, if disturbed in his enjoyment by the former, can maintain a suit for recovery of possession against him.

Basdeo Rai v. *Dwarka Ram*, 32 Ind Cas. 346 ; 14 A. L. J. 197 ; 38 A. 178, distinguished.

Where a *Zemindar* has resumed possession of a site abandoned by a licensee the latter cannot resume possession of the site without the permission of the *Zemindar*.

Hazari Lal v. *Nimar*, 71 Ind. Cas. 1038 ; 21 A. L J. 277 ; (1923) A. I. R. (A.) 295 ; 45 A. 386, followed.

On an auction-sale of the proprietary rights of a proprietor in a village the entire land appertaining to the property sold passes to the auction-purchaser, and by operation of law the judgment debtor becomes a *ryot* and the rights of the judgment-debtor in respect of the site occupied by his dwelling house are reduced to those of other persons residing in the village.

Second appeal against the decree of the Judge, Small Cause Court of Allahabad, exercising the powers of a Subordinate Judge, dated the 31st January 1922.

Mr. *Iqbal Ahmed* and Dr. *K. N. Katju*, for the Appellants.

Messrs. *Abu Ali*, *P. N. Banerji*, and *Majid Ali*, for the Respondents.

***JUDGMENT.**—The dispute in this appeal relates to a plot of land situated in Jhansi which was at one time occupied by a house belonging to Muhammad Zahur. Muhammad Zahur was a *ryot*. The *zemindari* rights of his father in the village were, it is said, sold sometime before 1882. Muhammad Zahur worked as a *karinda* of his father-in-law, who had a *zemindari* share in Busgit, his wife and children lived in Busgit, while he kept up his connection with Jhansi, He died in 1887. The house in question fell into ruins sometime afterwards and the question for consideration in this case is whether the defendants, who are the heirs of Muhammad Zahur, had abandoned the house after the death of Muhammad Zahur and allowed it to fall into ruins so as to entitle the *zemindar*, namely, the defendant No. 9, to resume the land on which the said house stood and grant the right of occupancy thereof to the present plaintiff-respondent. The plaintiff-respondent owns a house adjacent to the land in dispute; and her allegation is that the license to build a house on the land so abandoned was granted to her by the defendant No. 9 in September 1919. She complains that when she wanted to build a house on the said land the defendants-appellants interfered and prevented her from making constructions over the same. It is also said that the said defendants then hurriedly collected some materials and built certain walls and a room in order to keep the plaintiff out of the enjoyment of that site.

The defendants deny having abandoned the site. The Court of first instance found in their favour but the lower Appellate Court held otherwise. The question at issue is really one of fact depending very largely on the evidence of intention afforded by the conduct of the plaintiffs since 1887.

The lower Appellate Court has referred in detail to the various facts established by the documentary evidence produced, tending to show that the defendants had abandoned their residence in the house in dispute and settled elsewhere, that from 1889 onwards they described themselves as residents of Busgit, and that though three members of their family had been buried at Jhansi, one having come there to live with his wife and the other two temporarily on account of plague, none of them is shown to have occupied the house in dispute which was lying in ruins from long before. The lower Appellate Court has also pointed out that if any of the members of the family did come to Jhansi for temporary purposes, they came and stopped in other houses with other people and showed no intention of either retaining the site of the house in dispute under their control or to rebuild and maintain the house after it had been allowed to fall into ruins.

DHARINEE *v.* PIARI

The learned Counsel for the defendants-appellants contends that the plaintiff as a licensee had no right to sue; that the inferences drawn by the lower Appellate Court from the facts found to have been established were not justified, and that in any case the defendants should be deemed to have continued to be the owners of the site in question and to have a right to build thereon. The right of the plaintiff to stop the defendants-appellants from interfering with her constructions was denied by the defendants-appellants on the ground that the latter had not abandoned the site; but her right as a licensee to file a suit was never questioned in any of the Courts below or in the Memorandum of Appeal filed in this Court. In fact, if the finding of the lower Appellate Court that the defendants-appellants had abandoned the site and allowed the house to fall into ruins so as to entitle the *zemindar* to resume the same is correct, the right of the *zemindar* to grant a license to the plaintiff to occupy the site and build a house thereon cannot be questioned. The decision in *Basdeo Rai* v. *Dwarka Ram* (1) has no application because that was a suit between a licensor and a licensee, and the question was what was the proper remedy in a case where the licensee has been ousted by the wrongful revocation of the license. The finding arrived at by the lower Appellate Court on the question of abandonment is based not so much on inferences as on the conduct of the defendants since 1889 onwards and the intention to be gathered therefrom. In *Hazari Lal* v. *Nimar* (2) it was held in somewhat similar in circumstances in respect of land occupied by a grove, the trees whereof had been cut, that the land having been abandoned by the original grove-holders and having remained waste for over 12 years and reverted to the *zemindars*, and the successors of the original holders could not resume possession and plant a new grove thereon without the permission of the *zemindars*. As regards the site, there can be no question that on the sale of the proprietary rights, if any, possessed by the father of Muhammad Zahur, the entire land appertaining to the property sold passed to the auction-purchaser; and by operation of law the judgment-debtor became a *ryot* and the rights of the judgment-debtor in respect of the site occupied by his dwelling house were reduced to the position of the other persons residing in the village.

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

Z. K. *Appeal dismissed.*

(1) 82 Ind. Cas. 346; 14 A. L. J. 187; 38 A. 178.
(2) 71 Ind. Cas. 1038; 21 A. L. J. 277 (1923) A. I. R. (A) 295; 45 A. 386.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 631 OF 1922.

July 23, 1923.

Present:—Mr. Justice Daniells.

DHARINEE HAJJAM - PLAINTIFF—APPELLANT

versus

Musammat PIARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI r. 33 (1)—Restitution of conjugal rights, decree for—Direction that wife shall not be imprisoned—Appellate Court, interference by—Imprisonment, object of.

Where a lower Appellate Court directs under O. XXI, r. 33 (1) of the Civil Procedure Code, a decree for restitution of conjugal rights shall not be enforced by imprisonment of the wife, the High Court will be very slow to interfere with the exercise of the discretion.

Imprisonment, if allowed in such cases, is not a penalty for anything the wife may have done, but a means of forcibly compelling her return to her husband.

The tendency of modern legislation is against sending a woman to Jail in such cases.

Bai Parvati v. *Ganesh Mansukh Jetha*, 59 Ind. Cas. 361; 44 B. 972; 23 Bom. L. R. 1097, relied on.

Second appeal against the decree of the District Judge, dated the 1st February 1922.

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

Mr. *Muhammad Yusaf*, for the Respondents.

JUDGMENT.—This is an appeal in a suit for restitution of conjugal rights. The plaintiff-appellant has been given a decree, but the Court below has added to it a condition that it shall not be enforced by the imprisonment of the wife and it is against this condition that he appeals. O. XXI, r. 33 (1) of the Civil Procedure Code expressly permits of such a condition being inserted in the decree, and this

Court would, ordinarily, be very slow to interfere with the discretion of the Court below in a matter of this kind. It is quite true that this is not a strong case in favour of the wife. The allegations of cruelty which she made have been disbelieved. The finding of the learned Munsif, which the Court below adopts, is that the woman left her husband's house originally in the company of her brothers, but when the time came for her to return she was unwilling to do so. The learned Munsif says that the plaintiff has given no reason for her refusal but that the probabilities are that she is under the influence of a certain barber and that this has induced her refusal. Even in such a case it is possible, if the husband got her back by force, that he might take the opportunity for punishing her for her unfaithfulness. Imprisonment, if allowed in these cases, is not a penalty for anything the wife may have done, but a means of forcibly compelling her return to her husband. As the Bombay High Court remarked in a recent case, *Bai Parwati* v. *Ganchi Mansukh getha* (1), the tendency of modern legislation is against sending a woman to Jail in such cases, and in fact since this decree was passed the law has been so altered by both Houses of the Legislature as to make imprisonment illegal as a means of enforcing a decree of this nature. The learned Judge has slightly anticipated the amendment of the law. On the whole, I am not prepared to interfere with the discretion exercised by the learned Judge and I accordingly dismiss the appeal though, under the circumstances, without costs.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 861 ; 44 B. 972 ; 22 Bom. L. R. 997.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 525 OF 1922.

July 24, 1922.

Present:—Mr. Justice Kanhaiya Lal.

GOPI KOERI—DEFENDANT—APPELLANT

versus

Musammat RAJ ROOP KOER AND ANOTHER,—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 35—Election — Permanent lease — Acceptance of rent—Waiver.

When a person who succeeds to an estate accepts rent from a tenant of the estate without being aware of the fact that the tenant claims to hold under a permanent lease granted by an intermediate holder of the estate, which he had no power to grant, such acceptance does not amount to an election or to a waiver of the landlord's right to object to the validity of the lease.

Madhu Sudan Singh v. *Rooke*, 25 C. 1 ; 24 I. A. 164 ; 1 C. W. N. 483 ; 7 M. L. J. 127 ; 7 Sar. P. C. J. 194 ; 18 Ind. Dec. (N. S.) 1 (P. C.), distinguished.

Beni Pershad Koeri v. *Dudhnath Roy*, 27 C. 156 ; 26 I. A. 216 ; 4 C. W. N. 274 ; 7 Sar. P. C. J, 580 ; 14 Ind. Dec. (N. S.) 103 (P. C.), relied on.

Second appeal against the decree of the District Judge of Benares, dated the 11th March 1922.

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

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

JUDGMENT.—The dispute in this appeal relates to plot No. 738 *khasra* which is situated in Mauza Shukulpura outside the skirts of Benares City. The village Shukulpura was granted to *Mussammat* Asmedh Kunwar by the father of the plaintiff on the 9th of April 1889 by an agreement which provided that she was to hold the same in her possession and enjoy the profits thereof for her maintenance during her lifetime without any power of alienation.

While *Musammat* Asmedh Kunwar was so in possession of that village, she granted a perpetual lease of the plot in dispute to Gopal, Ganga and Gopi for a premium of Rs. 100 on an agreement that the lessees would pay her a rent of Rs. 12 per annum and be entitled to use the land for planting a grove, constructing buildings or for any other purposes they liked. On the strength of that lease a grove, consisting mostly of guava trees, was planted over the said land by the lessees and a ridge or mud wall was built around it for the protection of the trees.

GOPI *v.* RAJ ROOP

The lease was granted on the 11th of May 1905. On the 16th of March 1918 *Musammat* Asmedh Kunwar died. The plaintiff as the successor-in-interest of her father, the original proprietor of the village, sues to eject the lessees from the land of the said grove and for mesne profits, contending that the lease in question became inoperative after the death of *Musammat* Asmedh Kunwar. Gopal and Ganga have since sold their interest in the said grove to Gopi for Rs. 100 on the 12th of August 1916. The defence of Gopi was that the plaintiff had accepted the rent of the land in question since the death of *Musammat* Asmedh Kunwar, that the defendant had spent about Rs. 2,000 in making improvements over the said land, and that the plaintiff was not entitled to the relief claimed.

The trial Court found in favour of the plaintiff and allowed the defendant to remove all the constructions made and trees planted by him within a month from the date of its decree. The lower Appellate Court upheld the decree for possession but dismissed the claim for mesne profits, holding that the plaintiff was not entitled to the same by reason of her having accepted the rent of the holding from the contesting defendant for three years after the death of *Musammat* Asmedh Kunwar.

It is urged on behalf of the defendant-appellant that the acceptance of rent by the plaintiff operated as a ratification by her of the lease granted by Asmedh Kunwar, and that, in any case, the plaintiff is not entitled to claim possession without paying for the improvements made by the defendant during the subsistence of the lease. Section 35 of the Transfer of Property Act lays down that where a person professes to transfer any property which he has no right to transfer and as a part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; but an acceptance of a benefit by the person on whom it is conferred does not constitute an election by him to confirm the transfer, unless he is aware of his duty to elect and of those circumstances, which would influence the judgment of a reasonable man in making an election. The receipts filed show that the rent in the present case was received by Gaya Prasad, an agent of the plaintiff, and there is nothing to show that either the plaintiff or her agent was aware of the circumstances in which the lease was granted or of the terms on which it was held by the person paying the rent. There can be no election where the person receiving the rent is not aware of his duty to elect; or, in other words, of the fact that a perpetual lease had been granted by the intermediate holder which it was in his power to repudiate or confirm. An acceptance of rent in these circumstances even for a period of three years cannot operate as an estoppel or waiver by the plaintiff of the invalidity of the lease after the death of *Musammat* Asmedh Kunwar.

The decision in *Madhu Sudan Singh* v. *Rooke* (1) does not apply because in that case the rent had been accepted with a full knowledge of the *patni* lease, sought to be repudiated. In fact, the tenant had filed a petition, depositing the rent in Court to the credit of the opposite party, stating the rent was being paid on account of a *patni* lease granted to him by the intermediate holder. The intermediate holder in that case was a Hindu widow. On the said deposit having been made an application was filed on behalf of the reversionary heir of the said widow, agreeing to accept the said payment. A Hindu widow, holding a life-interest, has a larger power than a lady holding an estate in lieu of maintenance for her life without any power of alienation. In *Beni Pershad Koeri* v. *Dudhnath Roy* (2) where a grant of a village for maintenance was made by a *Zemindar* to his nephews operating only for life, and the grantee executed a permament lease in favour of another, it was held in a suit brought by the successor-in-interest of the original grantor that the mere acceptance of rent by such successor-in-interest at the rate stipulated in the permanent lease could not have the effect of confirming the lease in its entirety; nor could the duration of the lease exceed that of the original grant. In the absence of any evidence to show that the plaintiff or her agent was aware of the terms and conditions of the lease under which the grove was planted, an acceptance of rent from

(1) 25 C. 1; 24 I. A. 164; 1 C. W. N. 488; 7 M. L. J. 127; 7 Sar. P. C. J. 194; 13 Ind. Doc. (N.S.) 1 (P.C.).

(2) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Doc. (N.S.) 108 (P. C.).

the person in possession of the land could not, therefore, estop the plaintiff from claiming possession and seeking to avoid the lease so far as it granted the plaintiff a perpetual right.

As regards the improvements alleged to have been made by the lessees and referred to in the written statement and in the grounds of appeal to the Court below, it is not clear from the evidence when they were made and whether they were made in good faith within the meaning of section 51 of the Transfer of Property Act. No issue was framed on that point by the Court of first instance or evidence taken. The lower Appellate Court is, therefore, directed to determine, after taking such additional evidence which the parties may adduce,—

(1) Whether the improvements in question were made by the defendants or any of them in good faith, believing that they were absolutely entitled as lessees to make the same?

(2) Whether these improvements were made in the life time of Musammat Asmedh Kunwar or partly in her life time and partly after her death and the acceptance of rent by the plaintiff, and, if so, to what extent?

(3) What was the value of the said improvements, as it would accrue to the transferee, if the ejectment is effected?

Three months' time will be allowed for recording the findings. On receipt of the findings ten days will be allowed to the parties for objections.

S. D. *Issues remitted.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 93 OF 1922.

July 23, 1923.

Present:—Mr. Justice Banerji, Acting Chief Justice, and Mr. Justice Ryves.

MOHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISHAMBHAR SAHAI AND ANOTHER—DEFENDANTS - RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 32, applicability of—Easement—Servient tenement, heavier burden imposed on—Suit for removal of burden.

Defendant who was entitled to place beams on the plaintiff's wall, placed heavier and more numerous beams on the wall than had existed before and plaintiff brought a suit for the removal of the beams:

***Held*, that Article 32 of Schedule I to the Limitation Act had no application to the case.**

Jadu Ram Kanhaia Ram, 38 I. C. 90, **followed.**

A common instance of the application of Article 32 of Schedule I to the Limitation Act is that of a tenant who having a right to cultivate land digs a tank in it or builds a house on it.

Appeal, under section 10 of the Letters Patent, against on order of Mr. Justice Stuart, dated the 18th April 1922, in S. A. No. 1028 of 1920.

Mr. *N. C. Vaish*, for the Appellant.

Mr *Nehal Chand*, for the Respondents.

JUDGMENT.—The question which arises in this appeal is whether the claim of the plaintiffs is barred by Article 32, Schedule I of the Limitation Act. The facts are these. Between the houses of the parties lies a wall which in previous litigation between them was declared to be the property of the plaintiffs. The defendants have placed some beams on that wall and masonry roof. The plaintiffs' suit was instituted for the removal of the beams in so far as they rested on the plaintiffs' wall. The defendants claimed a right of support for the beams of their roof. The lower Appellate Court, without finding whether the defendants had a thatched roof resting on the plaintiffs' wall, held that, as the defendants had placed a much heavier burden on the wall than had existed before, the plaintiffs were entitled to have that burden removed and decreed the claim. An appeal was preferred to this Court and for the first time in this Court it was contended that the claim was barred by Article 32. This plea prevailed before a learned Judge of this Court and he held that the said Article applied and as the construction complained of had admittedly been made more than two years prior to the institution of the suit he dismissed the claim. The plaintiffs have preferred this appeal. The question is by no means free from difficulty but, after considering the matter, we are of opinion that Article 32 is not applicable to the present case. That Article runs as follows:—

"Against one who having a right to use property for specific purposes perverts it to other purposes."

It is admitted that the purpose for which

the defendants could use the wall was the support which the wall could afford to their beams, we do not think that they have used the wall for a different purpose. The only purpose for which they could use the wall was that of placing beams on it. They have carried out the same purpose but in a different way, that is to say, according to the finding of the Court below, they have placed upon the wall heavier and more numerous beams than had existed before and, instead of putting a thatched roof, they have placed a masonry roof. The real purpose, however, is that of support for the beams upon which the roof now rests. Therefore, it cannot be said that there has been a perversion of the purpose for which the defendants had a right to use the wall. Article 32 cannot apply to a case of this kind. A common instance of the application of the Article is that of a tenant who having a right to cultivate land digs a tank in it or builds a house on it. Our attention has been drawn to the ruling in *Jadu Ram* v. *Kanhaia Ram* (1), in which a learned Judge of this Court held that Article 32 had no application to a matter like this. That was a case which was much stronger than the case before us. We are unable to agree with the view which the learned Judge who decided this case has taken on the point. In our judgment the Article in question does not bar the present suit. There was no other question to be considered in the appeal. We, therefore, allow the appeal, set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court. The appellants will have their costs of both the hearings in this Court. We allow the defendants two months' time from this date for the removal of such portions of the beams in dispute as rest on the plaintiffs' wall.

Z. K. *Appeal allowed.*

(1) 33 Ind. Cas. 90.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 312 OF 1922.
November 15, 1923.
Present :—Mr. Kinkhede, A. J. C.
Lala ANANTRAM—APPELLANT
versus
Lala MURLIDHAR—RESPONDENT.

Arbitration—Award, publication of, mode of—Arbitrators, duty of—Stamp, failure to affix, effect of—Appeal—New case, whether can be made—Events during pendency of suit—Court, whether can take notice.

It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published. [p. 97, col. 1.]

Armitt v. *Breame*, (1705) 1 Salk 76, **relied on.**

As soon as the arbitrators have made a complete award, the award is regarded as made and published.

The law casts upon an arbitrator no obligation to stamp an award and an award is complete though it is unstamped and, therefore, inadmissible in evidence. [p 197, col. 1.]

In the absence of an express stipulation as to the mode of the delivery of the award, the duty of the arbitrators is to have the award ready for delivery to the parties at their request and to acquaint them with the fact within a reasonable time. [p. 197, col. 1.]

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had no notice during the hearing of the suit. [p. 196, col. 2.]

Nathu Piraji Marivadi v. *Umedmal Gadumal*, 1 Ind. Cas. 456 ; 33 B. 35 ; 10 Bom. L. R. 768, **relied on.**

Ordinarily, every plaintiff has got a right to say that the rights of the parties should be adjudicated upon as they existed at the date of the suit, and that the Court should not take notice of any events that have happened during the pendency of the suit. This, however, is not an invariable rule and a Court will, in exceptional cases, depart from it, especially when by so doing it can shorten a litigation and best attain the ends of justice by preserving the rights of both parties. It is not only in the power but it sometimes is the duty, of even a Court of appeal to take notice of events which have happened during the pendency of appeal, and such events not appearing on the record can be allowed to be proved by extrinsic evidence. [p. 197, col. 2; p. 198, col. 1.]

Ransome v. *City of Pierre*, 41 C. C. A. 585 ; 101 F. R. 665 ; *Ram Rattan Sahu* v. *Bishun Chand*, 11 C. W. N. 782 ; 6 C. L. J. 74, **relied on.**

Appeal against the decree of the District Judge, Jubbulpore, dated the 27th March 1922

Mr. *N. G. Bose*, for the Appellant.
Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, Anantram, brought this suit for a declaration

that he is a tenant of certain occupancy and ordinary fields in Mouza Kajarwara and also for the recovery of Rs. 420 said to have been recovered by defendant-respondent, Murlidhar, from some lessees of the said fields. The Munsif dismissed the suit on the ground that the land was the property of the defendant. The lower Appellate Court also dismissed the appeal. Against this decision the plaintiff has come in second appeal to this Court. The defence urged may be summarised as under. The defendant was a Patwari of the village and in view of his position as such he did not think it desirable to allow the land in question to stand in his own name and, therefore, arranged to have it recorded in the name of of the plaintiff; that the defendant had been uniformly in possession of the said land and that plaintiff was never in possession and that the rent used to be paid by the defendant; that the defendant resigned his Patwariship in Sambat 1975 from which year his name was recorded in the *jamabandis* as tenant of the land. This defence was raised on 12th May 1921 and the case was adjourned to 13th July 1921 for plaintiff's reply. On the day of this adjourned hearing the defendant filed an additional written statement wherein he urged the following additional plea, that the plaintiff and defendant and Jiwanlal had referred their dispute to arbitration by an agreement dated 21st May 1917. *Panchas* made their award on 7th November 1917 whereby the plaintiff's claim for the land in dispute was disallowed. As no stamp for the award was filed the delivery of the award was delayed till the 12th July 1921 when the value of a stamp was supplied by the defendant. This suit is, therefore, untenable. The plaintiff's reply, through Mr. Sheoprasad, pleader, on this additional plea was to the following effect :—"An agreement was entered into by the parties by way of a proposal to refer the dispute relating to the land in dispute to arbitration of Beohar Raghubir Singh and others in 1917 as alleged by the defendant in his additional written statement, but it was never given effect to as the parties withdrew the reference and no award was made by the arbitrators within a reasonable time. It is denied that the delay was due to want of time. The reference does not bar the present suit." It was also pleaded in the alternative that if the parties did not expressly withdraw the reference an implied withdrawal of the reference and refusal by the arbitrators to arbitrate should be inferred from the fact that the arbitrators did not make any award for such a long time and that, if the arbitrators made any award as alleged by the defendant, the proceedings as well as the award were never communicated to the plaintiff. They are, therefore, fraudulent and void on account of the misconduct of the arbitrators. The Munsif framed the following issues :—

"1. Whether the parties referred the dispute relating to the lands in suit to the arbitration of the Hon'ble Beohar Raghubir Singh and others ?

"2. Did they make an award and disallow plaintiff's claim to the lands in suit ? If so, when was it given ?

"3. Was the reference withdrawn by the parties and, if not, does the delay in making the award, if any, operate as an implied withdrawal ?

"4. Was the award communicated to the plaintiff ? If not, does the omission amount to misconduct on the part of the arbitrators and does it vitiate the proceedings and the award as fraudulent ?

"5. Is the suit barred by reason of the award ?"

The findings of the Court of first instance may be summarised as under; that the parties did refer the dispute relating to the land in suit to the *Panchas* as alleged by the defendant; that the reference was not withdrawn either expressly or by implication and, further, that there was nothing in the proceedings that might have vitiated the award; that the real and original award was Exhibit D-3 which was engrossed on a plain paper and signed by all the arbitrators on 7th November 1917; that the award declared the land in suit to be the property of the defendant subject to a payment of Rs. 200 by him to the plaintiff; that the award in question was not vitiated for want of publication to the parties, and that the *Panchas* did make an attempt to communicate the decision to the parties and it was no fault of theirs if the latter faild either to provide stamp or to attend to hear the

award pronounced. The Munsif, being of opinion that communication of the decision to the parties was not an essential condition of a valid award, did not give a definite finding on the question of the service of notice on the plaintiff, to the payment of Rs. 200 by defendant to plaintiff, the Munsif held that plaintiff was at liberty to receive the money if paid to the *Sarpanchas* or to claim it by a suit.

The District Judge held that, whatever disputes existed with regard to the land in suit were included within the reference to arbitration; that the award of 1917, Exhibit D-3, was a valid one. It was signed by all the *Panchas* and was already validated in the lower Court by realising the stamp-duty and penalty; that plaintiff-appellant had received notice of the date of making award and if he remained absent that was a matter of his own choice; that the reference to arbitration was not withdrawn either expressly or by implication by the parties and that there was no evidence to support the contention that the award was a fraudulent one. As regards payment of Rs. 200 the lower Appellate Court held, on the evidence of Beohar Raghubir Singh, that the defendant-respondent had actually deposited this amount with him as *Sarpancha* and it saw no reason to direct the defendant to pay the amount to plaintiff in this suit. In the end, it was held that the defendant-respondent's title having been made out sufficiently clearly and the award being binding on both parties the plaintiff's claim was rightly dismissed.

In second appeal three grounds are urged: (1) that the award dated 12th July 1921 was not legally valid and could not affect the plaintiff's right to the fields; (2) that there was no valid award between the parties and, therefore, the case should have been tried and decided on the merits, and (3) that the present dispute was not referred to arbitrators for decision by the *Ikrarnama* dated 21st May 1917 which has been wrongly interpreted by the Courts below. All the questions raised are, to my mind, questions on which there are concurrent findings of fact. As regards ground No. 1, suffice it to say that the Courts below did not treat the award dated 12th July 1921, Exhibit D-2, as a valid award. They regarded the award of 7th November 1917, Exhibit D-3, as the real award in the case. No question, therefore, about the award dated 12th July 1921, Exhibit D-2, affecting the plaintiff's right to the fields claimed at all arises for consideration by me. As regards ground No 3, I am not prepared to hold that the Courts below have committed any error in interpreting the *Ikrarnama*. If we look into the proceedings of the arbitrators, as also the deposition of Beohar Raghubir Singh and the award Exhibit D-3, it will be clear that plaintiff was desirous of having the question relating to the lands in suit settled by the *Panchas*. The finding seems to be correct and must stand.

Ground No. 2 is rather general and under that ground a long argument was addressed to show that there was no valid award between the parties which barred the present suit. Several matters not expressly pleaded challenging the validity of the award, were pressed by the appellant at the hearing; for example, though the appellant's case in the Court of first instance was that there was no award at all in 1917, the concurrent finding of fact was that there was such an award in 1917. He had challenged the validity of the award on the ground of want of publication, and characterised the proceedings of the arbitrators as fraudulent and void on account of their misconduct, but all the same he did not challenge its validity either on the ground that there was an interpolation in the terms of the *Ikrarnama*, or on the ground that the land in suit was not included in the reference or that the words "*Jagha Jamin*" in the *Ikrarnama* were not sufficiently wide to include a claim in respect of the land in suit. Neither did he contend in the first Court that the award left some items undecided, nor that the decision related to some and not all the parties to the reference. If I were to allow points such as these to be taken at this late stage of second appeal, it would be enabling a defeated litigant to evade his defeat by devising a new case which was never set up when it should have been set up. The Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit: *Nathu Piraji* v. *Umedmal Gadumal* (1). All these are points which, no doubt, might have been taken in

(1) 1 Ind. Cas. 466; 33 B 35; 10 Bom. L. R. 768.

answer to the plea of the defendant based on the award but they were never taken and cannot, therefore, be allowed to be raised at this final stage of appeal. These points, if pressed at the hearing, would have been replied to and witnesses could have been examined and cross-examined with reference thereto. I see no reason to allow them to be pressed before me.

One important question raised about the validity of the award on the ground of its non-publication remains to be disposed of. In this case I do not find that any date was fixed by the terms of the *Ikrarnama* before which the award was to be made. The arbitrators were, therefore, within their rights to make the award within a reasonable time. The *Ikrarnama* does not also specify the mode of delivery of the award whether it was to be delivered to "every party" or to "both parties" or to "the parties or one of them." In the absence of any express stipulation, I think the duty of the arbitrators was to have the award ready for delivery to the parties at their request and to acquaint them with the fact within a reasonable time. The time of actual delivery in such a case is not material. Moreover, the submission of Exhibit D-1 does not provide that the arbitrators shall "make and publish" their award. It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published, see *Armitt* v. *Breame* (2), quoted in Russell on Arbitration and Award, 10th Edition, page 436. It is observed by the learned author that this does not seem to be a matter of any practical importance because an award is generally regarded as "published" as soon as the arbitrator has done any act whereby he becomes *functus officio*. In other words, as soon as the arbitrator has made a complete award, such award is regarded as made and published. It is needless to add that the law casts upon the arbitrator no obligation to stamp the award, and he does not usually do so. So the award was complete though it was unstamped and, therefore, inadmissible in evidence As stated above, the Appellate Court has held that notice was given to plaintiff but the latter remained absent. In view of this finding the plaintiff cannot make his own negligence to attend before the arbitrators to inform himself about the actual decision, a ground for saying that the award was not valid for non-publication to him

Rightly or wrongly, both parties laboured under a misapprehension as regards the binding character of the award made upon a reference made by them to the arbitrators. The defendant being in possession of the property was not particular about furnishing the required stamp to the arbitrators to engross the award thereon. The plaintiff, on the other hand, presumably believed that the original award in respect of which notice was served on him "would not be available for any purpose whatsoever until the same was engrossed upon a stamped paper" as required by the Stamp Law and he was naturally not interested in furnishing the stamp himself. That award of 1917 was stamped and validated in the course of this suit ; this validation had, under the Stamp Law, a retrospective effect but for this validation the award was inadmissible in evidence and the Court could not act upon it though filed in the case as an Exhibit D-3. It has now, by reason of the validation by the Court on the recovery of the stamp duty and penalty on 19th December 1921, furnished a good defence to the suit, and the plaintiff's suit gets defeated by it. Under these circumstances, I think the plaintiff may be said to have had ample justification to file the suit on 3rd February 1921, but that he has lost his right to continue it as soon as the award of 1917 was validated and became admissible in evidence as an answer to the claim.

Under ordinary circumstances every plaintiff has got a right to say that the rights of the parties should be adjudicated upon as they existed at the date of the suit, and that the Court should not take notice of any events that have happened during the pendency of the suit. I need only say that this rule is not an invariable rule; there are several exceptions to it. Every Court will in exceptional cases depart from this rule especially where by so doing it can shorten a litigation and best attain the ends of justice by preserving the rights of both parties. It is not only in the power but it sometimes is the duty of even a Court of appeal to take notice of

(2) (1705) 1 Salk 76; 91 E. R. 72.

events which have happened during the pendency of appeal, and such events not appearing on the record could be allowed to be proved by extrinsic evidence. This power is, as stated by Mr. Justice Thayer in *Ransom* v. *City of Pierre* (3), cited with approval in *Ram Ratan Sahu* v. *Bishun Chand* (4), based on the principle that, 'it is the duty of the Court which still retains control of the judgment, to take such action as will shorten litigation, preserve the rights of both parties and best subserve the ends of justice." In the interest of justice, therefore, I think both the Courts were bound to take notice of the award of 1917 (Exhibit D-3) as validated and to give effect to it.

I cannot see any reason why in giving effect to the award the proper form of relief to which the plaintiff was entitled under the terms of the very same award should not have been granted to him in this very suit in place of the larger relief which he claimed. I think equity demands this. I, therefore, while upholding the dismissal of the plaintiff's claim for a declaration of his title to the property in suit, and for injunction for restraining the defendant from interfering with the plaintiff's possession and for the relief about the amount of Rs. 420 on account of lease money, order that a direction be added in the decree to the following effect: " that the defendant do pay to plaintiff Rs. 200 as directed by the award."

Admittedly, the payment of this amount was a condition precedent to the defendant's retaining the land to himself as the evidence of defendant's own witness No. 1 and the terms of the award Exhibit D-3 will show. The defendant had the use of this money as also the usufruct of the land from 7th November 1917 to the end of July 1921 after which the witness says the same was deposited with him. I do not regard the deposit of the money with D. W. 1 as a sufficient compliance with the direction of the award. The defendant ought to have deposited that money into Court as a complete answer to the claim. This he has not done. I do not, therefore think it equitable to allow the defendant to have the use of the money as also the usufruct and to merely order him to pay Rs. 200 only to the defendant. I think the ends of justice will be met by an award of interest on the amount at Court rate from 7th November 1917 till satisfaction. A further direction will, therefore, be inserted in the decree that interest should be paid from 7th November 1917 until satisfaction of this amount. As regards costs I think that the circumstances of the case show that both parties had laboured under some misapprehension of their rights and it is, therefore, but just and proper that each party should bear his own costs throughout and I order accordingly.

Z. K. *Decree modified.*

(3) 41 C. C. A. 585 ; 101 F. R. 665.
(4) 11 C. W. N. 782 ; 6 C. L. J. 74.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 560 OF 1922.

December 4, 1923.

Present :—Mr. Baker, J. C.

Seth RAMBHAN—APPELLANT,

versus

PRAYAGDAS AND ANOTHER—RESPONDENTS.

Contract Act (*IX of* 1872), *s.* 253—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 106—*Partnership—Member of joint Hindu family becoming partner, other members, whether partners—Death of partner—Dissolution of partnership—Suit for accounts—Limitation.*

Where one member of a joint Hindu family enters into a contract of partnership with a stranger, the other members of the family do not become partners and cannot sue for dissolution of the partnership. The partnership is dissolved by the death of the member who is a partner, and limitation for a suit for an account of the partnership begins to run from the date of the death of the partner. [p 199, col. 1.]

Gangayya v. *Grandhe Venkataramiah*, 43 Ind. Cas. 9 ; 41 M. 454 ; 68 W. 708 ; (1917) M. W. N. 605 ; 22 M. L. T. 527 ; 34 M. L. J. 271 ; *Sakkanadha Vannimundar* v *Sakkanadha Vannimundar*, 28 M. 344 ; *Gopala Chetty* v. *Viraraghavachariar*, 74 Ind. Cas. 621 ; 45 M. 378; 30 M. L. T. 283 ; (1922) A. I. R. (P. C.) 250 ; 26 C. W. N. 977 ; 43 M. L J. 806; 24 Bom. L. R. 1197 ; 20 A. L J. 862 ; 36 C. L. J. 308 (P. C.) relied on.

Appeal against the decree of the District Judge, Nimar, dated the 23rd August 1922.

Mr. *M. Gupta*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The facts of this case are set out in the judgments of the Courts below. The plaintiff brought a suit for accounts of a partnership alleging that his deceased brother Lachhusa entered into partnership with defendant 1 on behalf of the joint family and that on his death on 9th December 1917 the plaintiff and defendant 2 as survivors of the joint family

continued the partnership, of which the plaintiff sues for accounts.

The first Court found that Lachhusa did not represent the joint family ; that the partnership was dissolved on the death of Lachhusa, and that the present claim is time-barred.

On appeal the District Judge, Nimar, upheld the finding of the first Court, holding that the partnership was dissolved by operation of section 253, Contract Act, on the death of Lachhusa; that the suit was time-barred, and that though the claim for a share of assets subsequently coming into the hands of the defendant might lie, the present claim was not one of that description and the appeal, therefore, failed. The plaintiff makes this second appeal.

It is settled law that the contract of partnership entered into by Lachhusa with defendant 1 does not make the other members of the family partners, and they not being partners cannot institute any suit for dissolution of partnership ; cf. *Grande Gangayya* v. *Grande Venkataramiah* (1). The learned District Judge has relied on *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar* (2), in which it was held that where the manager of a joint Hindu family enters into a partnership for the family benefit with a person, a stranger to the family, the partnership is dissolved on the death of the manager in the absence of any agreement with the survivors. It was further held that, although a suit for a general account of a partnership will be barred under Schedule II, Article 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share of any particular assets received by a partner after such dissolution, it such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable. The latter part of this case has been overruled by the Privy Council in *Gopala Chetty* v. *Vijiyaraghavachariar* (3) in which it was held that if the right of a partner to sue for an account is barred by limitation, he cannot sue the partner who has subsequently received any assets for a share of them. The case in 28 Mad., 344 is referred to and disapproved as to this particular point. No question, therefore, would arise of the right of the plaintiff to sue for any assets received by the defendant subsequently to the dissolution of the partnership.

The remaining portion of the 28 Mad. case, however, is still law and it must, therefore, be held that the partnership was dissolved on the death of Lachhusa in December 1917, and limitation for a suit for accounts began to run from that date, and the present suit is time-barred, being brought on the July 1921.

The only other argument on which the present suit could be supported is that there was a contract that the partnership should not be dissolved on the death of Lachhusa. There is no pleading to this effect and no evidence. The plaint is based on the allegation that after the death of Lachhusa the partnership business was continued by the plaintiff on behalf of the joint family, this being apparently based on the supposition that all the members of the family were partners, which is not the law. There is no evidence that the partnership was continued between the sons of Lachhusa, or any of them, and the defendant after the death of Lachhusa. It has been contended that the fact that certain bags of linseed, which were purchased on behalf of the partnership, were sold after the death of Lachhusa and the proceeds paid to defendants with the consent of the plaintiff, is an indication that the parthership continued. In my opinion it is not an indication of anything of the kind. Obviously, the linseed which was purchased during the continuance of the partnership had to be sold and converted into cash after the dissolution as there was no object in keeping it ; it merely represents the assets of the partnership. As the plaintiff was a representative of a deceased partner, though not a partner himself, he would be entitled to a share in the assets, and, therefore, it is not unnatural that his consent should be taken by the broker who sold the goods to the payment of these assets to the defendants.

In these circumstances, it is clear that the partnership came to an end on the death of Lachhusa, that the present suit for accounts is time-barred, and that there is no indication

(1) 48 Ind. Cas. 9 ; 41 M 454 ; 6 L. W. 708 ; (1917) M. W. N. 805 ; 22 M. L. T. 527 ; 34 M. L. J. 271.
(2) 28 M. 344.
(3) 74 Ind. Cas. 621 ; 45 M. 378 ; 30 M. L. T. 288; (1922) A. I. R. (P. C.) 115 ; (1922) M. W. N. 386 ; 16 L. W. 250 ; 26 C. W. N. 977 ; 43 M. L. J. 305 ; 24 Bom. L. R. 1197 ; 20 A. L. J. 862 ; 36 C. L. J. 308 (P. C.)

that there was any contract that the partnership should not be governed by the ordinary law, that the plaintiff is not in law a partner and that he cannot sue to recover any assets received by the defendants after the dissolution of the partnership, when the suit for accounts is time-barred.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 65 OF 1923.

January 10, 1924.

Present:—Mr. Justice Das, Mr. Justice Ross and Mr. Justice Kulwant Sahay.

BALMAKUNDA MARWARI—APPELLANT

versus

BASANTA KUMARI DASSI AND ANOTHER —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Civil Procedure Code (Act V of 1908), ss. 144, 151—Application for restitution, nature of—Limitation—Patna High Court, whether bound by decisions of Calcutta High Court.

Held by the majority (Ross, J., dissenting):—An application for restitution under section 144 or 151 of the Civil Procedure Code is not an application for execution, and the proper Article of the Limitation Act applicable to such an application is Article 181 of the first Schedule of the Act

Case law discussed.

Per Das, J.:—Article 182 of Schedule I to the Limitation Act applies to such applications for execution as are contemplated by the Code of Civil Procedure and are provided in O. XXI of the Code. An application for restitution is not such an application. The jurisdiction to order restitution is inherent in the Court and flows not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. The Code of Civil Procedure and the Limitation Act are the two great procedure Codes in India. They are Statutes *in pari materia* and are to be taken together as forming one system and as interpreting and enforcing each other. [p. 206, col. 1]

The Patna High Court should not, without very good reason, depart from a long course of decisions of the Calcutta High Court, especially on points of procedure. [p. 207, col. 1]

Haji Abdul Ghani v. *Raja Ram*, 85 Ind. Cas 468; 1 P. L. J. 282; 20 C. W. N. 829; 3 P. L. W. 62 (F.B.) followed.

Per Ross, J.— An application for restitution under section 144 or 151 of the Civil Procedure Code is an application for execution and is governed by Article 182 of Schedule I to the Limitation Act. [p. 212, col. 2]

Second appeal from the order of the Subordinate Judge, Purulia, dated the 18th January 1923, reversing that of the Munsif, Purulia, dated the 26th November 1921.

Mr. *A. B. Mukharji*, for the Appellant.

Mr. *A. K. Roy*, for the Respondents.

ORDER OF REFERENCE TO FULL BENCH.

Mullick, J.—Abinash Chandra Karmakar and Satish Chandra Karmakar brought a suit against Basanta Kumari Dassi and her brother for rent and ejectment in respect of a house and obtained an *ex parte* decree on the 10th January 1917. On the 29th March of the same year the plaintiffs in that suit got possession of the house. On the 18th June 1917 the *ex parte* decree was set aside and the suit was restored for hearing. The result of the re-trial was that the suit was dismissed on the 7th March 1918. On the 13th July 1918 an appeal from that decision to the District Judge was also dismissed on the ground that the plaintiffs had no title. The defence of Basanta Kumari in that suit was that the house had been acquired by her husband from one Dwarka Nath Karmakar and on her husband's death devolved upon her son with whose consent she and her brother were occupying the house.

The *ex parte* decree having been set aside, the appellant preferred an application on the 29th June 1921 under section 144 of the Civil Procedure Code asking that she might be restored to possession. By that time Abinash Karmakar and Satish Chandra Karmakar were no longer in possession. It appears that in 1914 they had mortgaged the house to one Bal Mukund who obtained a decree upon his mortgage and took possession on the 24th May 1918.

The Munsif, who was the Court of first instance and to whom the application for restitution was presented, dismissed it on the ground that it was barred by limitation. It was also contended before him that restitution could not be obtained against Bal Mukund who was not the representative of the plaintiffs Abinash Chandra Karmakar and Satish Chandra Karmakar in the original suit; but on this point the Munsif decided in the applicant's favour.

In appeal the Subordinate Judge took the view that as Basanta Kumari had no title and was only in possession with the permission of her son, she was not competent to apply for restitution.

Basanta Kumari then preferred a second appeal, namely, No. 144 of 1922, to this Court which was heard by a Division Bench with the result that the appeal was remanded for rehearing by a judgment which is reported in *Basanta Kumari Dassi* v. *Balmakund Marwari* (1) The Division Bench held that restitution could be obtained against Balmakund. On the question of limitation they held that Article 182 of Schedule I of the Indian Limitation Act was applicable and that if Basanta Kumari could prove that she presented an application for recovery of possession on the 1st June 1918, and that the proceedings on her application were stayed by the order of the District Judge from the 1st June till the 13th July 1918 then the application was within the period allowed by Article 182.

The Subordinate Judge has now allowed the application for restitution, holding that on the 1st of June 1918 the applicant made an application for restoration of possession, that she was entitled to deduction of time during the period of stay, that is, from the 1st June till the 13th July 1918, and that her application was within three years of the 1st June 1918. He also found that on the 11th June 1919 the petitioner made another application for restoration of possession and that her application of the 29th June 1921 was, therefore, within time in any case without making any deduction for the period of the stay of the proceedings.

The present second appeal, No. 65 of 1923, is preferred against the Subordinate Judge's order.

The sole question argued before us here is the point of limitation.

It is contended on behalf of the appellant Balmakund Marwari that Article 181 and not Article 182 is applicable to the case and if that is so, then the right of restitution having accrued on the 18th June 1917 and the application for restitution having been made on the 29th June 1921 the application was barred under the provisions of Article 181 even after making allowance for the period between the 1st June and the 13th July 1918. On behalf of the respondents it is contended that the judgment of the Division Bench in Appeal No. 144 of 1922 conclusively decided that Article 182 and not Article 181 is applicable, and it is urged that it *res judicata*.

In my opinion a careful perusal of the judgment shows that it was not the intention of the Court to decide finally what was the period of limitation in this case and the matter is still open for decision.

There is, however, considerable difference of opinion on the point. The Division Bench have cited with approval *Soma Sundaram Pillai* v. *Chokkalingam Pillai* (2), where it was held that Article 182 was applicable to an application for restitution. In *Kurgodigowda Bin Lingangowda* v. *Ningangouda* (3) the question was whether section 6 of the Indian Limitation Act could be applied to extend time on the ground of minority in the case of an application for restitution and it was observed that, for the purposes of section 6 such an application could fairly be treated as an application for execution. On the other hand, *Shibai* v. *Yeso* (4) is clear authority for the contrary view that Article 181 is applicable. In *Kirpa Sindhu Roy* v. *Mahanta Raibhadra Das* (5) it appears to have been admitted that Article 181 was applicable ; but the matter was considered and the respondents contend that it is an authority which conflicts with the decision of the Division Bench.

In the circumstances, we think that the question is one which should be referred to the Full Bench.

There can be no doubt that for the purpose of appeal an order made in a proceeding for restitution is a decree within the meaning of the Civil Procedure Code, but the question is whether the application for restitution which starts the proceeding is an application for the execution of a decree. The relevant section in the Civil Procedure Code of 1882 was section 583 and section 144 of the present Code considerably amplifies that section and makes

(1) 72 Ind. Cas. 912 ; (1923) Pat. 1 ; Pat. 277; (1923) A. I. R. (Pat) 371; 1 P L.R. 338.

(2) 38 Ind Cas. 806, 40 M. 780 ; 5 L. W. 267.
(3) 41 Ind Cas. 288 ;41 B. 625 ; 19 Bom. L.R. 638.
(4) 48 Ind. Cas. 130; 48 B. 235 ; 20 Bom. L. R. 925.
(5) 47 Ind. Cas. 47 ; 8 P. L. J. 367.

clear various points on which there was conflict. It was held in some cases, for instance, that a separate suit for restitution would lie. The present section omits all reference to execution and also in clear terms bars a separate suit. The section, when read with section 36 of the Code, provides that an order for restitution will be enforced as far as possible as a decree, but it does not say that the order is a decree.

Again, the section applies only to cases where a decree is varied or reversed, and it may be contended that the reference to a Court of first instance indicates that the reversal should be made by an Appellate Court but, in my opinion, the words 'Court of first instance' do not control the preceding words. In any event, section 151 of the Code would apply and relief could be given under the inherent powers even if section 144 was not expressly applicable to cases of reversal of *ex parte* decrees.

But whether the decree of reversal be made by an Appellate Court or by the Court of first instance, the question is whether the application for restitution is an application for the enforcement of any relief given by a decree. There is really no decree to execute for the decree does not say that the defendant is to be restored to possession. Indeed, it could not give any such direction for the simple reason that a decree only speaks with reference to the facts upon which a plaint is founded and cannot take into account events which have happened thereafter. O. XXI, which contains rules framed for giving effect to section 47, Civil Procedure Code, and which prescribes how an application for execution shall be framed and what procedure shall be followed in execution proceedings, does not refer to any application for restitution.

The same reasoning applies to the contention that, though there may be no decrees, there is at least an implied order which is capable of execution under Order XXI. Order XXI does relate to the execution of decrees and orders, but orders not expressly referred to therein do not come within its purview.

An application for restitution, therefore, is, in my opinion, not an application for execution within the meaning of the Civil Procedure Code.

The next question is whether the words 'application for execution' have a wider meaning in Article 182 of Schedule I of the Indian Limitation Act. I think the answer must be in the negative. The Indian Limitation Act was amended in the same year as the Civil Procedure Code and must be read in conjunction with that Act. The term 'execution' in Article 182 mans execution in accordance with the provisions of the Civil Procedure Code and refers, in my opinion, only to those decrees and orders which are referred to in Order XXI.

If an order setting aside an *ex parte* decree carried with it an implied decree or order for restitution, subject to the rules contained in section 47 of the Civil Procedure Code and in Order XXI, then there was no necessity for prescribing expressly in section 144 that no suit shall be instituted, for that prohibition is already contained in section 47. In my opinion an application for restitution is an original application, something in the nature of a suit and is governed by Article 181.

Accordingly, as we differ from the decision of the Division Bench above referred to, we refer this appeal for final decision to a Full Bench.

The question to be decided is whether Article 181 or Article 182 of Schedule I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by section 144 or 151 of the Civil Procedure Code, and if neither of the above Articles is applicable, then is there any other Article applicable to the case.

Bucknill, J.—I agree.

JUDGMENT OF FULL BENCH.

Das, J.—The question formulated for the decision of the Full Bench is as follows:—Whether Article 181 or Article 182 of Sch. I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by section 144 or section 151 of the Code of Civil Procedure, and, if neither of the above Articles is applicable, then, is there any other Article applicable to the case. A preliminary argument was advanced to us on behalf of the respondent to the effect that the reference is not competent having regard to the fact

that a Division Bench of this Court, presided over by the learned Chief Justice and Mr. Justice Jwala Prasad, expressed a final opinion on this point at an earlier stage of this case. It appears that two questions were involved in the application for restitution presented by the defendant-respondent, Basanta Kumari Dassi, first, whether the application was not barred by limitation, and, secondly, whether Balmakunda, the appellant, against whom the application was made could be regarded, in the circumstances of the case, as the representative-in-interest of the plaintiffs, who obtained a decree against Basanta Kumari which decree was subsequently set aside on appeal. It may be mentioned that Balmakunda was not a party to the suit but is in actual possession of the property which is the subject-matter of the application for restitution by virtue of his purchase at a Court sale held in pursuance of a decree which had been obtained by him against the plaintiffs. The learned Munsif to whom the application for restitution was presented, dismissed it on the ground that it was barred by limitation. He held, however, that Balmakunda was the representative of the plaintiffs, and that an effective order could be made against him provided the application was within time. Basanta Kumari appealed from the decision of the Munsif ; and the learned Subordinate Judge dealing with the appeal took the view that no application for restitution could be made by Basanta Kumari against Balmakunda. Having arrived at that conclusion he thought it unnecessary to deal with the question of limitation and he left that question undecided. From that decision Basanta Kumari appealed to this Court and a Division Bench of this Court, presided over by the Hon'ble the Chief Justice and Mr. Justice Jwala Prasad, took the view that Balmakunda was the representative of the plaintiffs and in that view the Division Bench set aside the decision of the Subordinate Judge and remanded the case to him for considering the question of limitation. The whole argument of the respondent is based on this decision of the Division Bench which has been reported in *Basanta Kumari Dassi* v. *Balmakund Marwari* (1), and it has been strongly insisted before us that the Division Bench decided finally that Article 182 was applicable to an application for restitution and that it became necessary for the Division Bench to remand the question of limitation to the Subordinate Judge only because it was urged on behalf of Balmakunda that, even on the assumption that Article 182 was applicable, the application for restitution was barred by limitation It appears that certain facts which it was necessary for Basanta Kumari to establish to enable her to contend that her application for restitution, regarded as an application for execution, was within time were not before the Division Bench of this Court as the question had not been gone into by the learned Subordinate Judge; and the whole argument of Mr. A. K. Roy on behalf of the respondent was to the effect that the only question which was left for the decision of the learned Subordinate Judge was whether, upon the facts, the application of Basanta Kumari was within time, the Division Bench having decided finally that the application must be regarded as an application. for execution. On remand the learned Subordinate Judge considered that he was bound by the decision of this Court that Article 182 was applicable to an application for restitution; and he came to the conclusion that, in the circumstances of the facts proved before him, the application was within time. From that decision there was an appeal to this Court and another Division Bench of this Court, presided over by Mullick and Bucknill JJ., took the view that the question had not been finally decided by the earlier decision of the Division Bench and, being of opinion that the question was of sufficient importance, has referred it for the decision of the Full Bench.

It is obvious that if the question was in fact decided by the Division Bench by its decision reported in *Basanta Kumari Dassi* v. *Balmakund Marwari* (1), it was not open to another Division Bench at another stage of the case to allow the question to be re-agitated before it. I have, however, come to the conclusion that the question was not in fact decided by the Division Bench. I am willing to admit that there are expressions in the leading judgment which strongly support the argument advanced on behalf of the respondent ; but the question must, in my opinion, be decided on the terms of the actual order passed by the Court. Now, the actual order runs as follows:—"In the rusult, we set aside the decision of the Subordinate Judge refusing

the appellant's application but as the appellant's right to succeed in that application must still depend upon the question of limitation, we direct that the learned Subordinate Judge, before finally disposing of the appeal, to consider the question of limitation and come to a decision thereon in the light of the facts already before him." It will be observed that the whole question of limitation was remanded for the decision of the learned Subordinate Judge, and not the narrower question of fact, namely, whether Basanta Kumari had taken certain steps in execution which would save her application for restitution under Article 182 of the Limitation Act. It is worthy of note that Mr. Justice Jwala Prasad agreed " to the order proposed", namely, the order remanding the question of limitation for the decision of the learned Subordinate Judge. As I have said already, the judgment of the learned Chief Justice leaves no room for doubt that in his opinion Article 182 is applicable to an application for restitution, but if he had intended to decide the question finally and if Mr. Justice Jwala Prasad agreed with that view, the order of remand would have been couched in different language. It is one thing to express a view, it is another and a diffierent thing to decide a point. I can hardly believe that so careful a Judge as the learned Chief Justice should have asked the Subordinate Judge to decide the question of limitation, if he had decided it himself; and though I quite agree that it was in any case necessary to remand the case for the investigation of certain facts upon which alone it could be argued that the application for restitution was within time, even assuming that Article 182 was applicable to such an application, the form of order, in my opinion, precludes the argument that the Court decided that Article 182 was applicable and remanded the case merely for the investigation of an issue of fact. If the argument of the learned Vakil for the respondent were well founded the Court should have remanded the case under the provisions of Order XLI, rule 25 and not under the provisions of Order XLI, rule 23. In any event, I cannot ignore that Mr. Justice Jwala Prasad was careful to say that he agreed to the order proposed by the learned Chief Justice and that the order proposed left the whole question of limitation to be decided by the learned Subordinate Judge. In my opinion the question of limitation was not decided by the Division Bench and it was open to Mullick and Bucknill, JJ., to refer it for the decision of the Full Bench. I would accordingly overrule the preliminary point raised on behalf of the respondent.

I now come to the point raised in the order of reference, namely, whether Article 181 or Article 182 is applicable to an order for restitution. Now, it seems to me that, before dealing with the question, it is necessary to have a clear idea as to what is meant by restitution, and whether the jurisdication as to restitution is the same as the jurisdiction as to execution. Article 182 applies to an application for execution of a decree or order; and the broad question which we have to determine is whether an application for restitution is in essence an application for execution. That the jurisdiction to make restitution exists and is inherent in every Court is not open to doubt; nor is it open to doubt that that jurisdiction flows, not from any express power that might be given in that behalf by the Legislature, but from the recognition of the principle that, " it is the duty of the Courts to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.". *Rodger* v. *The Comptoir de Paris* (6). I desire to emphasise the point that this jurisdiction was not for the first time conferred by the Code of Civil Procedure but that it existed independently of the Code and could be, and was in fact, exercised whenever the act of the Court did any injury to the suitors. Execution, on the other hand, signifies the enforcement or effectuation of the judgments or orders of Courts of Justice. In a narrower sense, it means the enforcement of such judgments or orders by a public officer under certain express powers conferred by the Code. Execution presupposes a decree or order capable of being carried into effect; restitution presupposes an act of the Court which has done an injury to the suitors. Execution will issue as of course; but in cases not comprehended strictly within the letter of section 144 of the Code, restitution is not a matter of course but depends upon the discretion of the Court and will be ordered only when the justice of the case calls

(6) (1871) 3 P. C. 465; 7 Moor P. C. (N. S.) 314 40 L. J. P. C. 1; 24 L. T. 1; 19 W. R 449; 17 E. R. 120.

for : it *Ashutosh* v. *Upendra* (7). It seems to me that when the nature of the jurisdiction as to restitution is closely examined, it will be found that it bears only a superficial resemblance to the jurisdiction as to execution.

The argument in favour of the view that restitution is by way of execution has been put very forcibly and concisely by the learned Chief Justice of this Court in his order of remand reported in *Basanta Kumari Dassi* v. *Balmakund Marwari* (1): " Although " said his Lordship, " an application under section 144 is not included in O. XXI which lays down the rules of procedure in execution cases still in substance I think that an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced. It is true that the decree only deals with it in a negative sort of way but in fact the result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before that decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree." I understand that the view of the learned Chief Justice is that restitution is nothing more than carrying into effect this negative aspect of the decree. Now, let me take a concrete case. *A* obtains a decree against *B* for Rs. 5,000 and recovers the money from *B* by levying execution. The decree is ultimately set aside in appeal. I quite agree that the decree reversing the primary decree is authority for the view that *A* should refund to *B* the sum of money taken by him in execution, but in making restitution the Court has complete power to direct *A* not only to pay the sum of Rs. 5,000, but also to pay interest upon the sum to *B*. Upon what is the jurisdiction to compel payment of interest founded? I quite agree that the appellate decree, in so far as it reversed the decree of the Court of first instance, may be read as containing a direction by implication that *A* should refund to *B* the sum of money taken by him in execution, but there is no direction, either express or by implication, that *A* should pay interest on the sum seized by him by virtue of a wrong order of the Court. There is no jurisdiction in a Court executing a decree to award interest where the decree itself is silent as to interest. Whence, then, does the Court derive jurisdiction to compel a party to refund not only the principal sum seized by him in execution of an erroneous decree of Court (as to which there may be a direction by implication in the decree reversing the original decree) but also interest upon that sum (as to which there is no direction whatever either express or by implication)?

The answer, I think, is given by Lord Cairns in the leading case of *Rodger* v. *The Comptoir de Paris* (6). That was a case in which the Supreme Court of Hong-Kong gave a decree for money to the plaintiff in an action for trover. There was an appeal to the Privy Council, but pending the appeal the plaintiff recovered the sum decreed in his favour by levying execution. The Privy Council set aside the judgment of the Supreme Court of Hong-Kong and directed non-suit to be entered. The defendant, the successful party in the Privy Council, applied for restitution not only of the money which had been paid under the original decree, but also of interest upon all the sums paid. The Supreme Court at Hong-Kong took the view that there being no direction as to payment of interest in the decree of the Privy Council and interest not being recoverable either at common law or by statute in the case of repayment of money erroneously paid under a judgment which is reversed, it had no power to direct the payment of interest upon the sums paid under the original decree. Lord Cairns, after pointing out that it was the duty of the tribunals to take care that no act of the Court does an injury to suitors in the Court, proceeded to say as follows : " It is contended on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without

(7) 38 Ind. Cas. 17 ; 24 C. L. J. 467 at p. 473 ; 21 C. W. N. 568.

ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far as, therefore, principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld." It will be noticed that Lord Cairns does not base his decision upon the ground that there was in that case a decree which could only be carried into effect by directing payment not only of the principal sums paid under the erroneous decree of the Court of first instance but also of the interest on those sums. His decision, on the other hand, is based upon the view that it is the duty of the Court to take care that no injury is done to the suitors by any act of the Court. In my opinion the decision of Lord Cairns is authority for the view that the jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts.

The next question is, has the Civil Procedure Code and the Limitation Act expressed a different view as to the nature of restitution? It has been argued before us that the Code of 1882 contains a clear intimation to the effect that an application for restitution is to be regarded as an application for execution and that it was not the intention of the Code of 1908 in any way to alter the law on the subject. The provision as to restitution found its place in the Code of 1882 in the Chapter dealing with appeals, not in the Chapter dealing with executions and section 583, which contains the provision as to restitution, ran as follows :—"When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits." I can find nothing in section 583 to encourage the argument that in the Code of 1882 the Legislature expressed the view that an application for restitution was to be regarded as an application for execution. If that was the view of the Legislature, the provision should have found its place not in the Chapter relating to appeals but in the Chapter relating to execution. It no doubt laid down the procedure as to the execution of an order for restitution, but there is no suggestion whatever in the section itself that an order for restitution should be considered as an order for execution. The Code of 1908 removes any doubt that might arise upon the interpretation of the earlier Code. The word "decree" has been defined in the Code of 1908 to include the determination of any question within section 144. In other words, the order under section 144 is itself a decree and capable of execution as such. It is, in my opinion, impossible now to contend that an order for restitution is an order in execution.

Apart from any other consideration, it seems to me that the term "application for the execution of a decree or order" in Art. 182 of the Limitation Act must be understood in the sense in which that term is used in the Code of Civil Procedure. The Code of Civil Procedure and the Indian Limitation Act are the two great Procedural Codes in India and they were amended in the same year and were to come into operation on the same day. They are Statutes *in pari materia* and are to be taken together as forming one system, and as interpreting and enforcing each other—see *Palmer's case* (8). Now, Article 182 applies in terms to applications for executions of decrees or orders. Applications for execution of decrees or orders are dealt with in O. XXI of the Code. In my opinion, Article 182 applies to such applications for execution as are contemplated by the Code and are provided for in O. XXI of the Code. It is not disputed that an application for restitution is not an application provided for in O. XXI of the Code.

(8) (1784) 1 Leach. C. C. (4th Ed.) 355.

BALMAKUNDA MARWARI *v.* BASANTA KUMARI DASSI

This is my view of the question submitted for the decision of the Full Bench, but even if that were not my view, I think I would be bound to follow the decisions of the Calcutta High Court, which are to the effect that an application for restitution is governed by Article 181 and not Article 182 of the Limitation Act. See *Harish Chandra Shaha* v. *Chandra Mohan Shaha* (9); *Masurunnissa Khatun* v. *Joy Chand Lal* (10); *Gangadhar Marwari* v. *Lachman Singh* (11) and *Asutosh Gassain* v. *Upendra Prosad Mitra* (7). It is quite true that a different view has been taken in the other High Courts but, as was pointed out by the Full Bench of this Court in *Haji Abdul Gani* v. *Raja Ram* (12), " this Court should not, without very good reason, depart from a long course of decisions of the Calcutta High Court." The question raised in the order of reference is a question of procedure and to do otherwise than follow the decisions of the Calcutta High Court on the point would cause great and unnecessary confusion. It has been contended before us that the question has not been argued in the Calcutta High Court as to the applicability of Article 181 as opposed to the applicability of Article 182 in relation to an application for restitution. That may be so, but where the question is one of procedure, it is of the utmost importance that the suitors should know where they stand and it is not a matter of much moment that the question was not raised in the Calcutta High Court in the form in which it has been raised here. It is sufficient that the Calcutta High Court has intimated to the suitors that Article 181 applies to an application for restitution. It is worthy of note that in this Court the view has been taken that Article 181 is applicable to an application for restitution : See *Kripasindhu Roy* v. *Mahanta Balbhadra Das*, (5). In my opinion Article 181 is applicable to an application for restitution and as it is conceded before us that if Article 181 applies the application is clearly barred by limitation, I would allow this appeal, set aside the order of the Court below and restore the order of the Court of first instance.

(9) 28 C. 189.
(10) 16 Ind. Cas. 238.
(11) 6 Ind. Cas. 175; 11 C. L. J. 541.
(12) 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 329; 8 P. L. W. 62, F. B.

Ross, J.—The first point for consideration is whether it was decided by this Court in Miscellaneous Appeal No. 144 of 1922 that the Article governing the case is Article 182. Two questions were raised in that appeal. The first was whether Balmakunda Marwari, then respondent No. 1, was the representative in interest of the other two respondents, so that restitution might be claimed as against him. The other was the question of limitation. The Munsif had decided both these points ; the first in favour of the present respondent, and the second against her. The Subordinate Judge on appeal had held that the present respondent was not entitled to regain possession from anybody ; and, without dealing with the question of limitation, had dismissed the application. In this Court the first question dealt with was the position of Balmakunda. It was held that his position was no better than that of his mortgagors and that the application for restitution was maintainable as against him. The Court then turned to the question of limitation which had not been dealt with by the Subordinate Judge. It was pointed out that it was not quite clear from the Munsif's judgment how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property. The Subordinate Judge, who might have gone into the evidence, had not done so. But before sending back the case for a determination of this question by the lower Appellate Court, the learned Chief Justice considered that he had to be satisfied that, even upon the facts so far as known, the then appellant really had a case to present upon this part of the appeal. In this connection the question of Articles 181 and 182 was discussed. The opinion was expressed that Article 182 applied, and, there being, therefore, a case to present upon this part of the appeal, the case was remanded in the following terms : " In the result, we set aside the decision of the Subordinate Judge refusing the appellant's application ; but as the appellant's right to succeed in that application must still depend upon the question of limitation, we direct that the learned Subordinate Judge, before finally disposing of the appeal, to consider the question of limitation and come to a decision thereon in the light of the facts already before him. For that purpose he will be entitled, of course, to

consider any orders in the case that have been made and that appear in the order sheet in the Court records or in the record before him." It seems to me plain from the terms of this order that the remand was a remand of the whole case under O. XLI, r. 23 of the Civil Procedure Code. The Subordinate Judge had in effect disposed of the application on a preliminary point and the Appellate Court remanded the case directing what issue was to be tried. It was not a remand under O. XLI, r. 25 of the Civil Procedure Code. The whole question of limitation was before the Subordinate Judge and in my opinion it was not and could not have been the intention of this Court to decide a part of the question, namely, the Article of the Limitation Act applicable, and leave a part only, namely, the question of fact for the decision of the Court to which the remand was made. The applicability of Articles 181 or 182 had to be discussed in order that the Court might be satisfied that there was a case worth remanding; but the opinion expressed on that part of the case was limited to that purpose and was not, in my opinion, intended to be in any sense conclusive of the question. On this point, therefore, I agree with the judgment that has just been delivered.

I now turn to the question whether Article 181 or Article 182 applies to an application for restitution and on this point I am of a different opinion. I can see no reason in principle why an application for restitution should not be treated as an application for execution. There may be no express direction for restitution in the decree, but restitution follows as a necessary consequence where a decree that has been executed is varied or reversed and the effect of section 144 of the Code is that a direction for restitution is implied in the decree. The order reversing or varying a decree is by implication an order for restitution of any property taken in execution of that decree and is immediately capable of execution. To my mind, the words of the section: "The Court.....shall.....cause..... restitution to be made" import execution. It may be noted, in passing, that in England if a judgment for the recovery of land be reversed or set aside after possession has been obtained thereunder, restitution may be obtained by a writ of possession addressed to the Sheriff —Chitty's King's Bench Forms, Fourteenth Edition, page 693.

Authority also seems to me to be decidedly in favour of this view.

Three decisions in Calcutta were cited in which it was held that Article 181 applied. In *Harish Chandra Singh* v. *Chandra Mohan Dass* (9) the learned Judges referred to the decisions in *Nand Ram* v. *Sita Ram* (13) and *Kurupam Zamindar* v. *Sadasiva* (14) and said that they were disposed to agree with the latter; but added that whether Article 178 or Article 179 of the second Schedule to the Indian Limitation Act of 1877 (Act XV of 1877) applied, the application was out of time. The question, therefore, did not call for decision in that case. In *Masirunnissa Khatun* v. *Joychand* (10) the decision in *Harish Chandra Singh* v. *Chandra Mohan Dass* (9) was followed without discussion; and on the facts the question whether Article 181 or 182 of Act IX of 1908 applied did not require to be decided. In *Ashutosh Goswami* v. *Upendra Prasad Mitra* (7) it was held that no question of limitation arose, though incidentally a reference was made to Article 181. There is one case in Madras, *viz.*, *Kurupam Zamindar* v. *Sadasiva* (14) where also, although the learned Judges were disposed to think that Article 178 applies, the application was barred whether the Article applicable was 178 or 179. Moreover, it was held that the application was an application in execution, governed by the rules prescribed by the Code for the execution of decrees. It may also be noted that one of the Judges who was a party to that decision expressed a different opinion, in *Venkayya* v. *Ragava Charlu* (15). In *Shivabai Kom Babya Swami* v. *Yesoo* (4) it was stated that Article 181 applied but there was no discussion of the question, the only other Article considered being Article 166. In *Hanifunissa* v. *Chunnilall* (16) it was assumed that the case was governed by Article 181 and no question of law was discussed.

(13) 8 A. 545; A. W. N. (1886) 178; 5 Ind. Dec. (N. S) 272.

(14) 18 M. 66; 8 Ind. Dec. (N. S.) 797.

(15) 20 M. 448; 8 M. L. J. 79; 7 Ind. Cas. (N..S) 817.

(16) 63 Ind. Cas. 184. 19 A. L. J. 549; 811 P. L. R (A). 98.

On the other hand, there are reasoned decisions for the application of Article 182 of which some of the more important are the following: In *Venkayya* v. *Ragava Charlu* (15), it was held that Article 179 applied and it was observed that the reference to Article 178 in *Kurupam Zamindar* v. *Sadasiva* (14) was a mere *obiter dictum*. In *Somasundaram Pillai* v. *Chokkalingam Pillai* (17) the question was discussed by Seshagiri Ayyar, J., who, referring to the argument based on the difference in language between section 583 of the previous Code of Civil Procedure and section 144 of the present Code, said: "We are unable to see the difference. Section 144 of the present Code has been so framed as to enable the successful party in the Appellate Court to be placed *in statu quo ante*. The language of section 583 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realized by the successful party. Apart from this change, we see no ground for holding that the Legislature intended to make any departure in the procedure by which restitution is to be obtained. Under the old Code, restitution was by way of execution: see *Prag Narain* v. *Kamakhia Singh* (18). The same rule applies to similar applications under the new Code. The language of section 47 of the Code would cover all cases of restitution. The party seeking the aid of the Court is agitating a question relating to the execution of the decree under which the other party deprived him of his property." The same view was taken in *Unnamalai Ammal* v. *Mathan* (19), a case of the Madras High Court, where it was held with reference to the difference between section 583 of the old Code and section 144 of the new Code that, "the Legislature could not have intended that an application for restitution should not be treated as an application in execution. All that the Legislature intended was to make clear that certain applications, which under the old Code were not included in section 583, were included in section 144, Civil Procedure Code." The decision in *Asutosh Goswami* v. *Upendra Prasad Mitra* (7) was referred to and it was pointed out that the observation made in that case was *obiter* and that no reasons were given in support of the view that Article 182 did not apply. In *Kurgodigouda* v. *Ningangouda* (3) an order for restitution was treated as an order for execution. The question was also dealt with in *Sayad Hamidalli* v. *Ahmedalli* (20) where Macleod, C. J., decided that an application for restitution could not be treated as anything else than an application for execution of the decree of the Appellate Court. "It is the decree of the Appellate Court which entitles the successful appellant to get back something which he had been deprived of by the decree of the lower Court, under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful appellant must apply for execution of the order which entitled him to get back that possession. Clearly, therefore, Article 182 applies to applications under section 144." In *Nand Ram* v. *Sita Ram* (13), Oldfield and Tyrrell, JJ., described the benefit by way of restitution under a decree as a necessary incident of the decree and hold that the plaintiff was competent to move the local Court to execute the appellate decree in his favour according to the rules prescribed for the execution of decrees in suits, and that Article 179 applied. In *Damodar Das* v. *Birj Lal* (21) Chamier and Piggott, JJ., held that execution covered restitution. The question, however, in my opinion, is concluded by the decision of the Privy Council in *Prag Narain* v. *Kamakhia Singh* (18). In that case the respondents had applied in the execution proceedings for mesne profits and interest by way of restitution. It was held that their claim to have the questions in dispute determined in the execution proceedings was justified by sections 583 and 244 of the Code.

The weight of authority, therefore, in my opinion, is in favour of the view that Article 182 governs the present case and I would answer the question in this sense. I would accordingly hold that the application for restitution was not barred by time and would dismiss the appeal with costs.

(17) 88 Ind. Cas. 806 ; 40 M. 280 ; 5 L. W. 267.
(18) 3 Ind. Cas. 298 ; 31 A. 551 ; 10 C. L. J. 257 ; 11 Bom. L. R. 1200 ; 6 M. L. J. 303 ; 14 C. W. N. 55; 19 M. L. J. 599 ; 18 O. C. 180 ; 36 I. A. 197 (P. C.).
(19) 42. Ind. Cas. 580.
(20) 62. Ind. Cas. 283 ; 45 B. 1187 ; 23 Bom. L. R. 480.
(21) 30 Ind Cas. 377 ; 37 A. 567 ; 13 A. L. J. 769.

BALMAKUNDA MARWARI *v.* BASANTA KUMARI DASSI

Kulwant Sahay, J.—This case has been referred to a Full Bench for decision of the question as to whether Article 181 or Article 182 of Schedule I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by section 144 or 151 of the Civil Procedure Code, and if neither of the above Articles is applicable, then is there any other Article applicable to the case. The question has arisen in a second appeal and, therefore, the whole appeal is before the Full Bench for final decision.

The question propounded arose under the following circumstances: on the 10th of January 1917, an *ex parte* decree was obtained by Abinash Chandra Karmakar and Satish Chandra Karmakar against Basanta Kumari Dassi and another, directing among other reliefs the ejectment of the defendants from a house occupied by them. This decree was executed and possession was delivered to the plaintiffs-decree-holders on the 29th of March 1917. Upon an application made by the defendants under O. IX, r. 13 of the Civil Procedure Code the decree was set aside by the Court of first instance and the suit was restored by an order dated the 18th of June 1917. The suit was ultimately dismissed after hearing on the 7th of March 1918. There was an appeal to the District Judge which was also dismissed on the 13th of July 1918. On the 29th of June 1921 the defendants filed an application before the learned Munsif for restitution and prayed for restoration of possession of the house under section 144 of the Code of Civil Procedure. It appears that at this time the plaintiffs who had obtained the decree and were put in possession on the 29th of March 1917 were no longer in possession, but one Balmakunda, a mortgagee from the original plaintiffs-decree-holders, was in possession by virtue of purchase and delivery of possession in execution of a mortgage-decree obtained by him against the original plaintiffs.

Two questions were raised before the learned Munsif by way of objection to the application under section 144 of the Civil Procedure Code. The first objection was that the application could not be entertained against Balmakunda who was not the representative of the original decree-holders; and the second objection was that the application was barred by limitation. The learned Munsif held that restitution could be granted against Balmakunda who was a representative of the original decree-holders but that the application was barred by limitation, and he accordingly rejected the application. On appeal to the Subordinate Judge it was held that the application could not be entertained inasmuch as the original defendants had no title to the house, the title being in the son of Basanta Kumari Dassi and the defendants being in possession under the permission of the son, and further that the application could not be entertained against Balmakunda. In this view of the case, the learned Subordinate Judge held that the question of limitation did not arise and he dismissed the application. There was a second appeal to this Court which came up for hearing in a Division Bench, presided over by his Lordship the Chief Justice and Mr. Justice Jwala Prasad. Their Lordships held that the Subordinate Judge was wrong in holding that the application could not be maintained by the defendants or that it could not be entertained against Balmakunda. They accordingly set aside the order of the Subordinate Judge in so far as it held that the application was not maintainable; but as the question of limitation had not been decided by the learned Subordinate Judge, their Lordships remanded the case for a consideration of the question. In the course of the judgment, his Lordship the Chief Justice expressed the view that the proper Article applicable to the case was Article 182 and not Article 181 of the first Schedule of the Indian Limitation Act. His Lordship expressed the opinion that applications for restitution were really applications for execution of decrees, and consequently Article 182 applied, and the petitioners for restitution were entitled to show that a previous application for restitution had been made by them within the period of limitation, and if they succeeded in doing so, then the present application, filed on the 29th of June 1921, being within three years from the previous application would be within time. Moreover, it was stated before their Lordships that in a previous application for restitution which was filed within time a stay had been obtained from the Court of

appeal below and that the period during which the stay was in force should be excluded. Their Lordships, therefore, remanded the case to the lower Appellate Court. On remand the learned Subordinate Judge has held that the application was within the period of limitation treating it as an application for execution under Article 182 of the Limitation Act. Against this order of the learned Subordinate Judge the present second appeal has been preferred to this Court. This appeal came on for hearing in a Division Bench presided over by Mr. Justice Mullick and Mr. Justice Bucknill, and their Lordships differed from the opinion expressed by their Lordships the Chief Justice and Mr. Justice Jwala Prasad on the question of limitation, and the case has accordingly been referred for the decision of a Full Bench.

In my opinion the proper Article applicable to an application for restitution under section 144 or section 151 of the Civil Procedure Code is Article 181 of Schedule I of the Indian Limitation Act. Section 144 provides for cases where a decree is varied or reversed, and if any party is entitled to any benefit on account of such variance or reversal by way of restitution or otherwise, that such restitution should be granted to such party and that the parties should be placed, as far as it may be possible, in the same position which they would have occupied but for such decree or such part thereof as has been varied or reversed. The right to apply for restitution is a right which is independent of any reliefs granted by the decree. The power to grant restitution is an inherent power in a Court to restore parties in the position which they occupied before the decree which is reversed was passed. It is the power to prevent any injury being caused to any party by any act of the Court itself, and this power, to my mind, is wholly independent of the rights conferred by a decree and which rights can be enforced only by way of execution. Where, for instance, in a suit for possession of property the plaintiff succeeds in the Court of first instance, and in execution of that decree possession is delivered to him, but on appeal the decree is subsequently reversed, the final decree of the Court of appeal merely declares that the plaintiff is not entitled to any relief and does not provide for re-delivery of possession to a successful defendant, the defendant in such a case cannot properly apply to execute the decree of the Court of appeal in order to be restored to possession because there is no such direction in the decree. The application can be made to the Court only in its inherent power to restore parties to their original position. This application for restitution is, to my mind, an application either in the suit itself or by way of miscellaneous proceeding invoking the Court's inherent jurisdiction to remedy an injury caused to a party. In some of the cases dealing with the point, it has been said that the relief granted by the decree of the Court of appeal which varies or reverses the decree of the Court of first instance is of a negative character and that it grants a relief to the successful party which is capable of enforcement by way of execution. With very great respect to the learned Judges who hold this view, I am unable, to agree with them. A decree can be executed only in so far as it grants any relief; so far as the successful defendant is concerned, it merely dismisses the claim of the plaintiff, there is no relief either positive or negative granted to the defendant, and there is no direction in the decree which is capable of execution. That an application for restitution under section 144 is not an application for execution is clear on a reference to the old section 583 of the Code of 1882. Section 583 provided for restitution in case of decrees passed in appeal under Chapter XLI of the Code of 1832 which related to appeals from original decrees. Moreover, it directed that on an application being made by any party entitled to any benefit (by way of restitution or otherwise) under a decree passed in appeal and who desires to obtain execution of the same, the Court to which the application is made shall proceed to execute the decree passed in appeal according to the rules which were prescribed for the execution of decrees in suits. There was, therefore, a clear provision in the Code of 1882 that applications for restitution should be dealt with as applications for execution. In section 144 of the present Code there is no reference to execution at all. Moreover, if an application for restitution be treated as an application for execution, then I fail to see any necessity for enacting section 144 at all because such matters had already been provided

for in section 47 of the Code. If an application for restitution is an application for execution, then it relates to a question arising between the parties to the suit or their representatives, and relating to the execution, discharge or satisfaction of the decree. Furthermore, it is provided in section 47 that questions relating to execution, discharge or satisfaction of a decree, shall be determined by the Court executing that decree and not by a separate suit. Section 144 also provides that no suit shall be instituted for the purposes of obtaining any restitution or any other relief which could be obtained by application under sub-section (1) of the section. To my mind, section 47 deals with questions relating to execution of decrees which properly may be treated as applications in execution, while section 144 deals with questions which do not come strictly within the meaning of execution of a decree but which are analogous to it, namely, applications for relief consequent upon a decree being set aside. Under the definition of a decree as given in the Code of Civil Procedure, the determination of any question within section 144 is a decree; and when an application is made for restitution under section 144 and the Court makes an order directing restitution to be effected, that order is a decree which has to be enforced in the way in which decrees are enforced by way of execution. I am, therefore, of opinion that an application for restitution under section 144 or 151 of the Civil Procedure Code is not an application for execution; and the proper Article of the Limitation Act applicable to such an application is Article 181 of the first Schedule of the Act. That Article 181 applies to such applications has been uniformly held by the Calcutta High Court (See *Harish Chandra Saha* v. *Chandra Mohan Das*, (9) and *Ashutosh Goswami* v. *Upendra Prasad Mitra* (7). There has been a divergence of opinion on this point in the Bombay High Court. In *Kurgodigouda bin Lingangouda* v. *Ningangouda bin Ningangouda*, (3) and *Sayad Hamidalli* v. *Ahmedalli* (20), it has been held that Article 182 applies, while in *Shivbai Kom Babya Swami* v. *Yesoo* (4) the view has been expressed that the proper Article applicable is Article 181. In Madras the later cases are in favour of the view that Article 182 applies (see *Venkayya* v. *Raghvacharlu* (15) and *Somasundaram Pillai* v. *Chokkalingan Pillai* (17). The Allahabad High Court also take the same view in the case of *Nand Ram* v. *Sita Ram* (13) whereas the Patna High Court in the case of *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (5) took the view that Article 181 was applicable. With very great respect to the Judges who hold the contrary view, I beg to differ from them, and I would answer the question referred to us by saying that the proper Article applicable to an application for restitution is Article 181 of Schedule I of the Indian Limitation Act.

It has, however, been contended by the learned Vakil for the respondents that the question as to which Article of the Indian Limitation Act is applicable to the present case has already been determined by this Court in the order of remand of their Lordships the Chief Justice and Mr. Justice Jwala Prasad, and that it is no longer open to us to come to a different finding on the same question in this case, and reliance has been placed upon the case of *Rai Brij Raj Krishna* v. *Chathu Singh* (22); on the other hand, it has been contended by the learned Vakil for the appellant that their Lordships in their order of remand did not intend to lay it down as a proposition of law that Article 182 was applicable, and that when the question of limitation was sent down to the Court below for decision it was the whole question, and it is still open to the appellant to contend that the proper Article applicable to the case is Article 181 and not Article 182. The learned Judges before whom the case came in appeal after the remand have taken the view that the Division Bench which made the order of remand did not intend to decide this question finally. I regret I am unable to agree with them. When I read the judgment of his Lordship the Chief Justice I can have no doubt that his Lordship did lay it down as a proposition of law that the proper Article applicable to the question was Article 182, and the case was remanded to the Court below only for a finding on the question of fact as to whether or not the application, treating it as an application in execution, was within time within the meaning of Article 182 of the Limitation Act. In the first place,

(22) 76 Ind Cas. 136 ; 4 P. L. T. 35 ; (1923) A. I. R. (Pat.) 226.

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dealing with the question as to whether ne application for restitution was maintainble, his Lordship the Chief Justice observes s follows:—"I think, therefore, that, apart rom the question of limitation which must e considered presently, the decision of the earned Subordinate Judge cannot stand." His Lordship thereupon proposed to consider nd did as a matter of fact proceed to onsider the question of limitation. His ordship then observes that it was not quite lear from the judgment of the Munsif ow far any application for execution of the ecree was made or how far that application ncluded a claim to be restored to possession f the property, and after referring to the fact hat the learned Subordinate Judge had not ealt with this matter, his Lordship says that he Subordinate Judge would be entitled to go nto the evidence upon this matter and arrive t a conclusion about it. But before sending ack the case for determination of this quesion by the lower Appellate Court his Lordhip thought that he must be satisfied that he appellant really had a case to present upon his part of the appeal even upon the facts isclosed so far. His Lordship then proceeds o consider the question whether an applicaion under section 144 of the Civil Procedure Code was to be treated as an application in execution, because if it was not to be so treated, then it was quite clear that the application would be barred by limitation and no remand would be necessary. His Lordship then refers o the case of *Somasundaram Pillai* v. *Chokkalingam Pillai* (17) where it was laid down that an application for restitution was an application for execution under the present Civil Procedure Code and says, " in my opinion that case was properly decided." His Lordship then examines the question in detail and comes to the following conclusion : " I think, therefore, that it is only right and proper to regard an application under section 144 as an application made in execution of a decree." His Lordship then refers to certain circumstances which if proved would save the application, treating it as one for execution, from being barred by limitation. One of those circumstances was the fact appearing from the Munsif's judgment that on 12th June 1918, an application for execution had been made by the appellant in the appeal before his Lordship and with reference to that application his Lordship observes as follows: " If in fact that application was made, then I think it being, as I have already said, an application in execution, and governed by Article 182 of the Limitation Act, the present application must be regarded as in time." It was because there was no finding in the judgment of the lower Appellate Court upon the question as to whether such previous application for execution had been really filed and whether there was in that previous execution application an application for possession, that a remand to the lower Appellate Court became necessary, otherwise, had there been a finding, no remand would have been necessary. I have, therefore, no doubt in my mind that it was not a mere expression of a view by his Lordship the Chief Justice but a clear and binding decision on the point that the Article applicable to the present case was Article 182 of the Limitation Act. As regards the form of the order of remand I think there can be no doubt on reading the whole judgment that the order of remand directed the lower Appellate Court to come to a finding of fact and then to decide the case having regard to the decision on the point of law already arrived at by this Court. This view is supported by the form of the decree drawn up in that appeal. I think no inference can be drawn from the words: " I agree to the order proposed " used by Mr. Justice Jwala Prasad. His Lordship apparently agreed with the Hon'ble the Chief Justice in his decision on the point of law otherwise he would certainly have expressed his views on the point if he held a different view. I am, therefore, of opinion that it is no longer open to contend in this case that the proper Article applicable is Article 181. I would, therefore, dismiss the appeal on this ground.

Das, J.—As a result of the decision of the majority of the Bench, this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

JAN BIBI *v.* BATULAN BIBI

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 473 OF 1922.
July 4, 1923.

Present :—Mr. Justice Daniells.

Musammat JAN BIBI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Musammat BATULAN BIBI AND ANOTHER —DEFENDANTS—RESPONDENTS.

Muhammadan Law—Dower—Widow in possession of husband's property, whether entitled to retain it till entire dower is paid.

When a Muhammadan widow is in possession of her husband's property in lieu of dower, she is not liable to piecemeal suits by every separate heir of her husband. She is entitled to retain the entire property until her entire dower is satisfied.

Second appeal against the decree of the District Judge of Benares, dated the 11th of January 1922.

Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiffs-appellants, *Musammat* Jan Bibi and others, for possession of their shares of a house by partition. The finding of the Court below is that defendant Batulan Bibi is in lawful and peaceful possession of the house in lieu of her unpaid dower and that the plaintiffs cannot obtain possession without satisfying her dower. The main plea on which the plaintiffs attack this finding is based on an ambiguity in the judgment of the Court below. The learned Judge of the Court below finds in the earlier part of his judgment that *Musammat* Batulan Bibi is undoubtedly in possession of the house. Further on he says :

> "I have been shown no ruling which requires that the possession of the house on the part of the widow must be exclusive. All that appears to be necessary is to show that she is in actual possession and that there has been no division between her and any other person."

This is not a clear finding, and the sentence in question may mean one of two things. It may mean either that *Musammat* Batulan Bibi and the other heirs of the family were in actual joint possession of the house, in which case the decree of the Court below would be clearly incorrect; or it may merely mean that *Musammat* Batulan is not in possession adversely to the other heirs. The former meaning would be to some extent inconsistent with what the learned Judge has said above and I have examined the evidence to find out what the learned Judge's finding meant. I find that *Musmamat* Batulan and her husband gave clear evidence that they were in exclusive possession of the house. They were not cross-examined on the point and there is no evidence to the contrary to be found on the record. The plaintiffs admitted in para. 8 of their plaint that they were out of possession at the time when the suit was instituted. It is, therefore, clear that the learned Judge could not have meant that *Musammat* Batulan was not in sole possession of the house and his decree cannot be attacked on this ground.

The second and remaining plea which has been urged is that the plainitiffs should only have been required to pay up a proportionate share of the dower. No authority has been quoted in support of this proposition and, so far as I know, the authority of all the commentators is against it. If the widow is in possession in lieu of dower she is not liable to piece-meal suits by every separate heir. She is entitled to retain the entire property until the entire dower is satisfied. The decree of the Court below is, therefore, correct and I dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

BUDGA *v.* CHAIN

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 420 OF 1922.
July 19, 1923.

Present : —Mr. Hallifax, A. J. C.

BUDGA—APPELLANT

versus

CHAIN AND OTHERS—RESPONDENTS.

C. P. Tenancy Act (I of 1919) Sch. II, Art. (i), applicability of, to part of holding.

Article (i) of Schedule II to the C. P. Tenancy Act, applies to the case of dispossession from part of a holding as well as to dispossession from an entire holding.

AMJAD KHAN *v* SHAFIUDDIN KHAN

Appeal against the decree of the Additional District Judge, Bilaspur, dated the 26th June 1922.

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

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—After a good deal of discussion of the matter I am still quite unable to see how the fact that the plaintiff is closely related to the Protected Thekedar of the village is relevant at all ; indeed, there would be no more relevancy in the fact, if it were one, that he was actually one of the proprietors of the village, as he has been somewhat carelessly assumed to be, and not merely a person with certain rights against the sole lessee of it. The objection taken here to the plea of limitation being allowed to be raised in appeal for the first time rests on the assertion that in answer to it the plea of fact could have been advanced that the land was not an occupancy holding at all but really *khudkasht*. But that plea was raised and examined in the lower Appellate Court and the materials for the decision of the question of fact are more than sufficient. The plaintiff was undoubtedly an occupancy tenant of the land from the time he was so recorded in the Settlement of 1904.

The only other contention put forward on behalf of the appellant is that Article (i) of the Second Schedule of the Tenancy Act, 1920, applies only to a case in which a tenant has been dispossessed of his entire holding, not to one in which he has been dispossessed of a part only and has retained possession of the rest. The original holding had an area of 22-18 acres and the present suit is in respect of 13-9 acres only. It is by no means certain that the plaintiff is in possession of any part of the holding. Even if he is, it is by no means improbable, from his own statements in the plaint, that he was dispossessed of the whole of it at one time by five brothers and has recovered possession of a part from one of them by a suit filed in 1917, that is to say, within two years of his dispossession which was in 1916, and is now seeking to recover the rest from three more of them.

But I can discover no reason whatever for holding that the words of Article (1) of the Schedule of the Tenancy Act have reference only to an entire holding and not a part of one. Two agruments were put forward by the learned pleader for the appellant. The first was that, whenever the Act refers to a part of a holding as well as to the whole it says so expressly Sections 98 and 100 were cited as instances of both the whole and a part being expressly mentioned, and sections 21 and 35 might have been cited as instances of the mention of the holding having referece to the whole only and not to a part. Such an argument might be used in support of another sound reason in support of the proposition, but it is so weak in itself that the other reasons would have to be practically sufficient in themselves and so not in need of any reinforcement.

The other argument was that a tenant who retains possession of a part of his holding can still be said to retain some sort of possession over the holding and cannot, therefore, be said to have been dispossessed of his holding. That is merely a repetition of the proposition that the word "holding" means the whole of it and not a part of it, but the matter has no bearing on the question of the time that should be allowed to him for the recovery of possession. There is no reason why he should have to sue within two years for the whole of his holding, and yet have twelve years if he had retained possession of a part of it. Indeed, if there is any ground for making a difference in the periods of limitation allowed in the two cases, it would seem reasonable to give the shorter period to the man still in possession of a part of holding. The appeal will be dismissed and the appellant must pay all the costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 542 of 1922.

July 24, 1923.

Present :—Mr. Justice Kanhaiya Lal.

AMJAD KHAN AND OTHERS—DEFENDANTS —APPELLANTS

versus

SHAFIUDDIN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

License—Denial of licensor's title—Forfeiture—Revocation—Permanent structure built by licensee.

AMJAD KHAN *v.* SHAFIUDDIN KHAN

A licensee, unlike a lessee, does not forfeit his title by merely denying the title of his licensor. [p. 217, col. 2]

Akbar Ali Khan v *Shah Muhammad*, 40 Ind. Cas. 443 ; 15 A. L. J. 592 ; 39 A. 621, followed.

A license cannot be revoked where the licensee acting upon the license has executed a work of a permanent character on the premises included in the license. [p. 217, col. 2.]

Nasirul Zaman Khan v. *Azimullah*, 3 A. L. J. 765 ; 28 A. 741 ; A. W. N. (1906) 216, followed.

Jai Chand Bahadar v. *Girwar Singh*, 52 Ind. Cas. 866 ; 17 A. L. J. 814 ; 41 A. 669, distinguished.

Second appeal against the decree of the District Judge of Agra, dated the 25th January 1922.

Mr. *R Malcomson* and Dr. *K. N. Katju*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to a house situated in the town of Ferozabad. The plaintiffs claim to be the owners of the site occupied by that house and allege that Mussammat Khairatan and Hasan Amjad Khan, who were occupying that house, have been wrongfully denying the title of the plaintiffs to the land in question. They seek the ejectment of the said occupants and implead certain other persons whom they describe as having been once in possession as the heirs of Nur Khan, the original ryot.

According to the plaintiffs the land in question belonged to Azim-ud-din Khan by virtue of a purchase made from Rahim Ali on the 4th of December 1859 and Nur Khan had built a house thereon with the permission of his predecessor-in-title. It was also stated that after the death of Nur Khan two of his sons, Kale Khan and Sardar Khan, executed an agreement on the 3rd of July 1865, by which they agreed to pay a ground rent of one anna per mensem and to vacate the land in case default was made in payment thereof.

It appears that Nur Khan died, leaving three sons, Kale Khan, Sardar Khan and Munir Khan, and a daughter named *Musammat* Khairatan. According to the plaintiffs the heirs of Kale Khan and Sardar Khan, namely, *Musammat* Mariam Bibe, *Musammat* Mamman and Hamid Khan, had left the house long ago and gone to live in another house in the town and Munir Khan had similarly left the house 15 or 16 years ago and gone to live elsewhere. The defendants, *Musammat* Khairatan and Amjad Khan, who are in occupation of the house deny the plaintiff's title to the land occupied by the house in dispute and plead that they have been in adverse possession of the same. They also deny the genuineness of the lease purporting to have been executed by Kale Khan and Sardar Khan on which the plaintiffs relied in support of their claim. The lease did not specify the boundaries or number of the land to which it related and no attempt was made by any of the Courts below to find out whether it related to the land occupied by the house of Nur Khan, which was referred to in the sale-deed of the 4th December 1859 executed by Rahim Ali in favour of Azim-ud-din Khan. The trial Court refers to an admission said to have been made by Amjad Khan that he and his mother or Nur Khan had no other house in the town except the one in question. But while the Court of first instance held that the *sarkhat* of the 3rd of July 1865 executed by Kale Khan and Sardar Khan was not binding on the other defendants, the lower Appellate Court thought that it had been presumably executed by Kale Khan and Sardar Khan on behalf of the entire family and was binding on the other defendants also. Both the Courts below eventually agreed in passing a decree in favour of the plaintiffs for the ejectment of the defendants on the ground that they denied the title of the plaintiffs to the land in question and were liable to be evicted whether they occupied the same as licensees or tenants.

It appears that there were two houses in the occupation of the descendants of Nur Khan at the time of the Settlement of 1877. In the sale-deed the boundaries of the entire land sold were mentioned and it was also stated that a portion of that land was occupied by a house belonging to Imam-ud-din and another portion by a house belonging to Nur Khan, both of which had been built with the permission of the former proprietor. In the *sarkhat* no boundaries were given but a house existing on the land leased was described as having been occupied by Kale Khan and Sardar Khan. In the *Khasra abadi* of 1877 A. D. *ahata* No. 261 comprising house No. 184 was entered as having been occupied by Gul Khan (*alias* Munir Khan), son of Nur Khan,

and *ahata* No. 382 comprising house No. 261 was described as having been occupied by Kale Khan, son of Nur Khan. The trial Court thought that the latter house was the one received by Kale Khan from his father-in-law, and the former was the one referred to in the sale-deed and the *sarkhat*.

Be that as it may, the *sarkhat* is not binding on the present occupants. *Musammat* Khairatan derived her title directly from Nur Khan and Amjad Khan is her son. They are not bound by any *sarkhat* which Kale Khan and Sardar Khan may have executed in favour of Ajimuddin Khan, agreeing to pay ground rent and to vacate the land in case of non-payment. In the plaint it was admitted that *Musammat* Narayan had been living with her husband in another house from 14 or 15 years, and that Hamed Khan and *Musammat* Mamman had left the house long ago, and were living in another house belonging to the plaintiff. In these circumstances, the contesting defendants cannot be treated as tenants liable to ejectment for non-payment of rent which, as the Court of first instance found, was never actually realised even from those who are said to have agreed to pay the same. In the Municipal *khasra* prepared in 1896 house No. 323 was entered as having been occupied by Munir Khan, son of Nur Khan, as a tenant of the present plaintiffs, but there is nothing to show which that house was. That entry is of no value.

The contesting defendants can, therefore, be treated as only licensees, holding the land in dispute in succession to Nur Khan by virtue of a license which was granted by one of the former proprietors when the house was built. The existence of the license is indicated by the sale-deed of 1859 which was executed when there was no dispute between the parties, and the recital there contained is admissible in evidence both as an admission made by a party before the controversy arose and otherwise. It is not shown that the license was granted subject to any restrictive covenant entitling the licensor to revoke it at his will. The house in dispute has been in the continued occupation of Nur Khan and after him by that branch of his line which is now represented by the contesting defendants without the payment of any rent, and the mere fact that, being ignorant of the origin of their title, they have denied the title of the plaintiffs, would not render them liable to ejectment; as pointed out in *Malik Akbar Ali Khan* v. *Shah Muhammad* (1) a licensee, unlike a lessee does not forfeit his license by merely denying the title of his licensor. In *Nasirul Zaman Khan* v. *Ajimullah* (2) it was held that a license could not be revoked, if the licensee acting upon the license had executed a work of a permanent character. It was further pointed out that a *kachcha* thatched house might be a work of a permanent character and the fact that the thatch was renewed from time to time did not make it a work of a temporary character. On behalf of the plaintiffs-respondents reliance has been placed on the decision in *Jai Chand Bahadur* v. *Girwar Singh* (3). There the question was one of burden of proof of adverse possession and a licensee who had set up an adverse right was held to have no title to claim the same, unless he succeeded in establishing his title by adverse possession. There is no question of burden of proof here. The title of the plaintiffs as owners of the land and of the defendants as licensees from the former proprietor is beyond dispute. The only question is whether that license has been forfeited by reason of the denial set up in this case. There was no denial prior to the suit. Unless the license is shown to have been granted under restrictive conditions of the nature set up, no revocation can be allowed to the prejudice of the heirs of the licensee, by whom a permanent structure has been built.

The appeal must, therefore, be allowed and the claim of the plaintiffs dismissed, but, in view of the fact that the defendants have improperly denied the title of the plaintiffs to the ownership of the land occupied by the house in dispute, I direct the parties to bear their own costs throughout.

Z. K. *Appeal allowed.*

(1) 40 Ind. Cas. 448, 15 A. L. J. 592; 39 A. 621.
(2) 8 A. L. J. 765; 28 A. 741; A. W. N. (1906) 216.
(3) 52 Ind. Cas. 866; 17 A. L. J. 814; 41 A. 669.

AMIRKHAN *v.* SHANKAR

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 253 OF 1922.

October 30, 1923.

Present : —Mr. Prideaux, A. J. C.

AMIRKHAN—APPELLANT

versus

SHANKAR AND OTHERS—RESPONDENTS.

Berar Land Revenue Code, 1896, *s.* 211 (2)—*Pre-emption—Sale in consideration of old debts—Market value, how to be ascertained.*

Where property is sold in lieu of old debts and the debts are wiped out by the sale, the consideration for the sale for purposes of pre-emption is not the nominal value of the debts, *i.e.*, their arithmetical total, but their present or market-value.

Phumman Mal v. *Kiman*, 75 P. R. 1901 ; 123 P. L. R. 1901, relied on.

Appeal against the decree of the Additional District Judge, Buldana, dated the 14th February 1922.

Mr. *D. W. Kathalay*, for the Appellants.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—The plaintiffs sue stating that defendant No. 2 had sold to the 1st defendant sub-division 2 of S. No. 30 of Mouza Jamb under a sale-deed dated 12th June 1920, that plaintiffs are co-occupants in the same S. No., being holders of sub-division 1, and that no notice had been given to them as required by law. Plaintiffs contend that the real amount of the purchase is Rs. 400 and that Rs. 800 is falsely entered in the sale-deed in order to defeat plaintiffs' right of pre-emption. It seems that the 2nd defendant executed a mortgage-bond for Rs. 300 with interest at 2 per cent. per mensem on 10th July 1916, and another mortgage-bond for Rs. 400 carrying the same rate of interest on 31st July 1917. These two bonds were on two separate fields, that for Rs. 400 being on the field in suit. On 12th June 1920 accounts were made up and a total of Rs. 1,292 was found due. The defendant No. 1 advanced Rs. 8 to make a total of Rs. 1,300, and the other defendant executed a fresh mortgage-deed on other fields for Rs. 500 on 12th June 1920 and sold the property in dispute for the balance of Rs. 800.

The Courts below found that the price of Rs. 800 was not fixed in good faith, that the fair market-value of the land at the time of the sale was Rs. 400 and that the plaintiffs are entitled to pre-empt the land for Rs. 400.

It is here contended that the sum of Rs. 800 should have been fixed as the price at which plaintiffs were entitled to pre-empt, and that as Rs. 800 were due to the plaintiffs on the two mortgages and as the field was sold in satisfaction of a portion of the entire debt due by defendant No. 2, the sale cannot be said not to be in good faith. Sub-section (2) of section 211 of the Berar Land Revenue Code, 1896, reads,—

> " If in the case of a sale or relinquishment for valuable consideration, the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market-value of the interest sold or relinquished".

Now, the other field is one of some 15 acres with a rental of Rs 12 while the one the suit is 2 acres with a rental of Rs 4. It is difficult to understand why the larger portion of the debt was not placed on the larger field and the smaller field sold for the balance. The fact that this was not done and that Rs. 800 was assigned as a price of the field in suit while Rs. 500 remained as a burden on the larger field points to *mala fides* and to a desire to get as much as possible from those entitled to pre-empt. Sufficient material exists to enable the Court to fix the fair market-value of the interest sold. What that market-value at the time of the sale was is proved to be Rs. 400, and the appellant-defendant has himself admitted that this was the case. But even if I had found that the circumstances did not point to *mala fides*, it seems to me that in cases where property is sold in lieu of old debts, and if the vendor sells to discharge the debts and the debts are wiped out, the consideration is not the nominal value of the debts *i.e.*, their arithmetical total, but their present or market-value : see *Phumman Mal* v. *Kiman* (1) and in a case like the present where the sum fixed in the deed of transfer is twice that of the market-value, I do not think the buyer can burden the pre-emptor with the excess amount. On the finding that Rs. 400 was the correct market-value I am of opinion that the decrees of the Courts below are correct. This appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

Z. K. *Appeal dismissed.*

(1) 75 P. R. 1901 ; 123 P. L. R. 1901.

JAGADISH CHANDRA *v.* HARIHAR

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 8 OF 1923.

November 22, 1923.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

JAGADISH CHANDRA DE AND OTHERS—APPELLANTS

versus

HARIHAR DE AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 108, O. XXXII r. 4—Minor defendant—Guardian ad litem—Mother, when can be appointed—Consent—Appeal, second—Finding based on inadmissible evidence—Procedure - Evidence Act (I of 1872), s. 32 (3)—Recitals in consent decree, whether admissible—Failure to object, effect of.

A Court is not competent to appoint the mother of a minor defendant as his guardian *ad litem* without her express consent. [p. 219, col. 2.]

Narendra Chandra Mondal v. *Jogendra Narain Roy*, 27 Ind. Cas. 139 ; 19 C. W. N. 537 ; 20 C. L. J. 469, followed.

The recitals in a consent decree which sets out the terms of the arrangement arrived at between the parties but does not embody the statements of the parties as to their rights in the subject-matters of the litigation, are not admissible in evidence under section 32 (3) of the Evidence Act. [p. 220, col. 1.]

An erroneous omission to object to the admission of evidence which is not admissible under the provisions of the Evidence Act, does not render it admissible. [p. 220, col. 1.]

Miller v. *Babu Madho Das*, 23 I. A. 106 ; 14 A. 76 ; 7 Sar. P. C. J. 73 ; 9 Ind. Dec. (N. S.) 50 (P. C.) ; *Luchmiram Motilal v. Radha Charan Poddar*, 66 Ind. Cas. 15 ; 34 C. L. J. 107 ; 49 C. 93 ; (1922) A. I. R. (C.) 267, followed.

Where, in second appeal, it is discovered that a finding of fact arrived at by the lower Appellate Court is based partly on inadmissable evidence, the High Court is bound to remand the case for a fresh decision and can neither affirm the finding of the Court nor determine the matter itself under the provisions of section 103 of the Civil Procedure Code. [p. 220, col. 2.]

Womes Chandra Chatterjee v. *Chunder Churn Roy Chowdhury*, 7 C. 293 ; 3 Ind. Dec. (N S.) 787, distinguished.

Appeal against the decree of Mr. Justice Walmsley, dated the 6th February 1923.

Babu *Ganesh Chander Sen*, with him Babu *Prasanta Bhusan Gupta*, for the Appellants.

Babu *Jogesh Chander Roy*, with him Babu *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.—This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for recovery of possession of land on declaration of title, for establishment of a right of way and for other incidental reliefs. The suit was decreed in part in the trial Court. On appeal by the defendants their objections were overruled and the cross-objections of the plaintiffs were allowed with the result that the Subordinate Judge decreed the claim in full. That decree has been affirmed by Mr. Justice Walmsley on the present appeal, which has been preferred by three of the defendants, it has been urged that the judgment of the Subordinate Judge is based upon inadmissible evidence and cannot be supported. We are of opinion that this contention is well founded and must prevail.

It appears that in 1900 there was a litigation between the predecessors in interest of the parties to this suit. The first and second defendants in that suit were the predecessors in interest of the first seven defendants in this suit, and the third, fourth and fifth defendants in that suit, then minors, are now appellants. A consent decree was made in that suit as between parties other than the present appellants, and the suit was decreed *ex parte* against them. They have contended in the present litigation that they are not bound by that decree because they were not effectively represented for the purposes of that suit by their mother whose name appeared as their guardian *ad litem*, though she never consented to act in that capacity; as a matter of fact, she did not enter appearance on behalf of her minor children. This contention is supported by the decision of this Court in *Narendra Chandra Mondal* v. *Jogendra Narain Roy* (1), where the principle was enunciated that a Court is not competent to appoint the mother of the infant defendants as their guardian *ad litem* without her express consent.

In view of the difficulty mentioned, an attempt was made in the Court below to utilise the consent decree under the provisions of section, 32, clause (3), of the Indian Evidence Act. That section provides that statements, written or verbal, made by a person who is dead, are relevant facts, when the statements are against the pecuniary or proprietary interest of the person making them. The

(1) 27 Ind. Cas. 139 ; 19 C. W. N. 537; 20 C. L. J. 469.

Subordinate Judge has held that the recitals in the consent decree are statements within the meaning of section 32 and he has relied upon those recitals in various portions of his judgment. We are of opinion that the recitals in the consent decree are not statements within the meaning of section 32. There are no recitals in the consent decree as to the previous rights of the respective parties in the subject-matter of the litigation. On the other hand, it is stated at the outset that, regardless of the rights of the parties, they had come to an arrangement that in future their rights would be regulated in the manner specified. In substance, the decree sets out the terms of the arrangement between the parties and does not embody statements of the parties as to their rights in the subject-matter of the litigation. Consequently, the recitals in the decree cannot be used as evidence under section 32.

We may add that the respondent has urged that no objection was taken in the trial Court to the reception of the decree in evidence on the ground now formulated. This, however, is of no avail to the respondent. The question is not one of mode of proof, as in *Girindra Chandra* v. *Rajendra Nath*, (2) *Ali Mohammad Khan* v. *Maharaj Bepari* (3) and *Gopu Nataraju* v. *Rajammal* (4) but of relevancy of evidence; and, as pointed out by Sir Richard Couch in *Miller* v. *Babu Madho Das* (5), an erroneous omission to object to evidence which is not admissible under the provisions of the Indian Evidence Act does not make it admissible: *Luchmiram* v. *Radhacharan* (6). It has further been urged that there is no substance in the objection taken, because the judgment of the Subordinate Judge is in essence based upon evidence other than the consent decree. We have carefully examined the judgment and we are unable to hold that the Subordinate Judge arrived at his conclusion independently of the recitals in the decree which are frequently mentioned in different parts of his judgment. Consequently, the case does not fall within the scope of the decision in *Womes Chunder Chatterjee* v. *Chunder Churn Roy Chowdhury* (7) where it was ruled that, on second appeal, though the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, is sufficient to warrant the finding of the Court below, the case may be disposed of by the High Court without a remand where the lower Court has arrived at its conclusion upon other grounds. Here, the judgment of the Subordinate Judge shows that his conclusion is based as much upon the recitals in the decree as upon the other evidence on the record.

We have been finally invited by the respondent to look at the evidence; but we are not in a position to do so, even under the terms of section 103 Civil Procedure Code That section provides that, in any second appeal the High Court may, if the evidence on the record is sufficient, determine an issue of fact necessary for the disposal of the appeal, but not determined by the lower Appellate Court. Here the question has been determined by the lower Court, and that decision cannot be supported because it is based in part on evidence improperly admitted.

The respondent has contended, as a last resort, that, although recitals in the decree may not be admissible in evidence under section 32, the fact that there was a previous litigation between the predecessors in interest of the parties and that the litigation terminated in a consent decree, may be relevant for the determination of the present controversy. The distinction between the admissibility of the factum of a judgment and of the findings in a judgment has been frequently recognised; *Kesinath* v. *Jagat Kisore* (8), *Baidyanath* v. *Alef Jan* (9), *Saroda Prasonna* v. *Umakant* (10): *Tripurana seethapati* v. *Rokkam Venkanna* (11), but we need not at this stage consider the applicability of that doctrine to this case.

(2) 1 C. W. N. 530.

(3) 64 Ind. Cas. 266; 36 C. L. J. 186.

(4) 69 Ind. Cas. 15; 43 M. L. J. 448; 16 L. W. 122; (1922) M. W. N. 464; 31 M. L. T. 125; (1922) A. I. R. (M.) 304.

(5) 23 I. A. 106; 14 A. 76; 7 Sar. P.C.J. 73; 9 Ind. Dec. (N. S.) 50 (P. C.)

(6) 66 Ind. Cas. 15; 34 C. L. J. 107; 49 C. 93; (1922) A. I. R. (Cal.) 267.

(7) 7 C. 208; 8 Ind. Dec. (N.S.) 787.

(8) 85 Ind. Cas 298; 28 C. L. J. 583; 20 C. W. N. 648.

(9) 70 Ind. Cas. 194; 36 C. L. J. 9; (1923) A. I. R. (C.) 240.

(10) 77 Ind. Cas. 450; 37 C. L. J. 233; (1923) A. I. R. (C.) 485; 50 C. 370.

(11) 66 Ind. Cas. 280; 45 M. 882; 42 M. L. J. 324; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; (1922) A. I. R. (M.) 71.

We need only decide now that the recitals, in the decree are not admissible in evidence under section 32 of the Indian Evidence Act; and that the decree itself is not operative against the appellants.

The result is that this appeal is allowed, the judgment of Mr. Justice Walmsley set aside and the case remanded to the Subordinate Judge for reconsideration in the light of the observations now made by this Court. The appellants are entitled to their costs in this appeal under the Letters Patent; but the costs of the hearing before Mr. Justice Walmsley will abide the result.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 51 OF 1922.

October 21, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

SAT NARAIN PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM AUTER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, Second—Questions of law, whether can be raised for first time.

Questions dealing with the admissibility and the legal effect of evidence, will not, as a general rule, be entertained in second appeal in the High Court, if they have not been taken at least at the stage of first appeal in the Court below. [p. 222, col. 2.]

Appeal, under section 10 of the Letters Patent, from the judgment of Mr. Justice Stuart, dated the 12th January 1922.

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

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

JUDGMENT.—This was a suit for redemption of a mortgage. The plaintiffs pleaded that they were unable to produce any written instrument of mortgage. They tendered certain evidence to prove that, in the year 1869, in the District of Mirzapur, certain parties had mortgaged certain land with possession to certain other parties, in return for a payment of Rs. 200. Other points regarding the title of the plaintiffs to represent the interest of the orginal mortgagors, and also with regard to certain other charges on the land set up by the defendants in possession, were gone into. All questions in issue were decided by the trial Court in favour of the plaintiffs, and they got a decree for redemption on payment of Rs. 200. The defendants then went up in first appeal. Their first plea was that the plaintiffs had totally failed to prove their title to redeem the mortgage, and also the particular mortgage set up by them. There were other pleas taken with respect to the other transactions which the defendants had set up, and it was alleged that those transactions were fully proved. There was a general plea that the evidence produced by the plaintiffs in the trial Court was altogether worthless and unworthy of credit. All these pleas were carefully dealt with by the learned Subordinate Judge. He reviewed the evidence in detail and confirmed all the findings of the trial Court in favour of the plaintiffs.

The defendants then came to this Court in second appeal. By this time the record had been examined on their behalf by a legal practitioner competent to appreciate all the difficulties arising out of the pleadings and the evidence in the two Courts below. It now occurred to the defendants that the Registration Act of 1866 was in force in the Mirzapur District in the year 1869. In their memorandum of appeal to this Court, therefore, they laid hold of statements in the plaint and certain statements made by one of the plaintiffs' witnesses in the trial Court. They put these forward as establishing beyond doubt the fact that the transaction of mortgage set up by the plaintiffs was embodied in a written instrument. From this they went on to contend that this instrument, not having been registered, was inoperative and could not have been admitted in evidence. The further contention followed that, therefore, secondary evidence of the contents of this document was also inadmissible. They also took the point that the plaintiffs had failed to lay the foundation required by law for the admission of secondary evidence before they tendered such evidence in the trial Court, and, finally, they contended that the evidence which the plaintiffs did tender, which had been accepted and acted upon by two Courts, was not within the defini-

tion of admissible secondary evidence under the provisions of the Indian Evidence Act. The learned Judge of this Court, who heard the appeal, has in substance refused to entertain these pleas, because they were not taken before the lower Appellate Court. It is true that in an earlier part of his judgment he discusses the question whether the plaintiffs had or had not laid a sufficient foundation for the production of secondary evidence of some sort or kind; but with regard to the remaining pleas, which we have set forth above, he frankly bases his decision on the ground that it would not be fair to the opposite party, under the circumstances, to permit these pleas to be taken for the first time in second appeal. In taking this line we are satisfied the learned Judge of this Court was within his discretion. We think it would be in the interests of the administration of justice in this Province if it were generally understood that questions of law of this nature, more particularly questions dealing with the admissibility and the legal effect of evidence, will not, as a general rule, be entertained in second appeal in this Court, if they have not been taken at least at the stage of first appeal in the Court below. We are not prepared to hold that the learned Judge of this Court was wrong in taking the line which he did. We dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 513 OF 1922.

December 20, 1923.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Mukerji.

Musammat MULANI—PLAINTIFF—APPELLANT

versus

MAULA BUX—DEFENDANT—RESPONDENT.

Muhammadan Law—Gift—Revocation—Possession not delivered, effect of—Suit to impeach gift—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 91.

Where a deed gift is executed by a person governed by the Muhammadan Law, and possession of the property comprised in the deed is not delivered to the donee, the gift is void *ab initio*, and in such a case, no question of limitation for a suit to impeach the gift can arise. The right of the donor to impeach such a gift can only accrue from the moment when by receipt of possession by the donee the gift can become operative by law. [p. 223, col. 2.]

Saraful Haq v. *Khadim Husain*, A. W. N. (1884) 60; *Meda Bibi* v. *Imaman Bibi*, 6 A. 207; A. W. N. (1884) 84; 3 Ind. Dec. (N.S.) 804, followed.

Under the Hanafi Law a gift cannot be revoked after the subject of the gift has increased in value owing to some accession thereto made by the donee which is inseparable from it. [p. 224, col. 1.]

Second appeal from the decree of the District Judge of Mainpuri, dated the 5th February 1922.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *A. P. Dube*, for the Respondent.

JUDGMENT.

Kanhaiya Lal, J.—The plaintiff seeks to set aside a deed of gift purporting to have been executed by her in favour of the defendant on the 11th of February 1914. Her allegation was that the defendant practised fraud on the plaintiff and caused her to execute the deed of gift by the exercise of undue influence over her. The precise nature of the fraud was not specified, but it was alleged that certain misrepresentations had been made by the defendant to obtain her consent. It was further alleged that, in spite of the deed of gift, the plaintiff had continued in possession of the house comprised in the gift.

The defendant denied that any fraud, undue influence or misrepresentation had been committed. He pleaded that he had been in possession of the house from the date of the gift and spent Rs. 150 in making improvements of the house in question and paid Rs. 150 to Bulaqi Das who had purchased the rights of *Musammat* Aliman, the daughter of the plaintiff, who was found to be the joint owner of the said house with the plaintiff. There was a further defence that the deed in suit was really a sale for consideration cloaked in the form of a gift to defeat a claim for pre-emption.

The trial Court found that the deed in question was nothing more than a gift without consideration and that it was executed under a misapprehension arising out of false promises made by the defendant and gentle persuasion exercised by him and was not consequently binding on the plaintiff. In the course of its judgment it observed that the plaintiff might

be said to have been duped or misled but she could not be said to have been put under undue influence, and that the plaintiff had given preference to the defendant, who was a very distant relation of her husband, in disregard of the claim of her own brother, because the latter had been neglecting her and the former had been attending to her wants and comforts in her old age. In regard to the question of possession the trial Court came to the conclusion that the rent of the house in dispute used to be paid to the plaintiff till very recently and that, as long as the defendant paid the rent realised from the house to her, she was quite pleased with the arrangement she had made, but when the defendant began to neglect her and stopped the payment of the rent to her, her eyes were opened and she sought the help of her brother in getting rid of the transaction. With reference to the other pleas raised by the defendant, the finding of the trial Court was that Rs. 150 had actually been spent in improvements and a similar sum in acquiring the rights of Bulaqi Das who had purchased the rights of *Musammat* Aliman, the daughter of the plaintiff. A decree was accordingly passed in favour of the plaintiff for the cancellation of the deed of gift and for the recovery of possession of her share of the house on condition of the plaintiffs paying Rs. 150 to the defendant on account of the improvements effected by the latter and Rs. 150 which the defendant had paid to Bulaqi Das for the share of her daughter *Mussammat* Aliman.

The defendant appealed and the plaintiff filed certain cross-objections. The whole of the suit was in effect before the lower Appellate Court for determination; but the Court confined itself to the question of limitation and without going into the various pleas raised on behalf of either side came to the conclusion that Article 91 of the Indian Limitation Act (No. IX of 1908) barred the claim.

It is not possible, however, to determine the question of limitation without going into many of the questions of fact which arise in the suit. The plaintiff had, for instance, alleged that she had remained in possession of the house in dispute in spite of the deed of gift, but that allegation was traversed by the defendant. The trial Court had recorded a finding on that point but the lower Appellate Court left it undetermined. Where a deed of gift is executed by a person governed by the Muhammadan Law and the possession of the property comprised in the gift has not been delivered, the gift would be void *ab initio*, and, as held in *Saraful Haq* v. *Khadim Husain* (1) and *Meda Bibi* v. *Imaman Bibi* (2), no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law.

Article 91 of the Indian Limitation Act provides a period of three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The lower Appellate Court has not determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to her. In *Singarappa* v. *Talari Sanjivappa*(3) where the plaintiff executed a sham sale-deed in favour of the defendants, neither party intending that it should be acted upon, and four years later the defendants began to set up a claim to ownership on the strength of the deed, it was held that the suit was not barred by Article 91 of the Indian Limitation Act, having been brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument. In *Petherpermal Chetty* v. *Muniandy Chetti* (4), their Lordships of the Privy Council similarly held that where a deed was inoperative it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. The plaintiff stated in her deposition that the payment of the rent of the house in dispute was stopped at or about the time when the suit was filed. That fact must, therefore, be determined.

It has also been urged that the deed of gift was in its very nature revocable under the Muhammadan Law, but that point also cannot be determined until the other questions raised in the appeal before the Court

(1) A. W. N (1884) 60.
(2) 6 A. 207 ; A. W. N. (1884) 34 ; 8 Ind. Dec. (N. S.) 804.
(3) 28 M. 349 ; 15 M. L. J. 228.
(4) 35 C. 551 ; 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 ; 18 M. L. J. 277 ; 35 I. A. 48 ; 4 M. L. T. 12 ; 4 L. B. R. 266 (P. C.).

below are decided. The parties are Sunnis and, according to the Hanafi Law, a gift cannot be revoked after the subject of the gift has increased in value owing to some accession thereto made by the donee, which is inseperable from it.

The appeal is, therefore, allowed and the decree of the lower Appellate Court set aside and the suit remanded to that Court with a direction to reinstate it under its original number and to dispose of it after determining the other points involved in the appeal and the cross-objections. The costs of this appeal will abide the event including fees in this Court on the higher scale.

Mukerji, J.—I agree that the appeal before the lower Court could not be decided merely on the point of limitation. The other points involved in the appeal required determination. I, therefore, agree with my learned brother that the appeal must be decreed and on terms stated by him.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NOS. 139 AND 140 OF 1923.

Present :—Mr. Justice Ross and Mr. Justice Das.

BISHUN LAL AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

BINDESHWARI SAHU—DECREE-HOLDER—RESPONDENT.

Chota Nagpur Tenancy Act (VI B C. of 1908), s. 181—Appellate decree, execution of—Limitation, commencement of.

The period of limitation fixed by section 181 of the Chota Nagpur Tenancy Act for the execution of an appellate decree runs from the date on which the decree is signed and not from the date of the judgment.

Second appeals from the order of the Judicial Commissioner, Chota Nagpur, dated the 24th February 1923, affirming that of the Munsif of Chatra, dated the 18th September 1922.

Mr. *Anand Prasad* for Mr. *Rai Gurusaran Prasad*, and *Bindeshri Prasad*, for the Appellants.

Mr. *Nawal Kishore Prasad* for the Respondent.

JUDGMENT.

Ross, J.—In these appeals the only question is whether the period of limitation fixed by section 181 of the Chota Nagpur Tenancy Act for the execution of a rent decree runs from the date of the judgment or from the date on which the decree is signed. The Courts below held that time should run from the date when the decree is signed. The learned Vakil for the appellants argues that the ordinary rule contained in Order XX, rule 7 should apply, namely, that the date of the decree is the date of the judgment. It is true that these cases are cases of execution of appellate decrees. Clause (b) of section 181 is in these terms : "Where there has been an appeal the date of the final decree or order of the Appellate Court." But clause (a) which deals with original decrees is in these terms : "the date on which the decree or order is signed." This discrepancy in the language between two clauses makes the section somewhat difficult and uncertain to construe, but the words in clause (a) "is signed" must have some significance and the clause cannot be read as if they did not exist. If clause (a) means that time runs from the date of the actual signature of the decree then it would be unreasonable to suppose that the Legislature had intended one standard in the case of original decrees and another standard in the case of appellate decrees. On the whole, I agree with the decision of the Courts below and would dismiss these appeals with one set of costs.

Das, J.—I agree.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 246 OF 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

BALMAKUND RAM MARWARI—PETITIONER

versus

MADHO PRASHAD—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX r. 8, O XVII, rr. 2, 3—Suit adjourned for appointment of

MAHADEI *v.* JAGANNATH DAS

guardian ad litem—*Plaintiff, absence of—Dismissal for default, legality of.*

Where a suit is adjourned for the purpose of appointing a guardian *ad litem* for a minor defendant and the plaintiff is absent on the adjourned date of hearing, the Court has no jurisdiction to dismiss the suit in default, as the suit is not ready for disposal and the adjourned date was not fixed for the hearing of the suit

Application for revision of the order of the Munsif, First Court, Monghyr, dated the 19th September 1922.

Messrs. *S. M. Mullick* and *S. S. Bose*, for the Petitioner.

Messrs. *Sambu Saran* and *S. N. Banerji*, for the Oposite Party.

JUDGMENT.

Das, J.—This application must succeed. The suit was instituted on the 28th July 1922 and the Court fixed the 23rd August 1922 for settlement of issues and for appointment of a guardian *ad litem* of the minor defendants. On the 23rd August 1922 the plaintiff applied for time and the suit was adjourned till the 14th September 1922 for appointment of a guardian. On the 14th September 1922 the plaintiff appeared but the defendants did not appear and the Court passed the following order: "Plaintiff to prove service of summons to deposit Rs. 24 towards the fee of the guardian to file copy of plaint. On plaintiff's petition for time the suit is adjourned to 19th September 1922 for appointment of guardian." It will be noticed that up to this time the Court was not in a position to dispose of the suit for the guardian to the minor defendants had not been appointed. On the 19th September 1922 the plaintiff did not appear and the learned Munsif dismissed the suit for default.

It is contended by Mr. Sushil Madhab Mullick on behalf of the petitioner that this order passed on the 19th September 1922 was wholly without jurisdiction inasmuch as the 19th September 1922 was not a date fixed by the Court for the disposal of the suit. It appears to me that this contention is right and must prevail. The suit was not ready for disposal on that date nor did the learned Munsif fix that date for the disposal of the suit. I would accordingly allow this application, set aside the order of the 19th September 1922, and direct the learned Munsif to proceed with the suit. There will be no order as to costs.

Ross, J.—I agree.

Z. K. *Apptication allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL NO. 1268 OF 1922.

January 7, 1924.

Present :—Mr. Justice Stuart and Mr. Justice Mukerji.

Musammat MAHADEI—JUDGMENT-DEBTOR—APPELLANT

versus

JAGANNATH DAS—DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 47—Mortgage decree, effect of—Execution of decree—Objection by defendant absolved from liability—Procedure.

A mortgage decree is passed against property standing in the name of a particular person and implies that the interests of that particular person in the specified property are to be sold. [p. 226, col 1.]

In a suit on a mortgage against two mortgagors it was held that the mortgage was valid as against one of them only and the suit was decreed as against him and was dismissed as against the other. When the mortgaged properties were about to be sold the absolved mortgagor filed an objection that the properties belonged to him alone and should not be sold, and that if they were sold, it should be proclaimed at the time of the sale that the judgment-debtor had no right, title, or interest in the properties ;

***Held*, that the objector was a party to the suit in which the decree was passed and that the objection related to the satisfaction of the decree, within the meaning of section 47 of the Civil Procedure Code, and the objection should, therefore, be decided on the merits. [p. 226, col. 1]**

Execution second appeal against the decision of the District Judge, Allahabad, dated the 26th August 1922.

Mr. *Damodar Das*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The litigation which has resulted in this appeal has taken a most unfortunate course. A woman called Mahadei, the widow of a Halwai called Mahadeo, on the death of her first husband married a certain Chunni Lal. Second marriages are permitted amongst Halwais. Mahadeo had owned two houses. On the 26th February 1907 a mortgage was executed for consideration in favour of Mahant Ishar Das by which these two houses were hypothecated. Ishar Das' successor-in-interest filed a suit upon this mortgage against Mahadei and Chunni Lal. The suit was decreed against both of them. Mahadei alone appealed. The District Judge found in appeal that there was an irregularity

in the execution of the mortgage which vitiated it against both executants but as Chunni Lal had not appealed he allowed Mahadei's appeal only. It is quite clear that the effect of his judgment was in no way to absolve Chunni Lal from liability and that the preliminary decree remained a good decree as against Chunni Lal. The decree as it stood was against Chunni Lal personally with a lien declared upon the two houses but a final decree was subsequently prepared against Chunni Lal only ordering the sale of the two houses. This decree, as it stands, does not affect Mahadei in any way. She is not named in it and to read the decree it can only mean that Chunni Lal's interests in the two houses are to be brought to sale. That is all that a mortgage-decree can mean. It is passed against property standing in the name of a particular person and implies that the interests of that particular person in the specified property are brought to sale. When this decree was put into execution for the sale of the two houses Mahadei put in an objection in which she stated that the houses in question did not belong to Chunni Lal but belonged to her and that they should not be sold by auction. She contended that if they were sold at auction it should be proclaimed at the time of the sale that she owned these two houses, and that Chunni Lal had no right, title or interest therein. This objection appears to us not to be in any way an objection impugning the decree but an objection setting forth a desire to explain the decree. Mahadei was undoubtedly a party to the suit in which the decree was passed under the Explanation to section 47, Civil Procedure Code, and the question that she raised was clearly to our mind a question relating to the satisfaction of the decree. So section 47 is applicable to the matter and Mahadei's objection should have been decided upon the merits as was ordered by the late Mr. Shibendra Nath Benerji on the 7th November 1921. We cannot agree with the views taken by the late Mr. Banerji's successor and by the District Judge. We hear that, in the meanwhile, Mahadei has filed a suit for a declaration to the same effect, that she has succeeded in this suit and that the suit is now pending before the District Judge in appeal. The fact that she has done so renders the remainder of the proceedings somewhat academic. It is absolutely clear that what must be decided is to whom these houses belong and whether the question is decided under section 47 or by a regular suit appears to us not very material in the circumstances of the case. What appears to be desired is a correct decision and what seems to be less important is the method of arriving at it. Fortunately, the law now meets any difficulty in this matter for a proceeding under section 47 can be treated as a suit and a suit can be treated as a proceeding under section 47. We accordingly remit the matter to the learned District Judge for decision according to law. He will be seized both with the appeal in the regular suit and this present objection. Costs here and hitherto will abide the result.

Z. K. *Case remitted for re-decision.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1709 OF 1921.

January 3, 1924.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Mukerjee.

SRI THAKUR KISHORI RAMANJI MAHARAJ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANDIT DULEY RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 80—Transfer of minor's property—Sanction not complied with, effect of.

It is the duty of a person who intends to take a transfer of a minor's property from his certificated guardian to see that the conditions laid down in the sanction granted by the District Judge for the transfer of the property are duly complied with. If the conditions are not complied with, the transfer will not be binding on the minor or on persons claiming through him. [p. 227, col. 2.]

Second appeal from the decree of the District Judge of Agra, dated the 15th July 1921.

Mr. *N. P. Asthana* and Dr. *K N. Katju*, for the Appellants.

Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted by the plaintiffs who are the appellants in this Court.

It is based on a mortgage, dated the 21st of February 1910. It was executed by one *Musammat* Sohan Dei as the certificated guardian of her minor son Naunit Lal. Naunit Lal, at the date of the mortgage, was about 19 years old. Subsequently, on attaining majority, he repudiated the mortgage and transferred a portion of the property mortgaged to the plaintiffs-appellants, to several persons including the respondent Duley Ram. The present plaintiffs then brought a suit in 1914 against Naunit Lal, his mother and her agent to obtain a declaration that the mortgage of the 21st of February 1910 was binding on Naunit Lal. The suit succeeded. The mortgage in question was executed on an alleged sanction given by the District Judge for the transfer. On the suit, out of which this appeal has arisen, being instituted, 16 persons were impleaded as defendants. They were Naunit Lal, his son, Duley Ram, and some subsequent transferees. Six written statements were filed and the question was raised whether the mortgage in suit was binding on Naunit Lal and his transferees. It was urged that the mortgage was not executed in accordance with the sanction of the District Judge and hence was not binding on anybody. The Court of first instance held, *inter alia*, that the decree passed in the suit of 1914 operated as *res judicata* against all the transferees of Naunit Lal. The suit was decreed *in toto* by the Court of first instance. Duley Ram alone appealed and the point was taken before the lower Appellate Court that the mortgage was not executed in accordance with the sanction of the District Judge. The lower Appellate Court found that the contention was right and it held that the mortgage was not binding on the appellant (Duley Ram). The lower Appellate Court thought that it could proceed on a point which was common to all the defendants, and it accordingly dismissed the whole suit.

The plaintiffs have accordingly appealed. The points raised for our determination are, (1) whether the mortgage in suit substantially complies with the terms of the sanction granted by the District Judge? (2) what is the effect of the decree made in the suit of 1914?, and (3) whether it is open to Duley Ram to raise an objection as to the validity of the mortgage?

The third point might be taken first. It is clear that the decree made in the suit of 1914 is not binding on Duley Ram. He had taken his mortgages prior to the institution of the suit of 1914. He had, therefore, acquired an interest in the property prior to the litigation and it cannot be said that Naunit Lal or his mother represented the interest which had been created in favour of Duley Ram. But the question is whether Duley Ram can repudiate the mortgage by taking advantage of the provisions of section 30 of the Guardians and Wards Act. We have already stated that Naunit Lal repudiated the mortgage in suit and granted certain mortgages in favour of Duley Ram. As Naunit Lal was certainly entitled to repudiate the mortgage of 1910, the mortgagee who claims under him is entitled to assert, in accordance with the assertion of Naunit Lal, that the mortgage of 1910 is not binding on him. This question, therefore, must be decided in favour of Duley Ram.

As to the first point it appears to us that the sanction granted by the District Judge has not been substantially complied with. The finding of the Court below, which is a finding of fact, is that at least a substantial portion of the mortgage-money did not find its way to the hand of the guardian or to the creditors of the minor. Apart from that finding, which is binding on us, it seems clear that the District Judge laid down as a condition precedent to the validity of the mortgage certain terms. They were that the satisfaction of the decrees were to be filed before him. An account of the expenditure of the sum sanctioned by him for the marriage of the minor should be submitted to him. He ordered that 40 acres out of the minor's property should be mortgaged. He fixed a date for the compliance of the conditions. That date expired and subsequently further time was granted for the compliance of the terms imposed by him. Finally, as the terms were not complied with, the District Judge revoked the sanction. Without entering into the question whether in all cases revocation of the sanction will affect or not a transfer made previously to the revocation, it seems to us to be clear on the facts of the present case that, the person who intended to take the transfer was bound to see that the terms imposed upon him were complied with. The District Judge was the

guardian of the minor. The certificated guardian could not transfer the property of the minor without the sanction of the District Judge. If the District Judge laid down certain terms which could not be complied with by the intending transferee, his remedy was to go to the District Judge and to say that under the conditions imposed he could not take the transfer. The District Judge may or may not have varied the terms. But it is not open to the transferee to say that the conditions laid down were impossible for compliance and, therefore, he would take the minor's property without complying with the restrictive terms imposed. In this particular case, instead of 40 acres of the minor's property, the whole property which belonged to him, namely, 169 acres, was mortgaged. The transfer, therefore, made in favour of the appellants was not the transfer sanctioned by the District Judge. The result is that the mortgage is not binding on Naunit Lal and his transferees.

The second question is, what is the effect of the decree in the suit of 1914? It appears to us that the result of the decree was a declaration that the mortgage created in favour of the plaintiffs was binding on Naunit Lal or any person claiming under him after the said decree cannot now go behind it. The judgment operates as *res judicata*. Thus, any person who took transfer from Naunit Lal, after the suit of 1914 was instituted, could not contend that the mortgage of 1910 was not binding on Naunit Lal or themselves.

The result of all these findings seems to be this. The appellants are entitled to sell the property mortgaged to Duley Ram subject to the mortgages created in his favour. In other words, the property mortgaged to Duley Ram is liable to sale but the mortgage rights of Duley Ram will remain unaffected. The rest of the property in the hand of Naunit Lal and the remaining defendants, none of whom appealed against the decree of the Subordinate Judge, is also liable to be sold. We allow the appeal and modify the decree of the lower Appellate Court accordingly. The respondent Duley Ram will have his costs in this Court including fees on the higher scale. The appellants will have their costs of this appeal as against the remaining defendants but these costs will come out of the property. The costs allowed to the appellants will include fees in this Court on the higher scale. The decree of this Court will be drawn up in the terms of O. XXXIV, r. 4, Sch. I of the Code of Civil Procedure.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 31 OF 1923.
November 12, 1923.
Present :—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick.

AKAL AHIR AND OTHERS—APPELLANTS
versus
BAIJNATH DAS AND OTHERS—RESPONDENTS.

Possessory title—Dispossession—Suit to recover possession.

If a person is in possession of land even without title thereto, he cannot be successfully turned out by another person who also has no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he has a title to the land. [p. 230, col. 1.]

Mr. *A. K. Rai*, for the Appellants.

Mr. *Rai T. N. Sahi*, for the Respondents.

JUDGMENT.

Mullick, J.—In this case the question is whether the plaintiffs have proved their occupancy right to the land in suit and whether they are entitled to recover possesion from the contesting defendants 3 to 18. The plaintiffs' case is, that by a partition with one Khirodhar, with whom they were co-sharers in the holding to which the land belongs, the land fell to their share some years before the suit and that they were in peaceful possession till the 29th July 1918 when the defendants 3 to 18 dispossessed them. That dispossession is alleged to have followed an order made under section 144 of the Criminal Procedure Code on the 29th July 1918. The parties in that proceeding were the defendants 3 to 18 on the one hand and the defendants 1 and 2 on the other, and the allegations of defendants 3 to 18 were that the land in suit was a part of their occupancy holding, that it was mortgaged to Khirodhar, the father of defendants 1 and 2; that they had brought a redemption suit

against the defendants 1 and 2, and that in execution of a decree obtained therein had taken possession by order of the Court. It was further alleged that the defendants 1 and 2, having resisted their possession after delivery of possession by the Court, it was necessary to have recourse to the Criminal Court in order that an order prohibiting the defendants 1 and 2 from interfering with their possession might be passed.

The plaintiffs were not parties to the redemption proceedings and are obviously not bound by the result, and in the present suit they ask for a declaration of their title on the ground that they had obtained title by virtue of a deed of gift from Khirodhar and that the decree in the redemption suit was not binding upon them. In addition to these declarations they seek for recovery of possession.

The Munsif found that, although the gift alleged to have been made by Khirodhar had not been made by a registered document, the plaintiffs were in fact in possession up to the time of the suit and that the case put forward by the defendants as to their title was entirely false. He found that the plaintiffs had, as alleged, been dispossessed on the 29th July 1918 and he gave them a decree for recovery of possession.

In appeal the Subordinate Judge has set aside that decree. He finds that the defendants, being admittedly in possession, the burden was upon the plaintiffs to prove that they had title to the land; that it was not sufficient to prove that they were dispossessed on the 29th July 1918, and that as they had failed to prove that they had obtained any valid title from Khirodhar the suit should be dismissed.

A second appeal was preferred to this Court and was heard by a learned Judge of this Court who agreed with the Subordinate Judge and dismissed the appeal.

The present appeal before us is made under the Letters Patent against the decree of the learned Judge of this Court.

It is quite clear that, although the plaintiffs have failed to prove that they derived title from Khirodhar by virtue of a deed of gift they are entitled to recover possession as against the defendants unless the defendants can show that they had a better title than the plaintiffs. In this connection it is necessary to observe that, in or about 1911, there was a Record of Rights made of the land in suit and that the plaintiffs were recorded as tenants in possession. There is also evidence, which apparently has been believed by the Munsif, that the plaintiffs have been paying rent to the superior landlord. Therefore, although it is open to the Subordinate Judge in appeal to say that whatever presumption as to title may have been created by the Record of Rights, it has been rebutted by the plaintiffs' failure to prove the title derived from Khirodhar, still the question whether the plaintiffs are entitled to recover possession on the strength of their previous peaceful possession has yet to be determined. From this point of view the learned Subordinate Judge has failed to approach the case. It is not sufficient to say that the plaintiffs have failed to prove their title. It is necessary to enquire whether the defendants have made an affirmative case that they had a good title to the land, or at least a better title than the plaintiffs when they dispossessed them. The defendants' case is that the land is theirs and that Kirodhar was the mortgagee. It is not sufficient for them to show that they were successful in the redemption suit against the defendants 1 and 2. They must prove their title as mortgagors and their right to remain in possession upon the strength of that title as against the plaintiffs also, and the learned Subordinate Judge in appeal should have come to a clear decision upon this point. The Munsif came to a decision against the defendants and the learned Subordinate Judge must either affirm that finding or set it aside. An attempt was made by the learned Vakil for the appellants to raise a case of adverse possession but it is quite clear that no such case was made in the pleadings and the learned Judge of this Court was right in declining to go into that point. A further attempt was made to found a title upon the fact that the landlord had received rent from the plaintiffs for some years previous to the suit, but mere receipt of rent would not be sufficient and, therefore, the question really at issue in this case is whether the defendants have proved that Kirodhar was their mortgagee and that they have redeemed the land. The case must, therefore, be remanded to the Subordinate

Judge for a clear finding upon this point. If he finds that the defendants 3 to 18 were the owners of the occupancy holding and that Khirodhar was their mortgagee then they will succeed, for the plaintiffs have failed to prove any title derived from Khirodhar. If the defendants fail in this then the plaintiffs will succeed It has been found as a fact that the plaintiffs were in peaceful possession at the time of the suit and that finding cannot be assailed in second appeal. The result is that the case will be remanded to the Subordinate Judge for a finding on the question as to the title of the defendants which should be returned to this Court as soon as possible. The costs of this hearing will abide the ultimate result of the appeal. The parties will not be entitled to adduce further evidence.

Dawson Miller, C. J.—I agree. There is abundant authority for the proposition that if a person is in possession of land even without title thereto he cannot be successfully turned out by another person who also had no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he had a title to the land.

Z. K. *Case remanded.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL MISCELLANEOUS No. 264 OF 1923.

October 15, 1923.

Present:—Mr. Rupchand Bilaram, A.J.C.

Messrs. MADHOWRAM HARDEVDAS—APPLICANTS

versus

Messrs. MITSUI BHUSHAN KAISHA, LTD.—OPPONENTS

Award—Error of law, when vitiates award.

An error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it. But where a specific question of law is specifically referred by parties to arbitrators and the latter arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred, an erroneous decision of law may be attacked, provided such error appears on the face of the award itself or any document so closely connected as to form part of it. [p. 231, col. 2]

Chamsey Bhera & Co. Ltd. v. *Jivraj Baloo Spinning and Weaving Co., Ltd.*, 73 Ind. Cas. 436 ; (1923 A. C , 480 at p. 487 ; 44 M L. J. 706 ; 25 Bom. L. R 588 ; (1923) A. I. R. (P. C.) 66 ; (1923) M W. N. 596; 50 C. 130 ; 47 B. 578 ; 33 M. L. T. 419 ; 28 C. W. N. 397 ; 50 I. A. 324, (P. C.) ; *London & N. W. Ry. Coy* v. *Neilson* (1922) 1 A. C. 263; 91 L. J. K. B. 680 ; 127 L. T. 469 ; 66 S. J 502 ; 38 T. L. R. 653, **relied upon.**

Application to set aside an award under the Indian Arbitration Act, IX of 1899.

Mr. *Kimatrai Bhojraj*, for the Applicants.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMENT.—This is an application to set aside an award on the ground of an error of law apparent on the face of the award. The applicants, Messrs Madhowram-Hardevdas, agreed to purchase from the opponents, Messrs. Mitsui Bhushan Kaisha, Ltd., one hundred tons Continental Steel Bars to be shipped in January and, or February 1923 on C. I. F. terms. Sixty tons out of the lot were not shipped and by a reference dated 29th May 1923 and signed by both the parties, they agreed to refer their disputes to the arbitration of Messrs. Clayton and Houghton. The reference recites that disputes have arisen between the parties relating to sixty tons mild steel bars out of one hundred tons Janaury-February 1923 shipment under contract No. 575, and that the parties refer the said disputes to arbitration. The award passed by the arbitrators, who were the chosen judges of the parties, declares that the contract to the extent of sixty tons stands cancelled, and that no amount is due from either party to the other on account of the said sixty tons.

There is no error of law apparent on the face of this award. Mr. Kimatrai, the learned pleader for the applicants, has, however, argued his case more or less on the same lines on which the judgment of the High Court of Bombay in *Jivraj Baloo Spinning and Weaving Co* v. *Chamsey Bhera* (1) proceeded and which has been reversed in appeal by their Lordships of the Privy Council in the ruling reported in *Chamsey Bhera Co., Ltd.* v. *Jivraj Baloo Spinning and Weaving Co., Ltd.* (2). Mr. Kimatrai wishes me to look at the correspondence between the parties preceding the reference and to the contract, and particularly

(1) 58 Ind. Cas. 799; 44 B. 780; 21 Bom L.R. 1087.
(2) 73 Ind. Cas. 436 ; (1923) A. C. 480 at p. 487 ; 44 M. L. J. 706 ; 25 Bom. L R. 588 ; (1923) A. I. R. (P. C.) 66 ; (1923) M. W. N. 596 ; 50 C. 130; 47 B. 578; 33 M.L.T. 419; 28 C.W.N. 397 ; 50 I.A. 324 (P.C.)

to clause 14 of the contract, which reads as under, —

"Should the goods or any portion thereof not be shipped by the specified time, the contract for the quantity so delayed shall at buyer's option be cancelled without any claim by the buyer. The buyer shall, in such a case, exercise his option of cancellation within three days of the coming to know that the shipment is delayed. Provided, however, that should the delay be due to occurrences such as storm, fire, war, tempests, frosts, floods, droughts, strikes, lockouts, accidents at mills, warehouses, railways, canals and the like, or any other causes beyond the control of sellers, the buyer shall not have the right to cancel the contract, but shall be bound to accept the goods on their arrival in terms of this agreement whenever the same arrive. If the goods are lost in transit or sunk the contract shall be cancelled in respect of such goods."

From the correspondence it appears that, owing to war conditions prevailing in Germany, the suppliers claimed the right to rescind the contract for supply of sixty tons out of the hundred tons contracted to be supplied by the opponents to the applicants. But on being pressed by the opponents, the suppliers were prepared to deliver the goods at their works on payment of the price less freight, in substitution of the original contract to ship the goods on C.I.F. terms. The opponents in their turn offered the same ultimatum to the applicants who refused to pay for the goods. The suppliers thereupon rescinded the contract to the extent of sixty tons which were consequently not shipped. The opponents declined to pay the damages and the parties referred their disputes to arbitration.

Mr. Kimatrai admits that all the differences between the parties were referred to arbitration. He, however, contends that as under clause 14 of the contract the buyers were bound to take delivery of the goods in the event of late shipment owing to *force majeure* and the buyers alone had the option to cancel the contract in the case of late shipment due to causes other than *force majeure*, the sellers had committed breach of the contract and, therefore, there was an error apparent on the face of the award in so far as the arbitrators had not awarded damages to the applicants.

As said by their Lordships of the Privy Council in *Chamsey Bhora Co., Ltd.* v. *Jivraj Baloo Spinning and Weaving Co., Ltd.* (2), "an error in law on the face of the award..... does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing, first, what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound" Their Lordships have pointed out that an error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it, as, for instance, a note appended by the arbitrators stating reasons of their judgment some legal proposition which is the basis of the award and which the Court can say is erroneous. In the present case, it was open to the arbitrators to construe the contract as a whole and to read clause 14 along with the first part of the contract which provides that the buyer shall take delivery of the goods or *such portion* of the goods as are shipped, and to decide whether the opponents were justified in taking up the position they had taken and whether they were liable in damages.

The arbitrators were judges both of facts and of law. They may have erred in law but an error in law, if any, does not vitiate the award, *Ghulam Jilani Khan* v. *Muhammad Hasan* (3).

Mr. Kimatrai has referred me to a passage at p. 263 in *London & North Western Railway v. Neilson* (4), and has urged that where the arbitrators make a mistake on a question of law which has not been specifically referred to them, but which question is material in the decision of the matters which have been referred to them, such mistake may be made a ground of objection in Court. The passage referred to by the learned pleader, however, states in clear terms that such mistake of law must be apparent on the face of the award itself.

Where a specific question of law is specifically referred by the parties to the arbitrators who arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award

(3) 29 C. 167 ; 29 I. A. 51 : 4 Bom. L. R. 161; 12 M. L. J. 77 ; 6 C W. N. 226; 25 P. R. 1902 ; 8 Sar. P. C. J. 154 (P C.)

(4) (1922) 1 A. C. 263 ; 91 L. J. K. B. 680 ; 127 L. T. 469 ; 66 S J. 502 ; 38 T. L. R. 653.

itself. Where, however, a specific question of law is not so referred an erroneous decision of law may be attacked provided such error appears on the face of the award itself, or any document so closely connected as to form part of the award. There is no such error in the present case and the objections, therefore, fail. I dismiss the application to set aside award with costs.

P. B. A. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 13 OF 1923.
January 7, 1924.

Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

BAKHTAWAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAKHTAWAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *s.* 60—*Mortgage—Default in payment—Possession, suit for, by mortgagee—Redemption, whether can be allowed—Hindu Law—Joint family—Mortgage by manager—Interest—Necessity—Burden of proof.*

A mortgage-deed provided that the mortgage-money would become payable at the expiry of ten years and that if it was not paid on the expiry of that period the mortgagees would be entitled to take possession of the mortgaged property for a period of twenty years. Default was made and the mortgagees brought a suit to recover possession of the mortgaged properties :

Held, **that the only decree which could properly be passed in the suit would be one allowing the mortgagor to redeem the property on payment of the sum due within a time to be fixed by the Court and in default to direct that possession of the mortgaged property be delivered to the plaintiffs.** [p. 238, col. 1.]

Muhammad Sher Khan v. *Swami Dayal*, 66 Ind. Cas. 853 ; 49 I. A. 60 ; 30 M. L. T. 220 ; 9 O L J. 81 ; 42 M. L. J. 584 ; 25 O. C. 8 ; 20 A. L. J. 476 ; 35 C. L. J. 468 ; 24 Bom. L. R. 695 ; (1922) A. I. R. (P.C) 17 ; (1922) M. W. N. 378 ; 4 U. P. L. R (P.C.) 50 ; 28 C. W. N. 79 ; 44 A. 185 (P.C.), followed.

A mortgagee can enforce his rights under a mortgage only consistently with, and not in derogation of, the rights of the mortgagor under the same transaction. [p. 238, col. 1.]

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at the rate and upon the terms contained in the mortgage-deed, and if this is not shown, that rate and those terms cannot stand. [p. 238, col ; p. 234, col. 2.]

Nawab Nazir Begam v. *Rao Raghunath Singh*, 56 Ind. Cas. 434 ; 46 I A. 145 ; 36 M. L. J. 521 ; 17 A. L. J. 591 ; 28 C. W. N. 700 ; 21 Bom. L. R. 484 ; 26 M. L. T. 40 ; 30 C. L. J. 86 ; (1919) M. W. N. 498 ; 1 U. P. L. R. (P.C.) 49 ; 41 A. 571 (P.C.) and *Ram Bujhawan Prasad Singh* v. *Nathu Ram*, 71 Ind. Cas. 933 ; 50 I. A. 14 ; 4 P. L. T. 29 ; (1923) A. I. R. (P. C.) 37 ; 32 M. L. T. 129 ; 44 M. L. J. 615 ; 25 Bom. L. R. 568 ; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 18 L. W. 767 ; 1 P. L. R. 445 (P.C.), followed.

Appeal against the decree of the Sub-Judge of Hardoi, dated the 22nd December 1922.

No one present.

JUDGMENT.—Dharam Singh, deceased, his brother, Bakhtawar Singh, defendant No. 1, and Jokha Singh, Gajraj Singh and Ram Singh, defendants Nos. 2 to 4, sons of Bakhtawar Singh, executed a deed of mortgage on the 7th June 1911 in favour of the plaintiffs in respect of the properties mentioned at the foot of the plaint for a sum of Rs. 8,000 with interest at the rate of 10 annas per cent. per mensem. The interest was to be paid six-monthly ; in the event of default in payment the interest was made compoundable. The mortgage-money was to become payable after the expiry of ten years ; in other words, the right to redeem the mortgaged properties on payment of the mortgage-money was given to the mortgagors. On the other hand, in the event of the mortgage-money not being paid at the end of the period stated above, the mortgagees were given the option to take possession of the mortgaged properties for a period of twenty years. On the 30th June 1911, the mortgagors borrowed another sum of Rs. 500 bearing interest at the same rate as was stipulated for in the earlier deed. On the 12th March 1920, they further borrowed a sum of Rs. 700 from the same mortgagees with interest at the rate of Re. 1 per cent. per mensem. The properties mortgaged under the deed of the 7th June 1911 were made security also for the two advances mentioned above and the conditions of the first deed were incorporated in the subsequent deeds. The mortgagors and the other defendants in the case constitute a joint Hindu family and the properties mortgaged belong to that family. The whole of the mortgage-money is still due to the mortgagees.

BAKHTAWAR SINGH *v.* BAKHTAWAR SINGH

The suit out of which this appeal arises was for the recovery of possession of the mortgaged properties. The Court below has granted a decree to the plaintiffs to the effect that the defendants were entitled to redeem the mortgage on payment of the principal sum with interest at 6 per cent. per annum calculated on the basis of six-monthly rests from the date of the execution of the deeds till the date of filing the suit and also further simple interest at the same rate till the date of payment, provided the entire sum is paid within one year from the date of the decree. In the event of such payment not being made, the plaintiffs will be entitled to enter into the possession of the mortgaged properties. The defendants shall thereafter be at liberty to redeem at any time they like on payment of the amount decreed. The plaintiffs are dissatisfied with this decree. Hence the appeal. Two points were urged on behalf of the appellants at the hearing of the appeal: (1) that the mortgagors should not have been given the right to redeem the mortgage in the present suit but that the plaintiffs-appellants should have been given a decree for possession at once, and (2) that the rate of interest should not have been reduced.

As regards the first point, we are of opinion that the decree passed by the Court below is not only perfectly proper in the circumstances of the case but it is also the only decree which could validly have been passed. On the terms of the mortgage of the 7th June 1911, the mortgagees' right to enter into the possession of the mortgaged properties arose at precisely the same moment when the mortgagors' right to redeem arose, that is, after the expiry of ten years from the date of the mortgage. It is conceded that a claim for redemption on the terms of the deed would be maintainable if a suit to enforce that claim were brought immediately on the expiration of the ten years mentioned above. Further, under the provisions of section 60 of the Transfer of Property Act of 1882, the mortgagors have an unqualified right to redeem the mortgage on payment of the mortgage-money due to the mortgagees at any time after the mortgage-money has become payable. That it has become payable is admitted. We, therefore, see no ground for postponing redemption and for relegating the mortgagors to a subsequent and separate suit for redemption. In our opinion, the decision of their Lordships of the Privy Council in the case of *Muhammad Sher Khan* v. *Swami Dayal* (1) covers the present suit.

It was argued by the learned Advocate for the appellants that the effect of the decree of the Court below has been the conversion of a suit of one into a suit of another character. We cannot accept this argument to be sound. The mortgagees' suit is founded on the deed of the 7th June 1911. The mortgagors' right to redeem also arises on the terms of the same instrument. The mortgagees can enforce their rights under that mortgage only consistently with, and not in derogation of, the rights of the mortgagors under the same transaction. The first point, therefore, fails.

On the second point, the ground of the decision of the Court below is that the mortgagors exceeded their authority in charging the family properties with such rate of interest as they agreed to give by the deeds in suit. The Court below pointed out that the rate of interest under the deed of mortgage dated the 28th April 1893 executed by Bakhtawar Singh, the head of the family, in favour of one Padam Singh was only six per cent. per annum. It may be mentioned that the bulk of the consideration of the deed of the 7th June 1911 was utilized towards the payment of the mortgage in favour of Padam Singh. The mortgagees have given no independent and satisfactory evidence to prove that there was necessity to borrow at the rate of interest contained in the mortgage-deeds. The principle applicable in a case of this character was laid down by their Lordships of the Privy Council in the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). In delivering the judgment of the Judicial Committee in that case, Lord Phillimore observed, - "It is incumbent on those who support a mortgage made by the manager of a joint

(1) 66 Ind. Cas. 853 ; 49 I A. 60 ; 30 M. L. T. 220 ; 9 O. L. J. 81 ; 42 M. L. J. 584; 26 O. C. 8 ; 20 A. L. J. 476 ; 35 C. L. J. 468 ; 24 Bom. L. R. 695 ; (1922) A. I. R. (P. C.) 17 ; (1922) M. W. N. 378 ; 4 U. P. L. R. (P. C.) 50 ; 28 C. W. N. 79 (P. C.) ; 44 A 185.

(2) 50 Ind. Cas. 434 ; 46 I. A. 145 ; 36 M. L. J. 521 ; 17 A. L. J. 591 ; 23 C. W. N. 700 ; 21 Bom. L. R. 484 ; 26 M. L. T. 40 ; 30 C. L. J. 86 ; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 ; 41 A. 571 (P. C.).

Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand.....It remains, therefore, that there was necessity and in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority." This principle was again affirmed by their Lordships of the Privy Council in the case of *Ram Bujhawan Prasad Singh* v. *Nathu Ram* (3).

As to the particular rate of interest which the learned Suborinate Judge has found to be reasonable to be allowed in the present case we, sitting as a Court of appeal, are not disposed to interfere with the decision of the Court below. This point also fails.

The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 71 Ind. Cas. 933 ; 50 I. A. 14 ; 4 P. L. T. 29 (1923) A. I. R. (P. C.) 87 ; 32 M. L. T. 129 ; 44 M. L. J. 615 ; 25 Bom. L. R. 568 ; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 18 L. W. 767 ; 1 P. L. R. 445 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 37-B. OF 1922.

October 26, 1923.

Present :—Mr. Kinkhede, A. J. C.

SITARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NANDRAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment — Discretion—Acknowledgment, maintainability of suit on.

The powers of allowing amendments under the new Civil Procedure Code are much wider than those under the old Code. [p. 235, Col. 1]

The discretion that vests in Courts in the matter of allowing amendments of pleadings is always regulated by sound principles of law. It is to be exercised in a judicial manner and an amendment should not be arbitrarily refused

To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief or a new cause of action in the plaint and no prejudice can result to the defendant especially when he has sought the disclosure or discovery.

As every acknowledgment implies a promise to pay, a suit based on an acknowledgment is maintainable.

Maniram v. *Seth Rupchand*, 33 C. 1047 ; 8 Bom. L. R. 501 ; 4 C L. J. 94 ; 10 C. W. N. 874 ; 1 M. L. T. 199 ; 3 A. L. J. 525 ; 16 M. L. J. 300 ; 33 I. A. 165 (P. C.) and 2 N. L. R. 130 at p. 138; *Chunnilal* v. *Laxman*, 63 Ind. Cas. 928 ; 28 Bom. L. R. 606 ; 46 B. 24 ; (1922) A. I. R. (B.) 188, followed.

Appeal from the order of the District Judge, East Berar, Amraoti, dated the 5th July 1923.

Mr. *R. R. Jaywant*, for the Appellants.

Mr. *V. V. Chitale*, for the Respondent.

JUDGMENT.—This appeal raises a question of amendment of the plaint. Mr. Jawahirlal, Subordinate Judge, Amraoti, dismissed a suit for the recovery of money due to plaintiff on the basis of certain transactions which the defendants had with his predecessor in interest and in respect of a portion of the amount due under which certain acknowledgments were passed. The plaintiff filed certain extracts of the account-books of his firm in support of his claim and also filed extracts from his *Sarkat Bahis* wherein the defendants had executed three acknowledgments, marked Exhibits P-1, P-2 and P-3. The acknowledgment marked Exhibit P-1 was stated to be for a cash loan of Rs. 700. It is dated 9th July 1914. The other acknowledgments are dated 21st March 1915 and 7th July 1917, the last one being for Rs. 1,026 only. After the date of the last acknowledgment, the parties continued their dealings and, according to the plaintiff, the account disclosed at the date of the suit that defendants were liable to plaintiff for a sum of Rs. 2,406.

The defence was that the suit was not maintainable on the basis of a mere acknowledgment. The defendants admitted all the acknowledgments but, so far as the acknowledgment dated 9th July, 1914 was concerned, it was contended on their behalf that it was not for cash paid but for a balance of the old debt due on previous transactions. The defendants naturally insisted upon their disclosure and called upon the plaintiff to give them inspection of the account-books prior to the date of

he said acknowledgment dated 9th July 1914. The books were produced in Court on 17th November 1920 and they disclosed that there were previous dealings between the parties and that the defendants' version was supportable. The plaintiff, who was not the original creditor, naturally thought that disclosure of the existing state of facts was very relevant for the purpose of making his suit all the more maintainable. This, no doubt, necessitated the withdrawal of the first assertion in the plaint that the acknowledgment dated 9th July 1914 (Exhibit P-1) was for *cash* paid on that occasion. He was, therefore, advised to make an application to the Court for amendment of the plaint by inserting therein a statement of the facts disclosed on inspection taken by the defendants. This was a very legitimate and straightforward request on plaintiff's part. The application was made on 2nd December 1920 to the Court presided over by the said Judge. The Court rejected the petition on several grounds, one of the grounds being that the prayer was *mala fide*. This order disallowing the application was followed by a wholesale dismissal of the suit on the ground that the suit was not maintainable on the basis of acknowledgments. The learned Subordinate Judge did not pause to see that the claim comprised several other items in respect of dealings subsequent to the date of the last acknowledgment dated 7th July 1917 and that the suit in respect of them could in no case be dismissed in the manner done by him. Against the dismissal plaintiff preferred an appeal to the District Judge who, differing from the trial Judge's findings on the question of the amendment of the plaint, remanded the case for trial on the merits. It is against this order of remand that the present appeal has been made.

"I am decidedly of opinion that the exercise of the discretion that vests in Courts in matters of allowing amendments is not to be arbitrarily refused as was done by the trial Judge and that the District Judge was perfectly justified in setting that Judge right. The discretion is always regulated by sound principles of law and is a discretion to be exercised in a judicial manner. The powers of allowing amendments under the new Civil Procedure Code are much wider than under the old Code ; so it has been held that where a party who has an honest case has either through ignorance,—see *Mukhoda Soondury Dasi* v. *Ram Churn Karmokar* (1) and *Krishnaji* v. *Wamanaji* (2),—*bona fide* mistake or some misapprehension not placed the real facts before the Court,—*Bhyro Dutt* v. *Musammat Lekharanee Kooer* (3) and *Lakshmibai* v. *Haribin Ravji* (4),—or has misconceived his cause of action and form of suit,—*Ragho Parashram* v. *Vishnu Govind* (5), *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India, Ltd.* (6) and *Krishnaji Lakshman Rajvade* v. *Sitaram Murrarrav Jakhi* (7),—should be allowed to amend, where this may be done without any prejudice to the defendant. In short, the object of the trial being to get at the rights of the parties, any amendment which may be required for that purpose, should, subject to well known general principles governing this matter, be allowed. It has been held that, apart from the question of limitation, it is unjust to a plaintiff to put him to the great expense of a new suit when a reasonable amendment not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit : *R.* and *N. Modhe* v. *S. Dongre* (8). Here, there is not merely a question of expense, for, if the amendment were refused, it might be that the plaintiff would be altogether debarred of his remedy in respect of the recovery of the debt in suit.

I dare say that this view finds ample support in the rulings of this Court also : see *Mangal Prasad* v. *Chandramall* (9), *Shriram Sadasheo Balkrishna Joshi* v. *Ganpati Kunbi* (10) and *Nemasa* v. *Ramkrishna* (11).

As to the question of prejudice on the point of limitation, I may mention that it may not arise at all in this case. To disclose

(1) 8 C. 871 ; 11 C. L. R. 194 ; 7 Ind. Jur. 32 ; 4 Ind. Dec. (N.S.) 562.
(2) 18 B. 144 ; 9 Ind. Dec. (N.S.) 604.
(3) 16 W. R. 123.
(4) 9 B. H. C. R. 1.
(5) 5 Bom. L. R. 829.
(6) 9 C. 695 ; at p. 698 ; 12 C. L. R. 440 ; 4 Ind. Dec (N S) 1112.
(7) 5 B. 496 ; 3 Ind Dec. (N.S.) 327.
(8) 5 B. 609 at pp. 613, 614 ; 3 Ind. Dec. (N. S.) 401.
(9) 1 N. L. R. 117 at p. 120.
(10) 2 N. L. R. 79 at p. 80.
(11) 23 Ind. Cas. 165 ; 10 N. L. R. 82.

further details of facts which support a cause of action already sued upon is not to introduce a new relief or a *new* cause of action in the plaint, and consequently no prejudice can result to the defendants who had in this particular case themselves sought the discovery or disclosure.

I may further observe that, in view of the observations of the Judicial Committee in *Maniram* v. *Seth Rupchand* (12), which has been followed by the Bombay High Court in a recent case, *Chunilal* v. *Laxman* (13), the objection that a suit is not maintainable on the basis of a *Raju* or acknowledgment is no longer available on the simple ground that every acknowledgment implies a promise to pay. With these remarks I dismiss the appeal and uphold the decision of the District Judge remanding the case for trial on the merits. I allow Rs. 40 as pleader's fee in this Court and direct that the appellants shall pay the costs of this Court. There is no necessity to pass any orders as to the costs of the lower Courts.

G. R. D. *Appeal dismissed.*

S. D.

(12) 2 N. L. R. 130 at P. 133 ; 33 C 1047 ; 8 Bom. L. R 501 ; 4 C. L. J. 94 ; 10 C. W. N. 874 ; 1 M. L. T. 199 ; 9 A. L. J. 525 ; 16 M. L. J. 300 ; 38 I. A. 165 (P. C.).

(13) 63 I. C. 923 ; 23 Bom. L. R. 606 ; 46 B. 24 ; (1922) A. I. R. (Bom.) 189.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 761 OF 1923.

January 15, 1924.

Present :—Mr. Justice Suhrawardy.

JOYMANGALSEN—DECREE-HOLDER—PETITIONER

versus

SARAFAT ALI—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Bengal Tenancy Act. (VIII of 1885), s 153—"Has decided a question of title" whether qualify decree or order—Order passed in execution, what it must decide

The words "has decided a question relating to title, etc.," in s. 153 of the Bengal Tenancy Act, qualify both decree and order. Therefore, an order passed in execution of a decree, whether the decree is appealable or not, must be an order which itself decides a question relating to title or to some interest in land as between parties having conflicting claims thereto.

Ganga Charan Bhattacharya v. *Shashi Bhusan Roy* 32C 572 ; 1 C. L. J. 255 followed

Civil Rule against the order of the Subordinate Judge, First Court, Chittagong, dated the 5th April 1923.

Babu *Narendra Kumar Das*, for the Petitioner.

Babu *Chandra Sekhar Sen*, for the Opposite Party.

JUDGMENT—This Rule is directed against an order of the Subordinate Judge of Chittagong decreeing an appeal preferred by the opposite party from the decision of the Munsif and setting aside the sale of the disputed property. The facts of the case are that the petitioner who is a landlord obtained a decree in a rent suit against the tenant Nayan Khan. The suit was valued at Rs. 20 and odd annas. It was not disputed that the holding was a non-transferable occupancy holding. The petitioner attempted to execute the decree. The opposite party made an application for deposit of the decretal amount under section 170 (3) of the Bengal Tenancy Act on the ground that he was a purchaser of the holding from the tenant judgment-debtor. This application was summarily refused by the Munsif on the ground that he did not believe that the purchase made by him was a *bona fide* one. The opposite party, therefore, preferred an appeal. but before the appeal came on for hearing the holding in dispute was sold in execution of the decree obtained by the petitioner against the tenant. On appeal the learned Subordinate Judge held that the appellant was a purchaser of a portion of the occupancy holding, that his purchase was *bona fide* and for consideration, and that he was entitled to make the necessary deposit under section 170, Bengal Tenancy Act. He allowed the appeal and further ordered that as the decretal amount had been deposited the sale should be set aside. I need not decide, in the view I take on other points, if the opposite party is entitled to make the deposit as purchaser of a portion of a non-transferable occupancy holding.

This Rule was obtained on the ground, first, that no appeal lay to the Court of appeal below from the order of the Munsif, and, secondly, that the lower Appellate Court has exercised a jurisdiction not vested in it by law in setting aside the execution-sale in the

appeal. With regard to the first ground, it is contended that as the suit was valued at less than Rs. 50 and tried by a Munsif specially empowered under section 153, Bengal Tenancy Act, no appeal lay either from the decree or from any order passed in execution of that decree. It is also argued that, whether an appeal lay from the decree in the original suit or not, the order which was passed was not an order deciding a question relating to title to land or some interest in land as between parties having conflicting claims thereto with in the meaning of section 153, Bengal Tenancy Act. With regard to the first branch of this argument I may observe that the decree itself and the pleadings are not on the record and so there is no proof whether in the rent suit any such question was not raised which would make the decree appealable under the proviso to section 153, Bengal Tenancy Act. With reference to the second branch of the contention, I hold that the order appealed from must decide, irrespective of the character of the suit, a question of conflicting title in order to be open to appeal. For the purpose of this case I will assume that the decree was passed in a suit in which such a question was raised as to make it appealable. The question, therefore, remains as to whether any order passed in the execution of such a decree would by virtue of the decree being appealable be also appealable, whether it does or not decide any question of conflicting title. There is no authority directly in point; but it is evident from an examination of a number of cases which have dealt with this point that the law at present must be taken to be that the order passed in execution must itself decide in order to be appealable a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. This point was considered in the case of *Ganga Charan Bhattacharjee* v. *Soshibushan Roy* (1), where it was laid down by Maclean, C. J., that in deciding whether an order is appealable under section 153, Bengal Tenancy Act, the point for consideration is not what the decree in the suit decided but what the order decided. This view was approved by a Full Bench of this Court in the case of *Kali Mondal* v. *Ramsarbaswa Chakrabarty* (2). The result of this Full Bench decision was the addition to section 153, Bengal Tenancy Act, of the explanation by the Amending Act of 1907 which virtually nullified the effect of the decision of the Full Bench. The point which was decided in *Ganga Charan Bhattacharya* v. *Sashibhusan Roy* (1), however, remained undisturbed; and it has further been held that the Explanation added to section 153 has not superseded the entire decision of the Full Bench in the case of *Kali Mondal* v. *Ram Sarbaswa Chakrabarty* (2). See the cases of *Benimadhub* v. *Bisweswar* (3), *Nobin Chandra* v. *Bipin Chandra* (4). Reference may in this connection be made to the case of *Prafulla Krishna Deb* v. *Nasibunnessa Bibi* (5) decided by a Special Bench. There the order was passed by a District Judge and the amount claimed in the suit did not exceed Rs. 100 but the order did not decide any question relating to title to land. In these circumstances, the Special Bench held that the order was not appealable. This decision is attempted to be construed as laying down two conditions of the non-appealability of an order; first, that the suit must be one in which no appeal can lie under section 153, Bengal Tenancy Act; and, secondly, that the order must decide a question of title. I do not agree that both these conditions must be satisfied. In that particular case both the circumstances existed and both are referred to.

It is further maintained by the learned Vakil for the opposite party that where the suit is such in which an appeal would lie under section 153, Bengal Tenancy Act, any order passed in execution, whether such order decides a question of title or not should be appealable. No authority has been placed before me in support of this very broad proposition. The section is not confined to decrees only but makes an order that has decided a question relating to title to land or some interest in land as between parties having conflicting claims thereto appealable. The words "has decided a question relating

(1) 32 C. 572; 1 C. L. J. 255.
(2) 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476 (F. B.).
(3) 15 Ind. Cas. 486; 17 C. W. N. 84; 16 C. L. J. 542.
(4) 29 Ind. Cas. 303; 19 C. W. N. 953; 22 C. L. J. 244.
(5) 37 Ind. Cas. 425; 24 C. L. J. 381.

to title, &c.," qualify both decree and order. I am, therefore, of opinion that an order passed in execution of a decree in which an appeal lies from the decree or not, must be an order deciding a question relating to title or some interest in land as between parties having conflicting claims thereto.

I now pass to the next contention of the learned Vakil for the opposite party, namely, that the order under consideration is one which has decided a question relating to title land. No doubt it does ; but it does not decide a question of title to land or some interest in land as between parties having conflicting claims thereto. At the time when the question of the opposite party was raised the petitioner landlord was not interested in the holding and there was, therefore, no conflicting claim to it between the petitioner and the opposite party on that basis. If this question had been raised after the sale and the opposite party had attempted to make the deposit under section 174, Bengal Tenancy Act, no doubt the order might have been taken to have decided a question of title as between parties having conflicting claims thereto. This is settled by authority : see the case of *Benimadhub* v. *Bisweswer* (3) and *Sital Ray* v. *Nandolal* (6) I, therefore, hold that on the date when the opposite party applied to make the deposit under section 170 (3), Bengal Tenacy Act, there was no conflict of interest or title to land between him and the decree-holder.

It has also been contended by the petitioner that the lower Court was not justified and had no jurisdiction to set aside the sale which had taken place subsequent to the filing of the appeal in that Court. I think that this contention should also prevail. It is argued, on the other hand, that the effect of the order of the lower Court was virtually to have the sale set aside, as it found that the opposite party had a right to make the deposit under section 170 (3), Bengal Tenancy Act and had already made the deposit. That may be so ; but the officer who set aside the sale was not the Munsif who had held it and I do not know whether an application was made to the Munsif for setting aside the sale in pursuance of the judgment of the lower Appellate Court. On these grounds, in my judgment, this Rule should be made absolute, the order of the lower Appellate Court passed in appeal dated the 5th April 1923, as amended by his order dated the 16th April 1923, be set aside and the original order of the Munsif restored. Each party do bear his own costs of this Rule

S. D. *Rule made absolute.*

(6) 1 Ind. Cas. 804 ; 13 C. W. N. 591; 11 C. L. J. 209.

MADRAS HIGH COURT.

CIVIL REVISION NO. 794 OF 1921.

November 27, 1923.

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

S. VAITHIANATHA AIYAR AND ANOTHER—DEFENDANTS—PETITIONERS

versus

S. SUBRAMANIA AIYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, Para 14 (c)—Arbitration—Hindu Law—Partition—Jeshtabhagam—Extra sum allowed to one party—Illegality—Revision, whether lies.

A dispute as to partition between Hindu brothers, was referred to arbitration. The arbitrator allowed the eldest brother a certain sum of money in excess of his share in consideration of his having to look after and educate his younger brothers for many years. He called this sum *jeshtabhagam* ;

***Held* (1) that the sum awarded to the eldest brother could not be described as "*jeshtabhagam*" under the Hindu Law ;**

(2) that the award was not illegal within the meaning of the para 14 (c) of Schedule II to the Civil Procedure Code.

***Semble* :—Where an award has been accepted by the Court and a decree has been passed in accordance with it, no revision lies against the legality of the award.**

Batcha Sahib v. *Abdul Gunny*, 21 Ind. Cas. 808 ; 38 M. 256 ; 14 M. L. T 314 ; 25 M L J. 507 ; (1914) M. W. N. 142, followed.

Petition for revision of the decree of the District Munsif of Trivadi, in O. S. No. 291 of 1917.

Mr. *Bhashyam Aiyengar*, for the Petitioners.

Mr. *S. Krishnamurthy Aiyar*, for the Respondents.

JUDGMENT.—It is suggested that in making the partition the arbitrator followed the now obsolete rule of Hindu Law giving the eldest brother an extra share as "*Jeshta-*

bhagam", and, therefore, under section, 14, cl. (c), of the Second Schedule, Civil Procedure Code, the award was illegal on the face of it. Though he uses the word "*Jeshtabhagam*" in para. 5 of his award, we do not think the arbitrator was applying any rule of *Jeshtabhagam* to the case, for, if he was doing so, he would have given a half share to the plaintiff of all the properties and only a one-fourth share to each of his brothers. He has only allowed the eldest brother to take the whole of the sum of Rs. 3,128 due to the family in consideration of his having looked after his brothers carefully for many years and by educating them enabled them to attain responsible positions in life. We do not think such an award can be said to be illegal. The lower Court has accepted the award and passed a decree in terms of it, and, in the circumstances, it is doubtful, if a revison lies at all: See *Batcha Sahib* v. *Abdul Gunny* (1). We decline to interfere and dismiss the Civil Revision Petition with costs.

Z. K. *Appeal dismissed.*

(1) 21 Ind Cas. 803; 38 M. 256; 14 M. L.T. 314; 25 M. L. J. 507; (1914) M. W. N. 142.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 45 OF 1923.

August 31, 1923.

Present:—Mr. Hallifax, A. J. C.

SETH GOPIKISSAN—DEFENDANT—APPLICANT

versus

Musammat MANKUWAR *alias* KARIM BI—PLAINTIFF—NON-APPLICANT.

Transfer of Property Act (IV of 1882), s. 68 (6)—Mortgage by conditional sale—Personal liability—Court, duty of, to advance just claims.

In every mortgage there is a personal covenant to pay the mortgage-debt unless the contrary is expressly stated in the terms of the bond or appears by necessary implication from them.

The astuteness and acumen of a Court of Justice should be devoted to the advancement of a just claim and not to its defeat.

Kundan Mal v. *Wasudeo*, 69 Ind. Cas. 615; 19 N. L. R. 67; 5 N. L. J. 259; (1922) A. I. R. (N.) 119; and *Ramasami Sastriyal* v. *Samiyappa Nayakan*, 4 M. 179; 16 Ind. Jur. 31; 1 Ind. Dec. (N.S.) 960 (F.B.), relied on.

Application for revision of the decree of the Judge, Small Cause Court, Raipur, dated 11th January 1923, in Civil suit No. 1386 of 1922.

Mr. *K. V. Deoskar*, for the Applicant.

Mr. *A. C. Roy*, for the Non-Applicant.

JUDGMENT.—On the 24th of July 1922 the defendant Mankuar Bai, who is the opponent of the application for revision here, executed a mortgage by conditional sale in favour of the plaintiff for Rs. 1,500. Of the consideration she took away Rs. 186-6-5 only, placing the whole of the rest in deposit with the mortgagee for payment of debts due by her to various people. Thereafter, she refused to get the mortgage-bond registered, and the plaintiff instituted this suit for the enforcement of her personal liability arising out of the bond to the extent of Rs. 186-6-5, on which he also claimed interest. The learned Judge of the Small Cause Court has held that " as the only condition in the deed about the mode of recovery is by *lahan gahan* there is no personal liability to pay the money advanced, and no decree for the payment of money can be granted. "

This decision purports to be based on two judgments of this Court reported in " 12 Nagpur 12 and 5 Nag. L. R. 259. " In Volume V of the Nagpur Law Reports, which contains only 193 pages, I can find no mention of the matter in question, and in Volume XII the only judgment dealing with it begins on page 19, not on page 12. There are also two judgments in Volume X which deal with the matter of the personal liability to pay the debt secured by a mortgage, one on page 9 and the other on page 185, but neither of them is applicable to the present case. It was found necessary in 1916 to call the attention of all Judges in these Provinces to the impropriety of citing judgments without having read them, though most ordinary persons might be expected to see that for themselves. That, however, is what the learned Judge of the Small Cause Court has done in this case.

In *Govind* v. *Jagannath* (1), Drake-Brockman, J. C., did lay down that there is no

(1) 38 Ind. Cas. 753; 12 N. L. R. 19.

implied personal covenant to pay in a mortgage-deed in which the only remedy mentioned is foreclosure and the only statement of such a covenant is in the inference to be drawn from "the mere fixation of a date by which the mortgagor undertakes to pay the mortgage-money" on pain of foreclosure. That, however, was in 1915 and it was in 1917 that the Privy Council laid down a directly contrary rule in *Ram Narayan Singh* v. *Adhindra Nath Mukerji* (2) holding that in every mortgage there is a personal covenant to pay the mortgage-debt unless the contrary is expressly stated in the terms of the bond or appears by necessary implication from them. This was followed by a Bench of this Court, of which I was a member, *D. B. Seth Jiwandas* v. *Mt. Janki* (3).

A later judgment by Kotval, A. J. C., in *Kundanmal* v. *Wasudeo* (4) has been published the result of which appears to be a direct contradiction of the decision of the Privy Council. My learned brother has accepted the principle laid down in that decision but has, as I suggest with all respect, applied the direct opposite of that principle, relying on the ruling in *Govind* v. *Jagannath* (1) and the judgment of the Madras High Court delivered in 1881 in *Ramasami Sastrigal* v. *Samiyappanayakan* (5), both of which must be regarded as overruled by the decision in *Ram Narayan Singh* v. *Adhindra Nath Mukerji* (2). The ruling of the Bench in *D. B. Seth Jiwandas* v. *Mt. Janki* (3) is not mentioned, but that after all merely reproduced the views of their Lordships of the Privy Council. It might further be pointed out that in the remarks quoted by my learned brother from the Madras case the learned Judges were discussing the liabilities arising out of a *lahan gahan* mortgage under the Hindu Law, not those implied in a mortgage by conditional sale; indeed, the decision of the whole case really amounted to this that there is no personal liability under a *lahan gahan* transaction only when there is no right of redemption after the date fixed for repayment, that is to say when the transaction is really a sale with an agreement to reconvey, but there is such a liability in what is really a mortgage by conditional sale with a right of redemption continuing after the date fixed for payment.

I am in any case bound to follow the ruling of the Privy Council, and even if that did not exist, I have to follow the published ruling of a Bench of this Court, and to hold that in the present case there was a personal covenant to pay the mortgage-debt unless the contrary was expressly stated in the terms of the bond or appears by necessary implication from them. So far is that from being the case that there is an agreement which very nearly amounts to an express agreement to pay, in the words: "and if I do not pay the full debt, principal and interest, within the fifteen months then I will go on paying interest at the same rate for as long as I remain responsible for payment of the debt, principal and interest." But the covenant would be there even if these words implying it were not there. It is an not express or even implied affrmation of the personal liability in the terms of the bond that is required. It arises out of the fact of the loan itself, and all that is wanted is the absence of any express or necessarily implied negation of it, of which there is no trace in the bond in this case.

There is at least one other way, and there are probably more, of looking at this obviously just claim in which it will be clearly seen that it ought to be decreed, but I need not discuss that matter. It will suffice to call attention once again to the necessity mentioned in *Jairam* v. *Motilal* (6) and *Maharashtra Jnan Kosh Mandal Ltd.* v. *Bijjulal* (7) of the astuteness and acumen of a Court of Justice being devoted to the advancement of a just claim, not to its defeat. The decree of the lower Court dismissing the suit will be set aside and in lieu thereof a decree will issue ordering the defendant to pay to the plaintiff the full amount claimed by him together with interest on that amount at 1 per cent. per mensem from the institution of the

(2) 38 Ind. Cas 932; 44 C. 388; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 32 M. L. J. 39; 25 C. L. J. 121; 21 C. W. N. 383; 19 Bom. L. R. 1194; 44 I. A. 87 (P. C.).

(3) 65 Ind. Cas. 53; 18 N. L. R. 145; 5 N. L. J. 49; (1922) A. I. R. (N.) 98.

(4) 69 Ind. Cas. 615; 19 N. L. R. 67; 5 N. L. J. 259; (1922) A. I. R (N.) 119.

(5) 4 M. 179; 6 Ind. Jur. 81; 1 Ind. Dec. (N. S.) 960 (F. B.)

(6) 55 Ind. Cas. 961; 17 N. L. R. 28; 8 N.L.J. 244

(7) 71 Ind. Cas 486; 19 N. L. R. 35; 6 N. L. J. 100; (1923) A. I. R. (N.) 182.

suit till payment is made and also the costs incurred by him in both Courts. The pleader's fee in this Court will be fifteen rupees.

G. R. D. *Application allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL
No. 2036 OF 1922.
May 25, 1923.

Present:—Mr. Justice Campbell.

THE FIRM SHERU MAL-CHINA MAL—JUDGMENT-DEBTOR—APPELLANT

versus

THE FIRM HIRA LAL-ANANT RAM—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 182 (5), (6)—Civil Procedure Code (Act V of 1908), s. 41, O. XXI r. 10—Execution of decree—Transfer of decree—Application to Court which passed decree, whether made to proper Court—"Applied for" in cl. (6), Art. 182, meaning of.

Where a decree has been transferred to a Court other than that which passed it for execution, and an application to take a step-in-aid of execution is made to the Court which passed it before the decree has been re-transferred by the Court to which it was transferred, with the requisite certificate of non-satisfaction, the application cannot be regarded as having been made to the proper Court within the meaning of Article 182 (5) of Sch. I to the Limitation Act and does not operate to extend limitation.

Maharaja of Bobbili v *Narasaraju Peda Baliara*, 36 Ind. Cas. 682; 39 M. 640; 31 M. L. J. 800: 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M.W. N. 541; 21 C. W. N. 162; 1 P L. W. 26; 43 I. A. 238 (P.C.) and *Rangaswami Shetti v. Shoshappa Manjappa Shimpi*, 68 Ind. Cas. 506; 47 B 56; 24 Bom. L. R. 798; (1922) A. I. R. (B.) 359, relied on.

Clause (6) of Article 182 of Sch. I to the Limitation Act must be read with clause (5) of that Article and the words "applied for" in the former clause mean "applied for as provided in clause (5)." [p. 243, col. 1.]

Miscellaneous first appeal from the order of the Subordinate Judge, Ambala, dated the 3rd May 1922.

Lala *Amar Nath Chona*, for the Appellant.

Lala *Har Gopal*, for the Respondent.

JUDGMENT.—This is a first appeal against an order in execution by the Senior Subordinate Judge, Ambala deciding that an application for execution of a decree presented on the 1st October 1921 was within time. The facts are these.

On the 9th December 1915 a decree was passed at Karnal in favour of Hira Lal-Anant Ram against Cheru Mal-Chaina Mal for Rs. 4,340, the value of the original suit, being over Rs. 5,000.

On the 11th May 1916 the decree was sent for execution under section 39 of the Code of Civil Procedure to the Court of the Subordinate Judge, Simla.

On the 8th June 1917 the decree-holder stated in the Simla Court that he had received Rs. 2,300 out of Court. He applied for attachment of certain property of the judgment-debtor but in consequence of his not paying the process-fee the proceedings were sent to record on the 27th July 1917.

On the 3rd May 1919 the decree-holders applied to the original Court at Karnal, which passed the decree, in the following terms :—

With reference to the decree specified above we have realised on the 16th July 1916 Rs. 1,500 and on the 19th September 1916 Rs. 800, total Rs. 2,300, from the judgment-debtor. For realisation of the balance and costs we ask for a certificate of transfer to Simla District, after service of notice upon the judgment-debtors.

As a result of this application a *robkar* was sent by the Karnal Court to the Simla Court asking what the result of the execution there had been.

On the 11th July 1919 both parties appeared before the Subordinate Judge, Simla, and agreed that Rs. 2,300 had been paid out of Court. The Subordinate Judge ordered that this partial satisfaction should be certified to the Karnal Court and that proceedings should be filed. A certificate accordingly was sent on the 14th July 1919.

Nothing further was done by the decree-holders until 1921 when they approached the Karnal Court again and the question is whether the application of the 3rd May 1919 was an application for execution or to take some step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act. The reasons why the learned Senior Subordinate Judge hold the subsequent application of 1st October 1921 to be within time are not very clearly expressed. He speaks of the certifying of the payment of Rs. 2,300 in the Simla Court on the 8th June 1917 but this date was not within three years of the 1st October 1921. He also mentions that notice was issued to the judgment-debtor by

the Karnal Court on the 3rd May 1919. In the earlier part of his judgment he brushes aside the Privy Council decision in *Maharaja of Bobbili* v. *Narasaraju Peda Baliara* (1), as having been passed on different facts, but in my opinion this decision is clearly and absolutely fatal to the decree-holder's case

This Privy Council decision came before the Bombay High Court in a case reported as *Rangaswami Shetti* v. *Seshappa Manjappa Shimpi* (2), where the facts were these :—The original decree was passed at Salem, in the Madras Presidency, in 1910. In 1914 it was transferred to the Subordinate Judge of Sirsi, in the Bombay Presidency, for execution. It was returned unexecuted in November 1918 and again was transferred to Sirsi in 1919. The question then arose whether an application filed on the 9th June 1919 was within time and depended for its answer upon whether an application to the Salem Court on the 4th August 1916, (that is to say, before the decree had been returned unexecuted by the Sirsi Court) praying that the decree might be sent to a Court in Mysore was an application for a step-in-aid of execution. The Bombay High Court held that by Explanation II to Article 182 the proper Court for the purpose of Article 182 (5) was the Court whose duty it was to execute the decree and that in *Maharaja of Bobbili* v. *Narasaraju Peda Baliara* (1) their Lordships of the Privy Council had ruled that, when the Court which has passed a decree sends it for execution to another Court, then the first Court ceases to be the proper Court within the meaning of that Explanation. The learned Counsel for the decree-holders-respondents admits that this Bombay judgment is completely against him but he submits that the decision is wrong and that the Privy Council decision has been misinterpreted.

In that case, *viz.*, *Maharaja of Bobbili* v. *Narasaraju Peda Baliara* (1) the facts were that a decree dated the 5th April 1904 had been sent by the District Judge of Vizagapatam on the 30th September 1904 to the Court of the Munsif at Parvatipur. The Munsif attached certain immoveable property and afterwards dismissed the petition for execution. No further steps were taken in his Court. On the 13th December 1907 the decree-holder presented a petition in the original Court, *i.e.*, that of the District Judge of Vizagapatam, stating that the Munsif had attached certain property but had retransferred the decree to the District Judge and praying that the property attached should be sold and that notice should be issued to the respondents. His application was returned for amendment and was presented again without amendment and nothing was done on it. The next thing that occurred was the presentation on the 27th April 1910 of another application to the District Judge. It was then ascertained that the decree had never been returned to his Court by the *Munsif* of Parvatipur and non-satisfaction was actually not certified by the *Munsif* until the 3rd August 1910. The question was whether the application of the 13th December 1907 saved limitation. Their Lordships of the Privy Council decided that it did not, because the copy of the decree with a non-satisfaction certificate was not returned to the District Judge until 3rd August, 1910, and because the petition of the 30th December 1907 was for execution of the decree by sale of the immoveable property of the respondents which was within the local limits of the jurisdiction of the Munsif's Court.

I am asked to assume that the real reason why the District Judge's Court was held not to be the proper Court was that the application was for the sale of property not attached by the Court to which the application was made and not within its jurisdiction. Their Lordships, however, referred to sections 223, 224, 228, and 230 of the Code of Civil Procedure of 1882 as satisfying them that the Court of the District Judge was not the proper Court and it has to be noticed also that the application of the 13th December 1907, prayed not only for sale of the property but also for the issue of notice to direct the judgment-debtor to appear before the District Judge. The present O. XXI, r. 10 was the first para, of old section 230 and this lays down that, " where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree.....or if the decree has been sent under the provisions hereinbefore contained

(1) 36 Ind. Cas. 682 ; 39 M. 640; 31 M. L. J. 800 ; 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472 ; 24 C. L. J. 478 ; 4 L. W. 558 ; (1916) 2 M. W. N. 541 ; 21 C. W. N. 162 ; 1 P. L. W. 26 ; 43 I. A. 288 (P. C.).

(2) 68 Ind. Cas. 506 ; 47 B. 56 ; 24 Bom. L. R 798 ; (1922) A. I. R. (B.) 359.

to another Court, then to such Court or to the proper officer thereof." The word *then* is of great significance and I think there is no doubt that the *ratio decidendi of Maharaja of Bobbili* v. *Narasaraju Peda Baliara* (1), was that the District Judge's Court was not the proper Court because it was not the duty of that Court to execute the decree when the decree had been transferred to another Court and had not been returned as provided for in present section 41, which was part of old section 223, one of the sections to which their Lordships of the Privy Council referred.

On these two authorities it must be held that the application of the 3rd May 1919 to the Karnal Court was not an application to the proper Court within the meaning of Article 182. The learned Counsel for the decree-holders-respondents has a subsidiary argument that notice was issued by the Karnal Court on the application of the 3rd May 1919 and that the issue of the notice saves limitation under Article 182 (6) in which sub-clause there is no mention of the proper Court. This argument has no force. It is clear that sub-clause (6) has to be read with sub-clause (5). The words in (6) are : " Date of issue of notice to the person against whom execution is applied for." Application is dealt with immediately above in (5) and there can be no doubt that the words ' applied for ' mean ' applied for as provided is sub clause (5)' ; otherwise we might have the absurd claim that limitation is saved by the issue of notice to a judgment-debtor by some unauthorised functionary who does not preside over a Court at all. The proceedings before the Subordinate Judge at Simla on the 11th July 1919, cannot be brought under Article 182 (5) for there was no application made on that day to the Subordinate Judge either for execution or for the taking of some step-in-aid of execution. It is argued that to certify part-payment is a step-in aid of execution but limitation is not saved by a step-in-aid of execution. It is saved only by an application to the proper Court to take a step-in-aid of execution.

For the above reasons, I must hold that the application for execution, dated the 1st October 1921, was barred by limitation. I accept the appeal, set aside the order of the Court below and dismiss the application accordingly.

The appellants will have their costs in this Court.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NO. 334 OF 1921 AND NO. 86 OF 1923.

December 18, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Lala MEGHRAJ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mr. K. C. BHATTACHARJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Act (*X of* 1865) *s.* 179—*Executor, title of, date of commencement of—Executor impleaded as party to proceeding before probate—Proceeding whether binding on estate—Transfer of Property Act* (*IV of* 1882) *s.* 3—*General Clauses Act* (*X of* 1897) *s.* 3 (125)—*Machinery, whether immoveable property.*

An executor derives his title from the Will and not from the probate ; the probate is the only proper evidence of the executor's appointment, but the executor represents the estate of the testator from the time of his death and not from the date of the probate. [p. 245, col. 1.]

Once probate is taken out by an executor all intermediate acts which he has done in connection with the estate of the testator are validated. [p. 245, col. 2.]

Where an executor is substituted as the legal representative of the testator in a proceeding before probate is obtained, the estate of the testator is sufficiently represented and the result of the proceeding is binding on the estate, provided probate is, as a matter of fact, obtained by the executor.

Lakhya Dasya v. *Umakanto Chuckerbutty* 2 Ind. Cas. 818 ; 14 C. W. N. 256, dissented from.

Machinery even though housed in a building is not immoveable property for the purposes of the Transfer of Property Act [p. 247, col. 1.]

First appeal from the decree of the Subordinate Judge of Meerut, dated the 7th May 1921.

Mr. *Nihal Chand* and Dr. *K. N. Katju*, for the Appellants.

Messrs. *P. L. Banerji* and *S. N. Mukerji*, for the Respondents.

JUDGMENT.—These two cases are connected together. The earlier one, F. A. No. 433 of 1921, ought strictly speaking to be

decided first, but in view of the facts we are about to set out we consider it expedient to dispose first of F. A. No. 86 of 1923. The record in that case has not been printed. We were of opinion that it was unnecessary to have this done in view of the decision at which we are about to arrive.

Before we proceed to deal with the questions which arise for determination before us, it is necessary to set out a number of facts which will have to be referred to hereafter.

We are concerned in these two cases with certain items of property which belonged to a Bengali gentleman named Kailash Chandar Bhattacharji.

This gentleman, on the 16th August 1910, in order to raise a loan of Rs. 25,000 mortgaged three items of property to a mortgagee named Lala Ram Das.

Those items of property were as follows:—

1. Mauza Sherpur.
2. Mauza Lalpur.
3. The Christy Cotton Bailing Press.

The Bank of Upper India, Limited, Meerut, which afterwards went into liquidation, had obtained in the year 1910 a simple money decree against Kailash Chandra Bhattacharji and in execution of this decree the Bank got Mauza Sherpur brought to sale and it was purchased on the 20th January 1913 by one Banarsi Das.

That sale was held subject to the mortgage which had been executed by Kailash Chandar in the month of August 1910,

In the month of June 1913 Banarsi Das, the auction-purchaser of Sherpur, redeemed the mortgage of the 16th August 1910 by paying a sum of Rs. 2,885 to the mortgagee L. Ram Das.

Kailash Chandar died on the 16th September 1912. He left a Will bearing date the 10th August 1911 and made bequests in favour of his widow and his four children.

One of these children was B. Krishna Chandar Bhattacharji who was appointed executor under the Will.

Krishna Chandar Bhattacharji took out probate of the Will on the 13th December 1913.

These are practically all the facts we have got to deal with in deciding the present cases.

To return to F. A. No. 86 of 1923. This appeal arose out of a suit brought by two sons and a daughter of the deceased Kailash Chandar in order to avoid the sale which took place in execution of the simple money decree obtained by the Bank of Upper India against their father Kailash Chandar.

The ground upon which these plaintiffs sought to avoid that sale was that the execution proceedings had been taken behind their backs and at the time the order for sale was made they had not been parties to the record.

The substantial defence which was set up by the defendants in that case, who included the Liquidators of the Bank of Upper India, was that the sale was perfectly valid and could not be set aside. It was pleaded that execution of the simple money decree against Kailash Chandar had begun in the latter's lifetime and it was pointed out that after his death his son Krishna Chandar was made a party to the execution proceedings in place of his deceased father.

It was claimed that Krishna Chandar, being the executor of his father's estate, completely represented that estate in the execution proceedings and that consequently there was no ground whatever upon which these plaintiffs were entitled to have the sale declared void.

The Subordinate Judge, who dealt with this suit, Mr. Abdul Halim, dismissed the plaintiffs' suit. He was of opinion that in no way could the execution sale at which Banarsi Das purchased the property be deemed to be void. He was of opinion that in the execution proceedings leading up to the sale the estate of the deceased Kailash Chandar was fully represented by the executor.

The same question was in issue in the other suit out of which F. A. No. 334 of 1921 has arisen. That suit, with which we shall have to deal presently, was a suit brought to enforce certain rights under the mortgage executed in the month of August 1910.

The sons and daughter of Kailash Chandar, who were the plaintiffs in the suit which we have just been discussing, were impleaded as defendants in this mortgage-suit and they raised the plea that Banarsi Das, whose interest is now vested in all the plaintiffs in the mortgage-suit, could take no title under the purchase which he made in execution of the Bank's decree.

The Subordinate Judge, who decided this particular case, Mr. P. K. Ray, repelled the contention that Krishna Chandar fully represented the estate in the execution proceedings. Mr. Ray was of opinion that, although Krishna Chandar was without doubt the executor of his father's estate at the time these execution proceedings were going on, he had not taken out probate and for that reason Mr. Ray seems to have thought that he did not fully represent the estate.

On the other hand, Mr. Ray was of opinion that, notwithstanding this circumstance, it could not be declared that the sale in execution of the decree was void. It was pointed out that, at any rate, one of the legal representatives of the deceased judgment-debtor was a party to those proceedings, namely, Krishna Chandar, and that the failure to cite as parties to the proceedings, the other representatives of Kailash Chandar amounted at most only to an irregularity whereby the sale in execution could not be treated as being void, but, at the best, voidable only.

In deciding this matter the learned Subordinate Judge relied upon the principles laid down in the Privy Council ruling in *Malkarjun* v. *Narhari* (1).

We are quite satisfied that both Courts were right in holding that this execution sale could not in any way be treated as a void sale. We prefer to follow the reasons given by Mr. Abdul Halim in his judgment and we have no hesitation in saying that in the execution proceedings anterior to the sale of the property the estate of the deceased judgment-debtor was fully represented. It seems to us nothing to the point to say that Krishna Chandar, who undoubtedly was his father's executor, could not fully represent the estate at the time these execution proceedings were going on because he had not at that time obtained probate of the Will. It is to be pointed out that every executor derives his title from the Will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment, but notwithstanding this it is clear that the executor represents the estate of the testator from the time of his death. There is clear provision to this effect in section 179 of the Indian Succession Act which declares that the executor is the legal representative of the deceased *for all purposes*, and all the property of the deceased person vests in him as such.

It is an admitted fact that probate of the Will was subsequently taken out and, that being so we, who are dealing with the case now, must take it that Krishna Chandar has conclusively been proved to be the executor of his father's estate, and that the estate of his father vested in him from the date of his father's death. The probate which was subsequently taken out established the Will from the date of the testator's death and is conclusive proof of the appointment of the executor ; and, further, it is provided by law, that once probate is taken out by the executor all intermediate acts which he has done in connection with the estate of the testator are validated.

It seems to us, therefore, to be impossible to say that the estate of the deceased judgment-debtor was not fully represented in these execution proceedings.

We may say here that we are not able to follow the view taken by a Bench of the Calcutta High Court in *Lakhya Dasya* v. *Umakanto Chuckerbutty* (2).

At the same time, we recognise that the judgment of the other Subordinate Judge, Mr. Ray, also proceeds upon a correct principle and that, even had our opinion regarding the nature of the executor's position been other than it is, we should have agreed with Mr. Ray's decision that the case ought to be dealt with upon the principles laid down in the Privy Council ruling to which we have referred. We take it, therefore, as being clear on all hands that the suit brought by the sons and daughter of Kailash Chandar for the purpose of having this sale set aside was bound to fail, and we hold definitely that the sale was not void but was a perfectly valid sale in favour of Banarsi Das.

As held by the learned Subordinate Judge Mr. Ray even if we were disposed to hold that the Will was voidable the suit brought by the sons and daughter was barred by limitation. The period of limitation to set aside a

(1) 25 B. 337 ; 5 C. W. N. 10 ; 2 Bom. L. R. 927 ; 27 I. A. 216 ; 10 M. L. J. 868; 7 Sar. P. C. J. 739, (P. C.).

(2) 2 Ind. Cas. 818 ; 14 C. W. N. 256.

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sale of this nature is one year and that period expired long ago.

This finding, therefore, disposes of F. A. 86 of 1923 which we must dismiss with costs to the respondent including in this Court fees on the higher scale, if any.

We have now to come to the other case, namely F. A. 334 of 1921.

We have already mentioned the fact that the plaintiffs in this case are said to represent the interest of Banarsi Das who purchased one of the items of the mortgaged property in the year 1913.

We have also mentioned the fact that on the 3rd June 1913 Banarsi Das redeemed the mortgage which had been executed by Kailash Chandar on the 16th August 1910.

The object of the present suit is to obtain the balance of this mortgage-money against the persons who have become subsequent transferees of the properties mortgaged other than the item of Sherpur which has come into the hands of the plaintiffs.

The village of Lalpur, which was one of the items of property mortgaged, was sold to one Kishori Lal who is now represented by the defendants Nos. 6, 7, 8 and 9 in this suit.

The other item of the mortgaged property, namely, the Christy Cotton Baling Press, was sold to the defendant No. 5.

The plaintiffs are claiming as representatives of the original mortgagee to recover out of the items mortgaged the sums which they are liable to contribute under the mortgage.

One of the pleas which was raised on behalf of the 5th defendant, the present owner of that item of property known as the Christy Cotton Baling Press, was that the suit was time-barred. The validity of that plea depended upon the question whether this Baling Press was to be treated as moveable or immoveable property.

In the mortgage-deed which was executed by the deceased Kailash Chandar he described this particular item of property in the following words :—

"*Ek manzil karkhana wa imarat mausuma Christy Cotton Baling Press Meerut mai jami saman mutaliqa uske.*"

So far as we understand the case, the 5th defendant who has been impleaded, purchased the Baling Press, *i.e.*, the machinery which goes to make up the Press, and has removed it to some place in the Punjab.

The learned Judge of the Court below was of opinion that the machinery of this Baling Press had undoubtedly been mortgaged under the document in suit. But he was of opinion that the machinery was moveable property and that, consequently, Article 120 of the second Schedule of the Limitation Act would apply.

It is now argued before us that the decision of the Court below on this point was wrong and that the item of property described in the mortgage-deed in the language to which we have just referred ought to be treated as immoveable property and not moveable property. After a full consideration of the arguments we are unable to entertain this contention.

We would say, in the first place, that there is practically no evidence on the record which gives us any accurate idea as to how this Baling Press was set up at Meerut.

There is no doubt a reference in the mortgage-deed to a building or "*imarat,*" but if we look to the evidence in the case all we can find is this. One of the plaintiffs' witnesses, Wasiyat Ali, says : "I saw the Christy Cotton Press for the first time at the end of 1913. The machinery was kept in the enclosure of Ganga General Mills."

The only other witness who speaks about this property is one Mr. Damodar Das, Vakil. This gentleman is the Director of the Ganga General Mills. He has deposed that the Mills held on lease the land on which their buildings were erected and it was stated by Mr. Damodar Das that his Company gave B. Kailash Chandar Bhattacharji a plot of land to keep his Cotton Baling Press on. Witness did not know the terms on which the ground had been given to Bhattacharji. He says he was treated as a sub-tenant. In cross-examination the witness said that K. C. Bhattacharji had erected some building but that this building had not been completed.

We are left, therefore, in doubt as to how this Press, which was set up in Meerut was located and, on such evidence as we have, do not see how we could possibly come to the conclusion that this Baling Press was immoveable property.

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We have been referred to the definition of the expression "immoveable property" contained in the General Clauses Act of 1897. This definition has to be read along with the interpretation section of the Transfer of Property Act (section 3) and in particular we have to pay attention to the words in this latter section " attached to earth."

We have mentioned already that there was no clear evidence before us that any building intended to shelter the machinery of this Baling Press was ever completed. But even if we assume that there was such a building it would be difficult for us, in view of this definition, to hold that the machinery which has now been removed to the Punjab and which has been sought to be sold in order to satify the claim of these plaintiffs was in any sense immoveable property.

We cannot decide this question on the English Law relating to Fixtures. We have to pay attention to the definitions in the Indian Statutes.

If there was a building in existence inside which this machinery was sheltered it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself as is contemplated in clause (*c*) of the definition in section 3 of the Transfer of Property Act.

It would be difficult in a case of this kind to speak of machinery being attached to a building embedded in the earth for the beneficial enjoyment of the building. On the other hand, it would seem more natural to suppose that the building is really put up for the purpose of sheltering the machinery and protecting it from the weather.

Nor, again, with reference to the definition of immoveable property contained in the General Clauses Act, is it possible to say that this machinery was permanently fastened to anything attached to the earth.

Having regard to this definition and to the state of the evidence in the case we have no hesitation in saying that the learned Subordinate Judge was quite correct.

It follows, therefore, that we cannot interfere with that portion of the decree which declares that the claim, in so far as it related to this machinery, was beyond time being barred by the six years' rule of limitation.

We come then to the other part of the case. We have it that some of the defendants are the transferees of another item of the mortgaged property named Lalpur.

The Subordinate Judge was of opinion that these plaintiffs could only sell up Lalpur to the extent to which that item was liable under the terms of the mortgage. In other words, the Subordinate Judge, in accordance with the provisions of section 82 of the Transfer of Property Act, distributed the liability of the three items of property as they stood at the time of the mortgage. He was of opinion that the value of Sherpur which the plaintiffs purchased was represented by the figure Rs. 6,000. Lalpur he found was of the value of Rs. 5,000 while the Christy Cotton Baling Press was of the value of Rs. 25,000.

Acting on this principle he has given plaintiffs a decree for a certain sum as principal and a further amount as interest and directed that this amount be realised by the sale of the portion of the village of Lalpur sufficiently to satisfy the decretal amount.

In appeal before us, however, the argument has been that the plaintiffs are entitled to throw the whole of the mortgage-debt upon Mauza Lalpur minus the share to which Sherpur is liable.

The suit in substance is a suit for contribution and the section which regulates the rights of the parties is section 82 of the Transfer of Property Act which lays down that, where several properties, whether of one or several owners, 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 after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

There is in this case no question of a contract to the contrary and, consequently, applying the principle laid down in section 82, it is evident that the three items of property which were mortgaged under the mortgage of 1910 were liable each to satisfy a rateable proportion of the mortgage-debt, the ratio being in proportion to their respective values. We have already indicated the values of these properties as they stood at the time of the mortgage. Sherpur was of the value of

Rs. 6,000. Lalpur was of the value of Rs. 5,000 and the Christy Cotton Baling Press was of the value of Rs. 25,000.

It is, therefore, on the basis of the ratio so indicated that the claim of the plaintiffs must be decided. A case in which this principle was laid down is reported in *Bhagwan Singh* v. *Mazhar Ali Khan* (3).

The learned Subordinate Judge has held that the plaintiffs are entitled to recover from the present owners of Lalpur a share of the mortgage-debt calculated in accordance with the respective liabilities of the three items of property as defined in section 82 of the Transfer of Property Act. In our opinion this decision of the learned Subordinate Judge is perfectly correct and ought not to be disturbed. The only other ground which is mentioned in the grounds of appeal is one with regard to future interest. We imagine this plea has been taken under some misapprehension. It seems to us that the decree of the Court below provides for subsequent interest and subsequent costs in the manner which is usual in the case of decrees for sale under O. XXXIV, r. 4 of the Code of Civil Procedure. The cross-objection which has filed in this case relates to the point which we have already decided in connection with F. A. No. 86 of 1923.

For the reasons already given, the cross-objection fails and is dismissed with costs.

This appeal fails too and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(3) 23 Ind. Cas. 339 ; 36 A 272 ; 12 A. L. J. 394.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 419 OF 1922.

October 3, 1923.

Present :—Mr. Baker, J. C.

Seth LAXMICHAND—PLAINTIFF—APPELLANT

versus

BAJIRAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Art 97, 116—Lessee—Registered lease—Dispossession—Suit for damages—Limitation.

A suit by a lessee under a registered lease for damages for dispossession before the expiry of the period of lease, is governed by Article 116 and not Article 97 of the Limitation Act and the limitation runs from the date of dispossession.

Appeal against the decree of the Additional District Judge, Betul, dated 31st July 1922, in Civil Appeal No. 42 of 1922.

Mr. *N. G. Bose*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The sole question in this appeal is one of limitation.

The respondents who were *malguzars* had let their *sir* lands in 1912 for five years to appellant and during the continuance of that lease they executed another lease of the same lands for eleven years to plaintiff-appellant on 18th September 1913. By the terms of this lease possession was to be given in April 1917 on the expiry of the first lease. In the meanwhile, on 6th April, 1914, the defendants' village was sold in auction and they lost their proprietary rights and became occupancy tenants of the land and thus incompetent to lease it for more than one year.

The plaintiff remained in possession till 1st June 1917 when he was ejected by defendants and he sues to recover the premium paid for the lease with interest as damages. The suit filed on 17th January 1922 was dismissed by the first Court as time-barred, Article 97, Limitation Act, being held applicable. On appeal the decision was upheld by the Additional District Judge, Betul.

It is contended on behalf of the appellant that Article 116 applies and that limitation runs from the date the appellant was dispossessed, 1st June 1917. The lease is registered, but being an agricultural lease is not

governed by the Transfer of Property Act. There can be no doubt that the respondents had a title to convey at the date of the lease, which was prior to their losing their proprietary rights. Morever, the appellant was actually in possession under the former lease till June 1917.

In view of the remarks of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (1) it would appear that limitation would run from the date of actual failure of consideration, which in the present case is the date of dispossession, As to whether the case falls under Article 97 or Article 116 there are a very large number of decisions on both Articles, some of which are rather difficult to distinguish. The case of *Mammikkutti* v. *Puzhakkal Edom* (2), quoted by the lower Appellate Court, is not a case of lease at all, but only of a license to cut trees. As a matter of fact, none of the numerous cases quoted are precisely similar to the present case.

In view of the fact that the lease is registered, I am disposed to hold that the case is governed by Article 116. There can be no doubt that the lease is a contract and though being an agricultural lease it is not within the provisions of the Transfer of Property Act, it contains an express contract that the plaintiff shall remain in possession after the expiry of the present lease.

It has been held that Article 116 applies to all registered contracts whether there is not an express provision in the Act for similar contracts not registered, cf. *Multanmal* v. *Budhumal* (3) and cases quoted therein. I am also distinctly of opinion that the plaintiff's cause of action rests upon the registered contract and derives its vital force therefrom.

It has been held in several cases that a registered instrument of sale or lease operates also as an executory contract to deliver possession of the property to the vendee or lessee, such contract being deemed to be embodied in the sale or lease, and a suit for damages for breach of such contract is within Article 116: cf. *Mul Kumar* v. *Chattar singh* (4) and *Zamindar of Vizianagram* v. *Behara Suryanarayan* (5). The question of the date from which limitation runs must be decided by reference to the Article under which the suit would have fallen if the contract had not been registered. That Article is of course Article 97 in the present case.

I rely on the remarks of Fawcett, J., in *Multanmal* v. *Budhumal* (3) *supra*, at page 334. I have already stated that, in view of the decision of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (1), limitation will run from the date of dispossession in June 1917. This being so, the limitation applicable being 6 years the suit brought in 1922 is not barred.

The decrees of the lower Courts are, therefore, set aside and the suit remanded to the first Court for determination of the other issues. Costs in appeal on respondents. Costs in the Courts below to abide the result.

G. R. D. *Suit remanded.*

(1) 19 C. 123; 18 I. A. 158 ; 6 Sar. P. C. J. 91 ; 9 Ind. Dec. (N. S.) 587.
(2) 29 M. 353.
(3) 61 Ind. Cas. 70 ; 28 Bom. L. R. 325 at p. 334; 45 B. 955.
(4) 30 A. 402 ; 5 A. L. J. 480 ; A. W. N. (1908) 185.
(5) 25 M. 587 ; 12 M. L J. 249.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 824 OF 1922.

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

SHAMBAI AND ANOTHER—PLAINTIFFS

versus

GOVERDHAN AND OTHERS —DEFENDANTS.

Will—Bequest for "Dharmaoo Kam" *whether void for uncertainty—Hindu Law—Registered Will whether can be varied by unregistered document—Specific Relief Act (I of 1877), section 12—Whether plaintiffs bound to claim all available consequential reliefs—Suit for declaration that bequest for* "Dharmaoo Kam" *is void —Advocate-General whether necessary or proper party—Costs whether to come out of the estate when testamentory directions defective.*

A bequest for "*Dharmaoo Kam*" **is void for uncertainty.** [p. 253, col. 2.]

[Indian and English case law on the subject reviewed and discussed.]

The law does not require a compulsory registration of a Will by a Hindu. There is, therefore, no bar to its terms being varied by an unregistered document, even if it be a registered Will. [p. 253, col 2.]

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Durga Prasad Singh v. *Rajendranath Bagchi*, 21 Ind. Cas. 750; 4 I. C. 498; 18 C W. N. 66; (1914) M. W. N. 1; 15 M. L. T. 68; 19 C. L. J. 95; 40 I. A. 228; 26 M. L. J. 25; 16 Bom. L. R. 42 (P. C.), distinguished.

In a suit for declaration that a bequest of a property is void and for an injunction against the trustees restraining them from spending income of the property in pursuance thereof, plaintiffs need not sue for possession of the property also. Section 42 of Specific Relief Act does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless, at the same time, he asks for a relief which he does not want. [p. 254, col. 1 and 2.]

In a suit of this nature, the Advocate-General is a proper party, though not a necessary party. [p. 255, col. 2.]

Where a litigation owes its origin to the fault of the testator by reason of the testamentary directions being vague or uncertain in law or fact, the costs of all parties should be awarded out of the estate of the testator. [p. 255, col. 2.]

Ramkamal v. *Syam Sunder*, 75 Ind. Cas. 41; 37 C. L. J. 482, followed.

Charter v. *Charter*, (1874) 7 H. L. 364; 43 L J. P. 73; *Srinibash Das* v. *Manmohini Dasi*,, (1906) 3 C.L J. 224 at p. 285; *Aghore Nath Mukerji* v. *Kamini Dasi*, 6 Ind. Cas. 554; 11 C. L. J. 461; *Dinbai* v. *Nuserwanji*, 28 Ind. Cas. 481; 14 S. L. R. 208, followed.

Mr. *Fatehchand Assudamal*, for the Plaintiffs.

Messrs. *Motiram Idamal*, *Dharam Das Thawer Das* and *Kalumal Palumal*, for the Defendants.

JUDGMENT.—This is a suit for a declaration that the trusts created by the deceased Visram Oka by his Will, dated 29th January 1921, and by his subsequent codicil, dated 10th March 1912, in favour of "*Dharmaoo Kama* or *Kam*" is void for uncertainty and for an injunction restraining the trustee from applying the trust money to such objects.

The two plaintiffs are the daughters of the testator. Defendants Nos. 1 (a) to (c) and defendant No. 2 are his nephews, being the sons of his brother Tokersi who died shortly after the testator. Defendant No. 3 is the husband of plaintiff No. 2, and the brother of plaintiff No. 1's deceased husband. He is also one of the five trustees appointed as such under the Will of the testator and now in sole management of the estate, three of the five trustees being dead, and the fourth trustee being *non compos mentis*. The testator has no other heirs or near relations interested in the management of the estate.

The Will, which is written in the Sindhi language by a bond-writer and executed by the testator in Gujrati characters, contains *inter alia* the following directions:—

> "I declare and make this Will that after my death Seth Haji Mahamed, Tokersi Uka, Jethalal Kalianji, Tulsidas Behar and Tikamji Bogha will take my immoveable property described above as trustees (on trust) under their care and management.....Out of my half share in the property bearing S. No 37 Sheet E 26 the trustees will utilize Rs. 15 every month in any "*Dharmaoo Kaman.*" They will give Rs. 10-0-0 every month to my elder daughter Javherbai and Rs. 10 every month to my younger daughter. The surplus if any will be paid by them to my wife Sakerbai during her lifetime out of which she will spend money on account of repairs to the said property and also pay taxes, etc.. therefor. After my wife Sakarbai's death the trustees above-named will pay Rs. 20 to my daughter Javherbai and Rs. 20 to my younger daughter Shambai every month. Out of the surplus of rent if any the trustees named above after defraying the expenses on account of repairs and paying the amount of taxes will utilize the whole balance in "*Dharmaoo Kaman*" in such manner as they deem fit."

The codicil, which is written in Gujrati in the handwriting of Tulsidas Behar one of the five trustees, referred to above, and is executed by the testator and attested by all the witnesses in Gujrati characters, *inter alia* provides as under:—

> "Besides this, I have made a separate registered Will. According to its writing I have awarded to my wife share. If the persons of my family trouble the trustees or my wife in so doing, then the rent of my half share of the house to be distributed in three parts, one Javherbai, one Shambai, one for my wife. If my wife dies, then her share to be utilized by the trustees in "*Dharmaoo Kam.*"

It is in evidence that the father of the testator migrated to Karachi from Kathiawar and that the testator did not know how to

read and write Sindhi, that he used to speak in Gujrati language, and that he did not know how to speak in Sindhi well : Jethalal, Ex. 5, lines 25 to 40.

The estate of the testator has been the subject-matter of previous litigation in this Court. In suit No. 96 of 1913 defendants Nos. 1 (*a*) to (*c*) claimed the whole property left by the testator by right of survivorship, contending that the deceased formed member of a joint Hindu family with his brother Tokersi and that the property left by him was joint family property which could not be disposed of by him by a Will. Both the Will and the codicil were expressly put in issue in this suit and were held to be valid, the deceased having been held to be separate from Tokersi. All the parties to the present suit were parties to that suit. An appeal was preferred by defendants Nos. 1 (*a*) to (*c*) against the decision of the lower Court but was subsequently withdrawn.

Another suit being suit No. 119 of 1916 was filed by the trustee defendant No. 3 against defendants Nos. 1 (*a*) to (*c*) for an account of the half share of the rents of plot No. 37 due to the estate of the deceased. This suit resulted in a compromise, by which the property was divided in two shares by metes and bounds and the trustee put in possession of his specific share.

In both suits, Nos. 96 of 1913 and 119 of 1916, the words " *Dharmaoo Kaman* " in the Sindhi Will and the words " *Dharmaoo Kam* " in the Gujrati codicil were translated by the Court Translator as " charitable purposes," " charitable " being used in the popular sense and not in the technical sense in which it is used in English law. The plaintiffs based their plaint on the English translation and asked for a declaration that the trusts being for charitable purposes were void for uncertainty. At the hearing, the plaintiffs were permitted by the Court to amend their plaint by substituting the words " *Dharmaoo Kam* " in place of the words " charitable purposes."

The chief contending defendants are defendants Nos. (*a*) to (*c*) and defendant No. 2, the sons of Tokersi, defendant No. 3, having adopted neutral position. The contentions raised by the parties are embodied in the following issues raised by the Court :—

1. Was the codicil executed by Visram Uka on 10th March 1912 ?

2. If so, is it valid under the Law ?

3. Are points referred to in issues 1 and 2 *res judicata* ?

4. Did Visram Uka make disposition of S. No. 37 S. S. A. 26 as shown in paras. 5 and 6 of the plaint ?

5. Is the bequest by Visram Uka for " *Dharmaoo Kam* " void for the want of certainty ?

6. Is the question of bequest for " *Dharmaoo Kam* " *res judicata* in view of decisions in suits Nos. 119 of 1916 and 96 of 1913, and 374 of 1916 ?

7. Are the plaintiffs estopped from contending that the bequest by Visram Uka for *Dharmaoo Kam* is void and unenforceable (covers para. 8 of the written statement) ?

8. Is the suit of the plaintiffs barred under Order II, rule 2, Civil Procedure Code ?

9. Can the suit lie as framed for declaration and injunction only or should the plaintiffs sue for possession also ?

10. Is the plaint insufficiently stamped ?

11. Is the Advocate-General or the Collector of Karachi a necessary party to the suit ?

12. General.

Issue No. 5. The main issue in the suit is issue No 5, the point for decision of the Court being whether a bequest for the surplus rents being utilized in " *Dharmaoo Kaman* " in the Sindhi Will or the share being utilized in " *Dharmaoo Kam* " as the trustees may deem fit " in the Gujrati codicil is void for uncertainty."

There is no dispute that " *Kaman* " in Sindhi and " *Kam* " in Gujrati means objects or works.

" *Dharmaoo* " is the adjective of " *Dharam*" and is derived from Sanskrit.

Bequests in favour of " *Dharam* " have been the subject of judicial decisions from the year 1842, and, except for the solitary dissenting note of Mr. Justice Subramania Ayyar, a Hindu Judge, in *Parthasarathy Pillai* v

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Thiruvengada Pillai (1), it has been consistently held by the different High Courts in India that a bequest to *Dharam* is void for uncertainty.

Reference may be made to *Shibachander Mullick* v. *Sreemutty Treeporah Saomdry Dossee* (2) where a bequest to *Dharam* was translated as a gift for pious acts to procure future bliss ; *Advocate-General* v. *Damodhar* (3), where '*Dharam Khate*', was said not to be equivalent to the term "charity" as defined in the Courts of Equity, and to imply performance of acts considered meritorious in the Hindu religions many of which could by no latitude of construction be brought within the term "charity" as used in the English cases. *Premjivan Tulsidas* v. *Den Kuverbai* (1859) (4), where *Dharma* was said to include a greater number of objects which came within the meaning of the word "benevolent" as contradistinguished from "charitable" as used in English decisions. *Devshankar Narainbhai* v. *Matiram Jageshvar* (5), where Fulton, J., held that in a purely discretionary matter of this kind the earlier decisions must prevail in settling the Law, and set aside a bequest in favour of "*Dhmrmada*" as uncertain and the Privy Council ruling in *Runchoredas* v. *Parvatibai* (6), where their Lordships referred to the definition of "*Dharama*" given in Wilson's Dictionary as meaning "Law, virtue, legal or moral duty" and held that the language of Lord Eldon in the leading case of *Morice* v. *Bishop of Durham* (7) applied as strongly, if not more so, to *Dharam* as to the words used in the English cases.

The remarks of Lord Eldon at p. 539 of the report, and referred to above, are as follows :—

> "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control ; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust. A trust, therefore, which in case of maladministration could be reframed, and a due administration directed, and then, unless the subject and the objects can be ascertained ; upon principles, familar in other cases, it must be decided that the Court can neither reform mal-administration, nor direct a due administration."

According to this rule, the Court has to determine whether the objects of the trust are so certain as to make it possible for the Court to control the adminisstration of the trust, if not the trust is ill-declared and must fail.

This rule is, however, subject to an exception, it being established that a trust for charity or for charitable objects shall not fail on account of the uncertainty of its objects being used not in its popular sense but in its technical sense as meaning objects which are either enumerated in the now repealed Statue of Elizabeth (43 Eliz. C. 4) or which fall within the spirit and intendment of that Act liberally construed.

In the *Bishop of Durham's case* (7), a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should approve was held to be invalid for want of certainty of the objects of the trust. On the same principle, a bequest for charitable or philanthropic purposes *Re-Madcuff* (8), a trust for purposes "most conduscive to the good of religion in this diocese" in *Most Reverend Robert Dunne and James Byrne* (9), a bequest for "patriotic purposes, objects and such charitable institutions as the trustees think fit," in *National Provincial and Union Bank of England, Ltd.* v. *Tetley* (10), have been held invalid under the English Law. A bequest to be disposed of in a righteous manner or in a pious and charitable way in *Nanalal Lallubhoy* v. *Hurlochund Jagusha* (11), a bequest for "*Sarakam*" in *Bai Bapi* v. *Jamnadas Hathisang* (12),

(1) 30 M. 340 ; 17 M. L. J. 379 ; 2 M. L. T. 198.
(2) (1842) Fulton 98 ; 1 Ind. Dec. (O. S.) 703.
(3) (1852) Perry O. Cas. 527 ; 4 Ind. Dec. (O. S) 481.
(4) 1 B. H. C. R. 76 N.
(5) 18 B. 136 ; 9 Ind. Dec. (N. S.) 599.
(6) 26 I. A. 71 ; 23 B. 725 ; 1 Bom. L. R. 607 ; 3 C. W. N. 621 ; 7 Sar. P. C. J. 543 ; 12 Ind. Dec. (N. S.) 485 (P. C.).
(7) (1805) 10 Ves. 522; 7 R. R. 282 ; 32 E. R. 947.
(8) (1896) 2 Ch. 451 at p. 468 ; 65 L. J. Ch 700 ; 74 L. T. 706 ; 45 W. R. 154.
(9) (1912) A. C. 407 ; 81 L. J. P. C. 202 ; 106 L. T. 394 ; 28 T. L. R. 257.
(10) (1923) 1 Ch. 258 ; 92 L. J. Ch. 351.
(11) 14 B. 476 ; 7 Ind. Dec. (N. S.) 779.
(12) 22 B. 774 ; 11 Ind. Dec. (N. S.) 1100.

a bequest for " popular or useful purposes " in *Trikamdas* v. *Haridas* (13), a bequest for " good words " in *Gokoolnath Guha* v. *Issur Lochun Roy* (14), a general endowment for the worship of God without specifying the Deity for whose benefit the endowment is to take effect," in *Chandi Charan* v. *Haribola Das* (15), a bequest for " spread of Hindu religion" in *Venkata Narasinbha Rai* v. *Subbarao* (16) have been held to be invalid in Indian Courts.

On the strength of the translation made by the Court Translator in the previous proceedings, the learned pleader for the defendants Nos. 1 (*a*) to (c) and defendant No. 2 contended that the bequest being for charitable objects or purposes was valid. The words " charitable objects " have been used in the translations both of the Sindhi Will and the Gujrati codicil in their popular sense. In the English language the word "charity" in its popular widest sense is probably incapable of definition, *In re Nottage Jones* v. *Palmer* (17) and includes all good affections men ought to bear towards each other, as per Master of the Rolls in the *Morrice* v. *Bishop of Durham* (18). "*Dharma*" likewise includes all objects of charity or of religion in this wide sense, and perhaps something more. In *Sarat Chandra Ghosh* v. *Pratap Chandra Ghosh* (19) where the words " *Dharma Kama Arthe* " and "*Dharama deshe*" were officially translated as religious acts and religious purposes, Choudhari, J., a Hindu Judge, observed that in Bengali these words connoted more than religious acts or religious purposes. The objects of a bequest for *Dharma* are too vague and indefinite and would include every possible object of benevolence whether religious or otherwise. In the Sindhi dictionary, "*Dharma*" is said to mean "justice, piety, virtue, duty, religion, faith, honesty, the customary observances of caste, sect, etc., charity, alms." It has practically the same meaning as contained in Wilson's dictionary which was accepted by Their Lordships of the Privy Council in *Runchoredas' case* (6). Similarly, in the Gujrati dictionary "*Dharama*" is said to mean " a sacred obligation or duty ; almsgiving, charitable acts and offices; alms, charities bestowed; virtue; moral or religious merit (resulting from good acts)."

The use of the words "*Dharmaoo*" or "*Dharmada Kama*" or " *Dharmarthe*" does not make the bequest less uncertain than a bequest for *Dharma*. In *Gurdit Singh* v. *Sher Singh* (20) the Punjab Chief Court held that there was no difference between " *Dharma* " and " *Dharma Artha.*"

In Suit No. 195 of 1918 *Lakiro Ramji* v. *Valabdas* (21), recently decided by this Court in the exercise of its Original Jurisdiction, Aston, A. J. C., held that a bequest in favour of " *Dharmada Kam* " in a Will made in the Gujrati language was void for uncertainty. In the present case the testator who knew Gujrati has used the expression " *Dharmaoo Kam* " both in the Sindhi Will and in the Gujrathi codicil, and it may safely be considered that he intended to use the words in the Sindhi Will in the same sense as he used them in the subsequent Gujrati codicil, I hold that the bequests for " *Dharmaoo Kam* " in the Sindhi Will as also the Gujrati codicil are void for uncertainty.

Issues Nos. 1 *and* 2. It is now admitted that the Will and the codicil have been duly executed and that they were held proved in Suit No. 96 of 1913. It is, however, contended that the codicil is not valid as it purports to vary the terms of the Will which is a registered document. Reliance has been placed on *Durga Prasad Singh* v. *Rajendranath Bagchi* (22). There is no substance in this objection. The law does not require the compulsory registration of a Will by a Hindu. There is, therefore, no bar to its terms being varied by an unregistered document. I hold on issue No. 1 that the codicil was duly executed and on issue No. 2 that it is valid.

(13) 31 B. 588 ; 9 Bom. L. R. 560.
(14) 14 C. 222; 11 Ind Jur. 334 ; 7 Ind. Dec. (N.S.) 147
(15) 51 Ind. Cas. 215 ; 46 C. 951 ; 29 C. L. J. 366; 28 C. W. N. 645.
(16) 73 Ind. Cas. 991 ; 46 M. 800 ; 17 L. W. 81 ; (1923) M. W. N. 111 ; (1923) A. I. R. (M.) 376.
(17) (1895) 2 Ch. 649 at p. 656; 64 L. J. Ch. 695; 12 R. 571; 73 L. T. 269; 44 W. R. 22.
(18) (1804) 9 Ves. 399 at p. 404; 32 E. R. 656.
(19) 21 Ind. Cas. 194; 40 C. 282.
(20) 14 Ind. Cas. 247; 63 P. W. R. 1912 ; 106 P. L. R. 1912; 78 P. R. 1912.
(21) 76 Ind. Cas. 209.
(22) 21 Ind. Cas. 750 ; 41 C. 498 ; 18 C. W. N. 66 ; (1914) M. W. N. 1 ; 15 M. L. T. 68 ; 19 C. L. J. 95 ; 40 I. A. 228 ; 26 M. L. J. 25 ; 16 Bom. L. R. 42 (P.C.).

Issue No. 3. This issue has been given up.

Issue No. 4. The original Will has now been traced and is Ex. No. 9. There is now no dispute as to its terms. I hold on this issue in the affirmative.

Issue No. 6. Suit No. 119 of 1916 was filed by the trustee defendant No. 3 against defendants Nos. 1 (*a*) to (c) for recovery of rent. The plaintiffs were not even parties to that suit.

Though all the parties to the present suit were parties to suit No. 96 of 1913, the point at issue in that suit was the right of Visram to bequeath his property by a Will. It was contended that he was joint with his brother at the time of his death and that the property was joint family property. The Court held against the plaintiffs. The question whether any particular bequest contained in the Will or in the codicil was not put in issue either expressly or impliedly in either of the two suits. It cannot, therefore, operate as *res judicata*.

It is admitted that suit No. 374 of 1916 referred to in this issue has no bearing to the present case.

I, therefore, hold on this issue in the negative

*Issue No.*7. In his opening address the learned pleader for defendants Nos 1 (*a*) to (*c*) faintly urged that as the plaintiffs did not dispute the validity of the alleged charitable bequests, prior to the compromise in suit No. 119 of 1916 the defendants were induced to enter into the compromise. He, however, did not lead evidence on this point or press the issue. Plaintiff No. 1 was a minor at the time and, so far as she is concerned, she cannot be said to have stood by and thereby prejudiced the defendants by her silence. There is no substance in this issue. I hold on this issue in the negative.

Issue No. 8. This issue has been given up.

Issues Nos. 9 *and* 10. It is urged that the suit as framed for a declaration that the bequests are void, and for an injunction against the trustee restraining him from spending money for *Dharmaoo* objects is incompetent, and that the plaintiffs must sue for possession of the property also. There is no force in this contention. As pointed out by Mukerji, J., in *Ramkamal* v. *Syam Sundar* (23), section 42 of the Specific Relief Act forbids a suit for a pure declaration without further relief but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want.

The property is in the possession of the trustee who holds it for the true owner. If the trust fails, the property, which is the subject of the trust, is undisposed of and, as said by Master of the Rolls in the *Bishop of Durham's case* (7): "The benefit of such trust must result to them to whom the law gives the ownership in default of disposition of the former owner." The plaintiffs are the heirs of the deceased Visram being his only daughters. The trustee is prepared to hand over the property to the plaintiffs if it be held that the bequest for "*Dharmaoo Kam*" is void. Under the Will and the bequest the plaintiffs have been given certain limited interest in the rents of the property in question, and are said to be in joint possession of the property. The estate has not yet been administered (Jethalal, Ex. 5, line 12). The trustee could himself have applied for the construction of the clause in question. He having failed to do so, it was open to the plaintiffs, who are the persons affected by the clause, to ask for the necessary declaration or for construction of the relative clause in the Will.

So long as the estate is in the hands of the executor and the administration of the estate has not been completed, a party affected by the Will has a recurring right to move the Court for the construction of the Will.

The plaintiffs have a right to ask for a declaration that the bequest to *Dharmaoo* purposes is void. They are content with this declaration and the injunction which they have claimed.

It is not necessary for the plaintiffs to sue for possession of the property. I hold that the suit can lie as framed and is properly stamped.

Issue No. 11. It appears that the point whether the Advocate-General is a necessary party or a proper party to a suit of this nature has not been decided in any reported Indian decisions. He was made

(23) 75 Ind. Cas. 41 ; 37 C. L. J. 482.

a party in *Cursondas Govindji* v. *Vundhra Vandas* (24), which went up to the Privy Council, the Privy Council decision being reported in *Runchoredas* v. *Parvatibai* (6). He has also been made a party in two or three other reported cases, the last case cited at the bar being the case of *Santanor Roy* v. *The Advocate-General of Bengal* (25).

In the majority of the Indian decisions cited at the bar the Advocate-General has not been made a party. In India the Advocate-General corresponds to the Attorney-General in England, *cf. Advocate-General of Bombay* v. *Adamji* (26). Like the Attorney-General in England, the Advocate-General, is the protector of all the persons interested in a charity fund. As such, he is no doubt a proper party to a suit of this nature, and where he applies to be made a party, the Court would join him as such, and provide for his costs out of the estate. It does not, however, follow that he is a necessary party to such a suit or that the suit must fail unless he is made a party to the suit. The trustee represents the estate and it is his primary duty to represent the case of charity before the Court. The next of kin who are interested in the wishes of the testator being carried out, are also parties to the action and the learned pleaders appearing for them have very ably placed the case of charity before the Court.

The only authority which I am able to find on the point at issue is a passage in Halsbury's Laws of England, Vol. 4, paragraph 672, where it is said that the Attorney-General is "similarly a necessary party when the question is whether a particular bequest is charitable" and the reference relied on in support is *Cook* v. *Duckenfield* (27). The ruling not being available in the Birdwood Law Library the learned pleaders for the plaintiffs have supplied me with a transcript of the ruling which does not, however, show that the Attorney-General was held to be a necessary party to the proceedings, though he was a party to the proceedings. In several subsequent reported English rulings the Attorney-General does not appear to have been made a party. Any decision to which he is not a party will not bind him, and it is open to him to have the question reagitated again either in a suit instituted by him or in a suit filed by any two members of the public interested in the alleged charity under his sanction. I am of opinion that though he is a proper party, he is not a necessary party to such an action. The Court would, in the exercise of its discretion, no doubt join him as a party in proper cases. I am further of opinion that the present case is, however, not a fit case for exercising that discretion and ordering that the Advocate-General be joined as a proper party.

The question now at issue was litigated in the Bombay High Court seventy years ago, and the decision then given has been consistently followed in the Bombay Presidency. It has been accepted by their Lordships of the Privy Council and adopted by other High Courts, in *Fakiro Ramji* v. *Valabdas* (21), of this Court which was instituted with the sanction of the Collector of Karachi in the exercise of his delegated powers as Advocate-General, the same view has been adopted by Aston, A. J. C.

Issue No. 12. I hold on this issue in the negative.

I hold that the plaintiffs are entitled to a declaration that the bequests for Dharmaoo objects are void and an injunction restraining the trustee from spending any money for such objects.

It is usual to award costs out of the estate of the testator where the litigation owes its origin to the fault of the testator by reason of the testamentary directions being vague or uncertain in Law or fact: *Charter* v. *Charter* (28), *Srinibada Das* v. *Manmohini Dasi* (29), *Aghore Nath Mukerji* v. *Kamini Dasi* (30). Suit No. 82 of 1914 *Dinbai* v. *Nusserwanjee* (31). I order that the costs of all the parties as taxed by the Clerk of the Court do come out of the estate.

P. M. A. *Suit decreed.*

(24) 14 B. 482; 7 Ind. Dec. (N. S.) 784.
(25) 62 Ind. Cas. 198; 48 C. 124; 32 C. L. J. 453; 25 C. W. N. 343.
(26) 30 B. 424; 8 Bom. L. R. 565.
(27) (1743) 2 Atk. 562 at p. 564; 26 E. R. 737.
(28) (1874) 7 H. L. 364; 43 L. J. P. 73.
(29) 3 C. L. J. 224 at p. 225.
(30) 6 Ind. Cas. 554; 11 C. L. J. 461.
(31) 28 Ind. Cas. 481; 14 S. L. R. 203.

RACHHPALI *v.* CHANDESSARDI

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 of 1921.

November 15, 1923.

Present :—Mr. Wazir Hassan, A. J. C., and Mr. Neave, A. J. C.

Must. RACHHPALI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Must. CHANDESSARDI AND OTHERS— DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation—Notice of separation to co-parceners, whether essential—Gains made by performance of religious services, if can be partitioned—Civil Procedure Code (Act V of 1908), s. 9—Gains made by helping religious ceremonies—Suit of civil nature.

Separation is an act of individual volition and does not depend for its effect on the consent or agreement of the other co-parceners. [p. 257, col. 1.]

For the severance of interest, notice to other co-parceners of the intention to separate unequivocally expressed is not a condition precedent. [p. 257, col. 1.]

The gains made by helping clients in the performance of religious ceremonies connected with the river such as bathing, offering flowers, etc., at *chaukis* are property in law, and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within the meaning of s. 9 of the Code of Civil Procedure. [p. 260, col. 1.]

Narain Lal Gupta **v.** *Chulhan Lal Gupta*, **14 Ind. Cas. 677; 15 O. L. J. 876 at p. 879, and** *Bhagwan Din* **v.** *Mani Ram*, **5 O. C. 225, distinguished.**

Appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 31st January 1921.

Messrs. *Wasim*, *Wasi Hasan* and *Imtiaz Ali*, for the Appellants.

Messrs. *A. P. Sen*, *G. N. Misra*, *Niamat Ullah*, *Ali Zaheer*, and *Har Gobind Dayal*, for the Respondents.

JUDGMENT.—The appellants were the plaintiffs in the Court below. Their suit for the recovery of possession of certain properties, moveable and immoveable, has been dismissed by the learned Additional Subordinate Judge of Fyzabad by his decree, dated the 31st January 1921. Mt. Rachhpali, plaintiff No. 1, claims a half share in the properties in suit on the ground that that share in the property belonged to her husband, Anand Bahadur, who died on the 24th June 1911 and on his death it devolved upon her by right of inheritance. The chief defence to this suit was, that Anand Bahadur was a member of a joint family at the time of his death and the properties in their entirety devolved by right of survivorship on Rameshar Prasad, nephew of Anand Bahadur. Mt. Chandesardei, defendant No. 1, is the mother of Rameshar Prasad and is the chief defendant to the suit. The other defendants are transferees. Rameshar Prasad died on the 24th December 1911. The learned Subordinate Judge has held that Anand Bahadur was not a separated member of the family and that, on the other hand, he died in a state of jointness and, consequently, Rameshar Prasad succeeded to the properties in suit by right of survivorship.

The main question in the appeal is, was Anand Bahadur a separated member of the family at the time of his death? Our conclusion is that he was. On this part of the case there are hardly any facts in controversy. The chief question argued at the hearing of the appeal is one of the legal inference to be drawn from those facts. On the 3rd April 1911 Anand Bahadur instituted a suit for partition of the joint family properties against his minor nephew Rameshar Prasad. Rameshar Prasad's mother, Mt. Chandessardei, was his guardian appointed by the District Judge of Fyzabad in 1903 (Ex. A.-64). She was consequently the guardian of her minor son in the suit brought by Anand Bahadur. In paragraph 6 of his plaint, Anand Bahadur stated: "that he asked the defendant and his mother, Mt. Chandessardei, several times to partition the share of the plaintiff but to no effect." In paragraph 8 he said that in the properties mentioned in the lists attached to the plaint he had a moiety of share and the other half belonged to the defendant. In paragraph 9 he said that the parties were equally liable for the debts due from the joint family given in list A. The relief for which he prayed was, "that a decree for recovery of the half share of the joint property in list A attached to the plaint be passed in his favour." Several dates for the hearing of this suit seem to have been fixed. Anand Bahadur, however, died before any written statement was filed on behalf of Rameshar Prasad. Anand Bahadur also executed a Will on the 11th May 1911. In this Will he stated that all the moveable and immoveable property in his and in his nephew's possession belonged to them in equal shares. He further stated that

he had 'asked his nephew and his mother to make a partition and that he had filed a suit against Rameshar Prasad for the partition of his share. He also stated as an accomplished fact that he had separated from Rameshar Prasad after the filing of the suit. By this Will he makes a gift of his entire share in these properties to his wife Mt. Rachhpali, the plaintiff of the present suit, and he also authorises her to prosecute her suit for partition and to obtain a decree therein (Ex. 1). Mt. Rachhpali applied to be made a plaintiff in that suit in place of her deceased husband. Her application was rejected finally by this Court on the ground that there had been no partition at the date of the suit and that, consequently, there was nothing which could devolve upon her on the death of her husband. On these facts it is difficult for us to understand how the learned Additional Subordinate Judge could have come to the conclusion that Anand Bahadur died in a state of jointness. His view seems to be that there could be no separation in status unless the intention to separate is also intimated to the other co-parceners. He holds that the notice of the plaint of Anand Bahadur is not proved to have reached Rameshar Prasad or his guardian, Mt. Chandesardei. We are clearly of opinion that, for the severance of interest, notice to other co-parceners of the intention to separate unequivocably expressed is not a condition precedent. It is true, that in most of the cases decided by their Lordships of the Privy Council, other coparceners had notice as a matter of fact, but the authorities clearly lay down that the separation is an act of individual volition and does not depend for its effect on the consent or agreement of the other co-parceners. Recent decisions of the Privy Council on the point under consideration are *Girja Bai* v. *Sadashiv Dhundhiraj* (1), *Kawal Nain* v. *Parbhu Lal* (2), *Ramalinga Annavi* v. *Narayana Annavi* (3), and *Syed Kasam* v. *Jorawar Singh* (4). The decision in the case of *Kawal Nain* v. *Parbhu Lal* (2), seems to us to support the view which we are taking in its entirety. In that case the date of the institution of the plaint was regarded as the date of separation. In Mayne's Hindu Law, 9th edition, at page 688, we find it clearly stated that a separation may take place even in the absence of other co-parceners.

The question of absence of notice does not seem to have been raised by the defendant No. 1 in her pleadings. On the contrary, paragraph 27 of her written statement clearly implies that the notice was as a matter of fact received. No issue was framed on the point. At the hearing of the arguments in the Court below, it appears to have been urged on behalf of the defendant No. 1, that the notice of the institution of the suit was not served either on Rameshar Prasad or on his guardian. The plaintiffs, therefore, applied on the 14th January 1921 that they were in possession of certified copies showing the service of the notice on the guardian of Rameshar Prasad and asked that the copies be received in evidence. The learned Additional Subordinate Judge, for reasons wholly insufficient, refused to accept them in evidence. In the circumstances stated above, we think that he ought to have received them. We are now asked in appeal to admit them in evidence. We are of opinion that they should be admitted in evidence and we accordingly do so. In support of our action we rely on a recent decision of their Lordships of the Privy Council in the case of *Indrajit Pratap Sahi* v. *Amar Singh* (5). This evidence conclusively establishes that a copy of the plaint of Anand Bahadur was served on Rameshar Prasad's

(1) 37 Ind. Cas. 321 ; 43 I. A. 151 ; 20 C. W. N. 1085 ; 14 A. L. J. 822 ; 20 M. L. T. 78 ; 12 N. L. R. 118 ; (1916) 2 M. W. N. 65 ; 18 Bom. L. R. 621 ; 4 L. W. 114 ; 24 C. L. J. 207 ; 31 M. L. J. 455 ; 43 C. 1031 (P. C.).

(2) 40 Ind. Cas. 286 ; 44 I. A. 159 ; 15 A. L. J. 581 ; 2 P. L. W. 57 ; 21 C. W. N. 986 ; 33 M. L. J. 42 ; 19 Bom. L. R. 642 ; 26 C. L. J. 101 ; (1917) M. W. N. 514 ; 6 L. W. 330 ; 39 A. 496 (P. C.).

(3) 68 Ind. Cas. 451 ; 49 I. A. 168 ; 30 M. L. T. 255 ; (1922) M. W. N. 399 ; 45 M 489 ; 26 C. W. N 929 ; (1922) A. I. R. (P. C.) 201 ; 43 M. L. J. 428 ; 16 L. W. 639 ; 24 Bom. L. R. 1209 ; 20 A. L. J. 889; 37 C. L. J. 15 (P C).

(4) 68 Ind. Cas. 578 ; 49 I. A. 358 ; 31 M. L. T. 46 ; 16 L. W. 228; 5 N. L. J. 209 ; 18 N. L. R. 127 ; (1922) A. I. R. (P. C) 358 ; 43 M. L. J. 676 ; 21 A. L. J. 57 ; 25 Bom. L. R. 1 ; 37 C. L. J. 73; 27 C. W. N. 179 ; 50 C. 84 (P. C.)

(5) 74 Ind. Cas. 747 ; 50 I. A. 183 ; 21 A. L. J 554 ; 4 P. L. T. 447 ; (1923) A. I. R. (P. C.) 128 ; 1 P. L. R. 345 ; 2 Pat. 676 ; 38 M. L. T. 233 ; 45 M. L. J. 578 ; 18 L. W. 728 ; 25 Bom. L. R. 1259 ; 28 C.W. N. 277 (P. C.).

guardian and mother, Mt. Chandesardei, on the 9th April 1911. We are, therefore, of opinion that the plaintiff No. 1 is entitled to the decree for which she has brought the present suit.

There is a good deal of controversy with regard to the items of properties stated in the lists attached to the plaint as to whether they are joint family properties and liable to be partitioned or not. There are three lists A., B., and C., attached to the plaint in respect of which the relief for possession and partition was sought. These lists have been incorporated in the decree under appeal. The claim in respect of list C has been expressly abandoned by the learned Counsel for the appellants before us. In list B there are six items. Items 1, 2, 4, and 5 have also been abandoned. As regards item 3 no proof has been advanced to support the title for possession or partition of that property. The suit, therefore, fails with regard to that item also. As regards item 6 the learned Additional Subordinate Judge has found that the decree to which it relates was joint family property. The respondents have not contested this finding. This disposes of list B.

In list A there are 62 items in all. Items 15, 26, 28, 30, 31, 47, 61, and 38 pieces in item 62 have been abandoned. The suit with regard to them, therefore, must fail. In the same list the following items have either been admitted to be joint family property liable to be partitioned or found to be so by the lower Court and the finding has been accepted by both sides before us:—1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 21, 24, 25, 34, 35, 37, 40, 42, 43, 44, 46, 48, 55, 56, 58 and 59. The controversy, therefore, relates to the following items in that list:—6, 7, 18, 20, 22, 23, 27, 29, 32, 33, 36, 38, 39, 41, 45, 49 to 54, 57 and 60.

Item 6 consists of four parts, the last three of which have been both found and admitted before us as properties liable to be partitioned. The dispute, therefore, relates only to the first part of it, that is, No. 807. Item 18 also consists of three parts the last of which, that is, No. 967, only is in dispute. The other two portions admittedly fall within the plaintiffs' claim. Item 36 is in dispute in its entirety. The case of the respondents with regard to the disputed portion of items 6 and 18 and in respect of the whole item 36 is that these plots originally belonged to *Nazul*, that is, the Crown, and were transferred under leases to persons for building purposes and one of the conditions of the lease was that on their becoming vacant they would revert to the Crown, that they did become vacant, reverted to the Crown and the Crown gave them to the respondent No. 1 under the lease, dated the 13th March 1918 (Exhibit A 1)). Neither the previous leases nor the condition that on the happening of a certain contingency it would revert to the grantor, for the fact that the contingency did happen, have been proved. On the other hand, these properties were admitted in the pleadings to be joint family property. We do not think that the respondents should be allowed to go behind the admission nor have any facts been proved which would induce us to allow them to do so. With regard to these items, therefore, we hold that the plaintiffs are entitled to a decree.

Items 7, 20 and 22. The respondents' case with regard to these items is that they are endowed properties. Exhibits 33 and 34 show that these properties originally belonged to one Mt. Lakhpatdei, and that she appointed Lal Bahadur a trustee in respect of those properties for the purpose of carrying out the trust. It appears, however, that as amongst the members of the family these properties have always been treated as joint family property. In a previous litigation on a claim by Anand Bahadur and Rameshar Prasad against Mt. Raj Dulari for possession of the joint family properties these items were accepted as belonging to the joint family and a decree was passed in favour of Anand Bahadur and Rameshar Prasad in respect of these properties on that footing (Exhibits 5, 8, 13 and 14). Some of the respondents in the present suit, for instance, respondent No. 4, admitted in the pleadings that these items are joint family property. We are, therefore, of opinion that in the present suit they should be treated as joint family property and the plaintiffs are entitled to a decree in respect of them.

Items 23, 32 and 33. These items originally belonged to one Mt. Tota Dei. She transferred them to Ram Bahadur by a deed of gift for consideration. The consideration stated in the deed (Exhibit 48) is the sum of Rs. 900 and services rendered. The learned

Additional Subordinate Judge is of opinion that the property so acquired is the self-acquired property of the donee in so far as the consideration consisted of the services rendered by him. But, inasmuch as the consideration of Rs. 900 was concerned, there was no evidence that the amount paid was the separate property of Ram Bahadur. In result he has held that the plaintiffs are entitled to a moiety share in the sum of Rs. 900 but not in the house which was the subject-matter of the gift. We cannot agree with him. "Services rendered" was merely an expression of euphemism for the motive of the gift and not the real consideration of the transfer. We are of opinion that the plaintiffs are entitled to a decree in these items also.

Item 27. With regard to this item the learned Additional Subordinate Judge thinks that the description of it given in the plaint is too vague and the plaintiffs cannot be given a decree in respect of this property with reference to that description but he is prepared to give a decree to the plaintiffs if the decree in respect of the houses covered by this item describes it by Nos. 834 to 837. Both sides are agreed before us that the plaintiffs may be allowed a decree in respect of that item by describing it as consisting of the houses denoted by Nos. 834 to 837. We, therefore, order accordingly.

Item 29. This property originally belonged to Mt. Lakhpat Dei. On the 24th June 1884 she made a gift of it to her son-in-law Ram Bahadur, the deceased husband of the defendant No. 1. This is proved by Exhibit A-83. In 1904 Lal Bahadur, brother of Ram Bahadur, brought a claim in the Court of Assistant Settlement Officer of Fyzabad against the Government for the settlement of certain properties with him. In the list of the properties with respect to which this claim was brought he included the item now under consideration describing it as the property which was gifted by Mt. Lakhpat Dei to Ram Bahadur as a dowry to her daughter, the wife of Ram Bahadur, and that since then he has been in possession of it. Lal Bahadur's statement that he has been in possession of this property the title to which he himself admitted to have vested in his brother, Ram Bahadur, cannot make it joint family property. We are, therefore, of opinion that the plaintiffs' suit fails in respect of this item.

Items 38, 49 and 50. In these items the only interest held by the joint family is that of a mortgagee. To that extent the learned Additional Subordinate Judge has granted a decree to the plaintiffs. The learned Advocate for the respondent No. 1 has argued before us that his client is also the representative of the mortgagor. He is, therefore, anxious that her proprietary rights in these items may be safeguarded in the decree. This can be easily done by indicating in the decree that the plaintiffs are entitled to a half share in mortgagee's rights only.

Item 39. This item consists of 5 pieces Nos. 52 to 56. The claim is admitted in respect of three of them. The dispute relates to two only. The admitted portions are shown in list A of the written statement of the defendant as three *chaukis* at Gaughat. The plaintiffs are, therefore, entitled to a decree in these three *chaukis* only and their claim with respect to the other two must be dismised.

Item No. 41. As regards this item we are of opinion that the plaintiffs' right is established by Exhibit 52 and that they should get a decree with respect to it.

Items 45 and 51. These items are covered by the gift (Ex. 48) which relates also to items 23,32 and 33 already disposed of. On the grounds stated before, we are of opinion that the plaintiffs are entitled to a half share in these items also.

Items 52, 53, 54 and 60. The plaintiffs' claim in respect of these items rests on Exhibit 52. A reference to the entires in that Exhibit in relation to these items will show that only one-half of them belonged to the ancestor of the parties and the other half was the property of a stranger. The learned Counsel for the appellants now admits that his right in these items must be limited to one-fourth only. We order accordingly.

Item 57. We think that the plaintiffs' case is established in respect of this item by Exhibit 52. They will, therefore, get a decree in respect of that property.

A general plea was taken in respect of all the items described in the lists attached to the plaint as *chaukis* to the effect that they were not property liable to be partitioned. The plea was elaborated in paragraph 29 of

the written statement of defendant No. 1. The learned Additional Subordinate Judge has upheld that plea. Our opinion is to the contrary. These *chaukis* are well understood spots on the banks of the river where one or the other members of this family used to sit, receive his clients and help them in the observance of their religious ceremonies connected with the river such as bathing, offering flowers, etc. For these services remuneration is paid by the clients who chose to avail themselves of those services. Ordinarily, the spots are marked by placing a *takht* on them. We think that the gains made by the performance of services at these spots are property in law and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within the meaning of section 9 of the Code of Civil Procedure. Our opinion is fortified by the decisions in *Beni Madho Pragwal* v. *Hira Lal* (6), *Ram Chander* v. *Chhabbu Lal* (7) and *Suraj Prasad v. Ganesh Ram* (8). Finally, we may refer to a learned and exhaustive judgment of Mr. Justice Mookerjee in the case of *Narayan Lal Gupta* v. *Chulhan Lal Gupta* (9). The learned Additional Subordinate Judge has relied on *Bhagwan Din* v. *Mani Ram* (10), *Baddu* v. *Babu Lal* (11). The principle of those cases if wholly inapplicable to the present case.

The defendant No. 1 pleaded that, in case the plaintiffs be given a decree, they should be held liable proportionately for certain valid debts. The learned Additional Subordinate Judge has decided the plea in favour of the defendant. The finding is not disputed before us by the appellants. The matter is covered by issue No. 11 and the debts are mentioned in list F, attached to the written statement. The plaintiffs will, therefore, be liable to pay half the amount of these debts.

Separate argument was addressed to us on behalf of the respondents 3, 4, 5, 6, 7, 10, 11, 12 and 13. The argument is that in case the plaintiffs' claim succeeds the properties transferred to these respondents should be allotted to the share of the respondent No. 1 in carrying out the partition of the joint family property and that this Court should embody in the preliminary decree a direction to that effect. It is only but fair that on a partition now being effected subsequent to the transfers the alienated properties should be debited to the share of the alienor but this can be done only so far as it is consistent with justice to all concerned. We, therefore, order that the decree shall contain a direction that in making the partition the properties held by the respondents mentioned above shall be allotted to the share of the transferor in all cases where it can be done without causing any prejudice or injustice to others.

As regards respondent No. 13, we may mention that, at a previous hearing of the appeal proceedings were taken *ex parte* against him. An application has now been made for permission to appear. We have heard the learned pleader for that respondent and have given our judgment in respect of his case already.

We, therefore, allow the appeal, set aside the decrees of the lower Court and decree the plaintiff's suit in respect of the properties admitted to be joint family property or held by us in this judgment to be such property. The rest of the claim will stand dismissed. The plaintiffs will get their costs in both the Courts in proportion to their success.

G. H. *Appeal allowed.*

(6) 59 Ind. Cas. 878 ; 18 A. L. J. 679 at p. 682 ; 2 U. P. L. R. (A.) 227 ; 43 A. 50.
(7) 75 Ind. Cas. 328; 21 A. L. J. 958; (1923) A. I. R. (A.) 350 ; 45 A. 445.
(8) 68 Ind. Cas. 94 ; 43 A. 581; 19 A. L. J. 516.
(9) 14 Ind. Cas. 677 ; 15 C. L. J. 376 at p. 379.
(10) 5 O. C. 225.
(11) 11 O. C. 212.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 310 OF 1922.

July 27, 1923.

Present:—Mr. Baker, J. C.

MAN SINGH—DEFENDANT 4—APPELLANT.

versus

KARAN SINGH AND OTHERS—PLAINTIFFS—DEFENDANTS 1 to 3—RESPONDENTS.

*Hindu Law—Joint family—Alienation by father—After-born son whether can challenge alienation—Suit by one of several sons—Alienation for illegal purpose—*In pari delicto potior est conditio possidentis, *applicability of.*

MAN SINGH *v.* KARAN SINGH

A Hindu son cannot object to an alienation validly made by his father before he was born or at least conceived. This principle, however, does not apply to the case of an invalid alienation as an after-born son has a right to a share in such property on account of the property being joint family property at the date of his birth, not having been validy transferred.

Where a Hindu father mortgages property of which he is sole owner, the transaction cannot be attacked by his sons on the ground that the mortgage-debt was incurred for immoral purposes. [p. 262, col. 2.]

Where a Hindu father improperly alienates family property any one of his sons can recover not only his share in, but the whole of the property, to be held for the benefit of the joint family. [p. 268, col.2.]

Where the owner of a property transfers it to another for an illegal purpose and such purpose is not carried into execution, neither the vendor nor his heirs can succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. In such a case the burden of proof lies on the plaintiff and the maxim *in pari delicto potior est conditio poissidenti* applies. [p. 263, col. 2.]

Appeal from the decision of the District Judge, Saugor, dated the 27th March 1922, in Civil Appeal No. 120 of 1921.

Messrs. *G. L. Subhedar* and *J. K. R. Cama*, K. B. for the Appellant.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—These two appeals are companion appeals and may be disposed of in one judgment. They raise a most important point of law, on which the rulings of the various High Courts appear at first sight to be conflicting. It is necessary to go into the facts and law in detail.

The facts are that one Nanho, *alias* Lachman Singh, had two sons by his first wife, named Bhujbal and Hazari. They died in 1917 and 1919 respectively. By his second wife he had a son Karan Singh, who is the plaintiff, and a daughter who was married to Nanhe, son of Mohan Singh, defendant No. 1. Nanhe died in 1918 leaving two minor sons Kirat Singh and Raghunath Singh, who are defendants 2 and 3. On 29th September 1911 Nanhe, *alias* Lachhman Singh sold the property in dispute to Mohan Singh, defendant No, 1. This was admittedly before the plaintiff was born. Bhujbal and Hazari, the two sons of Nanhe by his first wife, did not join in the sale and there is no evidence as to their consent. Nanho, *alias* Lachhman Singh, died on 9th November 1918. On 3rd September 1919 Mohan Singh, defendant No. 1, sold the property to Man Singh, defendant No. 4, the present appellant, who is the first cousin of the plaintiff, being the son of Behari who was Lachhman Singh's brother.

The plaintiff sues to set aside the alienation by Lachhman Singh to Mohan Singh on the ground that it was bogus and without consideration. The most important point in this case is one of law, *viz.*, whether the plaintiff can sue to set aside an alienation made by his father before he was born or even conceived The lower Courts have awarded the plaintiff's claim and held that the sale was bogus and without consideration and that he can sue to set aside the alienation, relying on the cases of *Sobharam Teli* v. *Makdu* (1) and *Tulsi Ram* v. *Babu Lal* (2). A large number of rulings have been quoted on both sides on the subject, some of which are apparently conflicting. It will be necessary to examine these rulings to see whether any consistent principle underlies them all. The basis of the law on the subject will be found in Mayne's Hindu Law, 9th edition, page 468, section 342, where it is stated : "Dispositions of property by a father can, of course, only be objected to by those who have a joint interest with him in the property, either by joint acquisition, or by birth. Where the objection is based on the latter ground, it is necessary to show that such an interest vested in the objector at his birth, or by his birth. Therefore, a son cannot object to alienations *validly* made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor....On the other hand, if the alienation was made by a father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him: *Tulsi Ram* v. *Babu Lal* (2), and *Hurdool Narain Singh* v. *Beer Narain Singh*. (3). The reason of the thing is not of course that the unborn son has any right in the family property at the time of the alienation, but that on his birth he acquired a share in the family property as it

(1) 12 C. P. L. R. 63.
(2) 10 Ind. Cas. 908 ; 33 A. 654 ; 8 A. L. J. 733.
(3) 11 W. R. 480.

then stands. If a previous alienation of any portion of the family property was validated by consent or failure to set it aside in time on the part of the other members of the family then in existence, the property in which he acquires a share at birth is diminished to the extent of the portion thus alienated. If the alienation was invalid, he acquires a share in the whole property including the portion purported to be alienated—not because the alienation was an invasion of his rights, for he had none, but because it was bad in itself and did not diminish the corpus of the joint family property : cf. *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (4).

It will thus appear that the basis of the law on the subject is the validity of the alienation, because if the alienation was invalid, it does not affect the family property and the son subsequently born is entitled to that property undiminished. If this theory be applied to the cases which have been quoted by the learned Counsel for the appellant, it will be found that the underlying principle of all decisions is the same. This principle has been recognised by this Court in the case quoted above. *Sobharam Teli* v. *Makdu* (1) in which it is stated that a son cannot object to an alienation *validly* made by his father before he was born or, at all events, before he was *in gremio matris* (*Sabapati* v. *Soma Sundaram*.(5) *Sobharam Teli* v. *Makdu* (1). But in *Sobharam Teli* v. *Makdu* (1) the alienation was not a valid alienation. It was not shown to have been assented to by the sons then in existence, and, therefore, as laid down in the case of *Hurodool Narain Singh* v. *Beer Narain Singh* (3), the rights of the after-born sons attached. Moreover, it was held that it was clear upon the authorities that any one son, whose claim is not barred by time, could recover the whole of the property to be held for the benefit of the joint family.

The learned Counsel for the appellant has relied on *Narayan Das* v. *Hardiyal* (6) in which it was held that an after-born son can not in a suit on a mortgage made by his father set up the defence of the immoral nature of the debt on account of which the mortgage was executed ; but in that case, at the time when the mortgage was made, the father was the sole owner, and it is now settled law that the defence that the debt was incurred for immoral purposes cannot be set up where the mortgage was made whilst the mortgagor was the sole owner. This case is, therefore, not inconsistent with the principle already laid down that the test is the validity of the transaction sought to be impeached.

The same principle has been laid down in a recent case by the Patna High Court in *Bishwanath Prasad Sahu* v. *Ganjadhar Prasad* (7) which is a case on a mortgage, where it was held that as the mortgage-bond was executed prior to the birth of both the appellants, the interest of the appellants' father, the mortgagor, was completely transferred to the mortgagee subject to the right of redemption in the mortgagor. The appellants obtained a vested interest in the equity of redemption only, which was left in their father at the time of their birth. It also appears from the headnote that the property had been inherited by the appellants' father from their mother's father and it was held that the sons of a Hindu do not by their birth acquire any interest in the property. Again in *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (8) it was held that under the Mitakshara School of Hindu Law a member of a joint family can contest the validity of the alienation by his father or grandfather only of such an interest in the ancestral property as existed at his birth and vested in him by his birth. Where there is a complete transfer of property by mortgage by the father or grandfather prior to the birth of such member, the only interest that may vest on birth is the equity of redemption. In *Soundararajan* v. *Saravana* (9) a suit by a subsequently born son to set aside the sale by his father before his birth of the whole family property was dismissed ; it was held that the entire family property having been sold, there was no property left in which the plaintiff could take an interest by his birth. In *Sardar Singh* v. *Ajit Singh* (10) it was held that the plaintiff having come into

(4) 38 Ind. Cas .913 ; 38 A. 126 ; 14 A. L. J. 25.
(5) 16 M. 76 ; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760.
(6) 21 Ind. Cas. 880 ; 35 A. 571 ; 11 A. L. J. 441.
(7) 43 Ind. Cas. 370 ; 3 P. L. J. 168 ; (1917) Pat. 356 ; 3 P. L. W. 286.
(8) 34 C. 572 ; 11 C. W. N. 462.
(9) 34 Ind. Cas. 794 ; 30 M. L. J. 592.
(10) 2 C. P. L. R. 141.

existence after the sale of the ancestral estate took by his brith no interest therein and could not bring a suit against the purchaser from his grand-father; but the same case lays down that a son takes an interest in ancestral property by birth and, therefore, if there is no ancestral property when he is born, there is nothing in which he can take an interest. The principle, therefore, underlying all these decisions is that if the alienation is valid, the subsequently born son cannot sue to set it aside, but if the alienation is invalid the subsequently born son can sue not because the alienation was an invasion of his rights for he had none, but because it was bad in itself and did not diminish the corpus of the joint family property. This has been laid down in the case quoted above and followed in *Sobharam Teli* v. *Makdu* (1) and in *Bunwarilal* v. *Daya Sunker* (11) where it was held that an alienation, if invalid, because made without the consent of all the co-parceners then in existence, can be set aside even at the instance of another co-parcener who was born subsequent to the alienation.

The only remaining case to which I need refer is *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (4), which has been relied on by the learned Counsel for the appellant, but which lays down the same principle, namely, that the only person who could contest the alienation did not do so and his right became extinct in 1898. The property ceased to be the property of the joint family and passed absolutely to the purchasers. The minor plaintiffs who were born subsequently did not acquire any interest in the property, as it had, at the date of their birth, ceased to be joint ancestral property in which they might have acquired a right by birth.

The first question, therefore, on which the decisions of these appeals will depend is whether at the date of the plaintiff's birth the property in suit had ceased to be joint ancestral property in which he acquired a share by his birth. If the alienation was valid and the property had passed, he acquired no share in it, but if the alienation was invalid the plaintiff can contest it as he has a right to a share in it as it constituted the joint family property at the date of his birth. It has been found by both the Courts below that, as a matter of fact the interest in the property never passed to the purchaser. This is a finding of fact with which this Court cannot interfere in second appeal.

It is contended that, assuming the sale to be to defraud creditors the plaintiff has only a right to his own share and cannot impugn the transaction as a whole. It appears that the plaintiff is now the sole survivor, and it was held in *Sobharam Teli* v. *Makdu* (1), quoted above, that any one son whose claim is not barred by time could recover the whole of the property to be held for the benefit of the joint family. It has also been contended on behalf of the appellant that if the transaction was intended to defeat the creditors, the heirs cannot succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. He relied on *Ragho Atmaram* v. *Purshotam* (12) in which it was held that, where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution neither the vendor nor his heirs can succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. In such a case section 84 of the Indian Trusts Act, 1882, throws the burden of proof upon the plaintiff and the maxim *in pari delicto potior est conditio possidentis* applies. It is pointed out that the general rule is, that the Court will not actually interpose in favour of a man, who is *particeps criminis* in a fraudulent transaction and no reason is apparent why the plaintiff should be regarded as in a better position than the vendor whose heir he is. This was approved in *Maniram* v. *Ganesh* (13), where, at page 150, a quotation from Mr. Justice Story's commentaries on Equity Jurisprudence (p. 191, 2nd English edition) is reproduced :—

> "In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se* Courts of Equity following the rule of law as to participators in a common crime, will not interpose to grant any relief."

(11) 1 Ind. Cas. 670 ; 13 C. W. N. 815.

(12) 4 N. L. R. 26.

(13) 4 Ind. Cas. 283; 5 N. L. R. 146.

It is replied on behalf of the respondents that the plaintiff's case is not based on the fact that the plaintiff's father intended to defraud his creditors, but on the bogus character of the sale, there being no transfer and no intention to transfer.

It is difficult to see what object the plaintiff's father could have had in executing a sale-deed of his property if he had no intention to transfer it, unless he wanted to defraud his creditors.

The plaint is quite clear on the point, paragraph 2 says: " Nanhe Singh, *alias* Lachhman Singh, was heavily involved in debt. To save the *patti* he executed a sale-deed in respect thereof." In paragraph 6 (*a*) the plaint says: " This sale-deed was executed as a safeguard." The defendants denied that there was any intention to defeat the creditors. The first issue framed by the first Court was, " Whether the sale-deed of 29th September 1911 was executed bogus and with a view to save the property from the hands of creditors as alleged by plaintiff ? The finding is in the affirmative, but, as a matter of fact, the point of law now raised was not raised before the Courts below at all. It appears to me that the debts of the plaintiff's father were not such as could not be paid by him. It also appears from the evidence that, subsequently to the transfer, the plaintiff's father's share was actually attached and sold by creditors in spite of the transfer whereupon the plaintiff's father paid up the decretal amount: see the evidence of Munnilal (P. W. 2), Gulzarilal (P. W. 8,). and Munnalal (P. W. 9). It would appear, therefore, that the alleged intention of defrauding the creditors was never carried into effect.

The defendants emphatically denied that the sale in question was intended to save the property from creditors. It was not their case that the claim was barred by reason of the transfer being made for an illegal purpose. It is denied that Nanhe, *alias* Lachhman Singh, had any debts, and, as I have said, the evidence shows that the creditors were not defeated by the transaction. They attached the share and afterwards the plaintiff's father paid up his debts. The illegal purpose, therefore, never got beyond the stage of intention, and the plaintiff's case does not fail on this ground.

There is, however, another aspect of the case. The defendant No. 4 claims to be a *bona fide* purchaser for value. The point does not seem to have been considered by the Courts below. The first Court framed issue No. 5 as follows: " Whether the sale to defendant No. 4 is nominal and intended to defeat plaintiff's right or whether defendant No. 4 is a *bona fide* purchaser for valuable consideration ?"

The first Court framed issue No. 5 in an alternative form and found on it in the affirmative, without stating to which of the alternatives the finding applies. There is no discussion on the point and the finding is meaningless. The lower Appellate Court states in paragraph 7 of its judgment: " A few months later respondent No. 4, Mohan Singh, sold the *patti* to appellant Man Singh, Although there is proof that the sale was executed and that consideration passed, I believe that the sale was collusive and bogus and the consideration was returned." The lower Appellate Court has not referred to any evidence in support of this view and there does not seem to be any on record. The case must, therefore, go back to the lower Appellate Court for decision on the issue whether the defendant No. 4 is a *bona fide* purchaser for value without notice and, if so, what is his legal position.

Costs to be costs in the case.

The other appeal depends on the result of this appeal. It arises out of a suit brought by the appellant against the respondent for rent based on the sale-deed. It will abide the final disposal of this appeal. Findings to be returned by the 15th October 1923.

G. R. D. *Case remanded.*

BISAL SINGH *v.* ROSHAN LAL

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO 1000 OF 1922.

January 21, 1924.

Present :—Mr. Justice Mukerji.

BISAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
ROSHAN LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS

' *Registration Act* (*XVI of* 1908), *s.* 28—*Place of registration—Property fictitious, included for purposes of registration—Registration, validity of—Fraud.*

Section 28 of the Registration Act lays down that to give a Sub-Registrar jurisdiction to register a deed, the property included in the deed or a part of it must be within the jurisdiction of that officer. No question of fraud by one party or the other enters into the language of the section. Where it is found that, as a matter fact, no part of the property included in a mortgage-deed was situate within the jurisdiction of the Sub-Registrar who registered the deed, the registration is void irrespective of the fact whether the mortgagee was or was not aware of the fact. [p. 266, col. 1.]

Second appeal from the decree of the District Judge of Allahabad, dated the 8th February 1922.

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

Nemo., for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are these. Two persons Someshwar and Drigbijai executed the mortgage on which the suit, out of which this appeal has arisen, was brought. The deed was executed on the 4th of June 1907. Someshwar is dead and the mortgagee, Kandhai Lal, is also dead. Kandhai Lal's sons sued Someshwar's sons and Drigbijai for recovery of money on foot of the bond. The defences taken, *inter alia*, were that the deed had not been properly attested and that it was not properly registered. The lower Appellate Court found that the deed had been properly attested and as to the registration it found that the properties mortgaged included a house in village Ghauspur Khathola, Pargana Chail, which never in fact existed. It is common ground that it was owing to the inclusion of this house in the mortgage-deed that the Sub-Registrar of Chail *alias* Allahabad had the jurisdiction to register it. The learned District Judge also found, or purported to find, that the mortgagee was no party to the fraud committed on the Law of Registration and that it was the mortgagors who were solely to blame in the matter.

In this Court it has been urged that the deed was not properly attested, that the property which was found to be fictitious was never intended to be security for the money and, that it must be inferred, therefore, that it was included simply for the sake of registration. Further, it is urged that, whatever the intention of the mortgagee may have been, the law has been infringed and the registration cannot be held to be good. One more point was taken in the grounds of appeal, namely, ground No. 5. But it has not been pressed.

As to the attestation, it is clear that the learned District Judge believed the marginal witness who swore that the executants signed the deed before him. The finding, therefore, of the Court below must be upheld.

On the question of registration, it appears to me that it is difficult to hold with the Court below that the mortgagee was an entirely innocent person in the matter. It being an admitted fact that the property did not exist, it follows that the mortgagee never had a look at the property in order to ascertain whether it should form an adequate security, or it should form with the other properties mortgaged an adequate security, for the money he was going to advance. So far, therefore, as he himself was concerned he was indifferent as to the value or nature of the property. In this state of things, the only legitimate inference to be drawn is that the property was included for the purposes of registration and not for the purposes of security. It has been urged by the learned Counsel for the respondents that this is really going against the finding of fact by the lower Appellate Court. But the so-called finding of the learned District Judge is really an inference to be drawn from the proved facts. There is no direct evidence referred to by the Court below that the mortgagee acted on a particular representation and what that representation was. The defendant Drigbijai Singh gave evidence to the effect that the mortgagee had requested that the property should be included in the mortgage, but that evidence was disbelieved by both the Courts below. The discarding of that evidence

does not give the result that it was proved by any positive evidence that the mortgagee was unaware of the fact that the property did not exist. As I have said, he was perfectly indifferent as to whether the property existed or not. If that was the case, the only object with which the property could have been included was the obtaining of registration in the office of Sub-Registrar of Allahabad. It may be (but there is no evidence to prove it) that the mortgagor said that they had a property within the jurisdiction of the Sub-Registrar of Allahabad and if that was included the registration could be effected at Allahabad and, further, it may be the case that, the mortgagee accepted those words and agreed that for the purposes of registration that property might be included. This is the utmost view that may be surmised in favour of the mortgagee. But the question is, does it absolve him from his responsibility in the matter ?

It is conceded that if the mortgagee was aware of the fact that the property alleged to be in Chail did not exist, the registration would be void. Now, assuming that the mortgagee believed that the property really existed but he allowed it to be included with the other property in the deed, in order that the Sub-Registrar of Allahabad might have jurisdiction, the question would be whether the registration is valid. In my opinion the law on the point is very clearly stated in section 28 of the Registration Act and it simply says that to give the Sub-Registrar jurisdiction the property included in the deed or a part of it must be situated within the jurisdiction of that officer. No question of fraud by one party or the other enters into the language of the law. The question of fraud may be pleaded only to stop a party from raising a plea, but the jurisdiction of a registering officer cannot come into play simply because one of the parties to a transaction has been guilty of fraud. There was no property within the jurisdiction of the Sub Registrar of Allahabad and in my opinion it follows as clearly as possible that he had no jurisdiction to register the deed. There is no case law which deals directly with the point. In every case that has been brought to my notice, the inference was that the mortgagee was more or less culpable. Such an inference is really irresistible and the case which I am asked to suppose is practically impossible to accept. I am, however, of opinion that assuming even that the mortgagee was absolutely innocent in the matter that fact would not give the Sub-Registrar of Allahabad jurisdiction to register the deed. The result must follow, namely, that the deed is inoperative. It may be that the mortgagors have laid themselves open to prosecution or a suit for damages, but that is a different matter.

The result is that the appeal succeeds. I set aside the decrees of the Courts below and dismiss the suit of the plaintiffs-respondents with costs throughout.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2131 OF 1919.

April 30, 1923.

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

MUNSHI LAL—PLAINTIFF—APPELLANT

versus

Must. SHIV DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift—Widow, power of, to make gift for spiritual benefit of herself.

A gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however pious or meritorious, cannot be enforced against the reversioners unless it is proved to be made with that object, and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in question. [p. 269, col. 2.]

Case-law discussed.

A one-fourth share of an estate cannot be described as a "moderate" or "small" share of the estate within the meaning of the above rule. [p. 268, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 28th July 1919.

Mr. *J. G. Sethi*, for the Appellant.

Dr. *G. C. Narang* for *Bakshi Tek Chand*, for the Respondents.

MUNSHI LAL *v.* SHIV DEVI

JUDGMENT.

Fforde, J.—The main question for our consideration is whether a gift made by a Hindu widow to a charitable institution of a portion of her deceased husband's estate is valid as against the reversioners.

The gift, admittedly, amounts to a little more than one-forth of the whole estate of the deceased and it is admittedly made for a charitable purpose.

The Court of first instance in a very clear and well-reasoned judgment held the gift to be invalid for two reasons. Firstly, because it was not made for the spiritual benefit of the deceased husband but for her own good, and, secondly, because it comprised too large a portion of the entire estate.

The first Appellate Court reversed this decision, holding that as the widow had done a virtuous act according to her personal notions, "there was nothing in the eye of the law to stand in her way provided it is ascertained that she has not behaved recklessly and has gifted a reasonable portion of her husband's estate."

Mr. Jai Gopal Sethi for the appellant contends that a gift by a Hindu widow of a portion of her husband's estate is only valid in law if it is made :

(1) for necessity ;

(2) for the purpose of defraying the expenses of the obsequial rites, etc., of the deceased ;

(3) it is given for recognised charitable purposes, for the spiritual benefit of the deceased, and then only if it comprises a small portion of his estate.

In the first two cases the entire estate may be alienated if only by so doing the necessary funds can be obtained.

Dr. Gocal Chand Narang for the respondents, on the other hand, advances the bold proposition that any gift by a widow for a pious purpose, recognized as such by Hindu Law, is valid even though admittedly made for the widow's own spiritual benefit alone. He argues that such a gift, having regard to the Hindu view of the relationship of husband and wife, must necessarily be for the husband's spiritual benefit. He agrees, however, that only a reasonable portion of the deceased's estate can be alienated for this purpose.

The power of a Hindu widow to alienate for necessity, whether the necessity be her own or to defray the obsequial expenses arising out of her husband's death, need not be considered here. It is true that the respondent pleaded necessity in her answer to the plaint but that plea is not relied upon.

The only questions we need consider are :—

(1) Can the proportion of the estate alienated, *viz.*, one-fourth of the whole, be held to be justifiable ?

(2) Was it alienated for the spiritual benefit of the deceased ?

(3) Is the alienation valid though made for the spiritual welfare of the alienor alone ?

The first question, though it has arisen in the course of argument, has not been pressed upon us. In fact Counsel on both sides seem to have assumed that if the gift is valid in law in other respects, it cannot be deemed to be excessive in proportion to the estate. This view appears to me to be very doubtful. The Hindu authorities on the point are all agreed in holding that a gift of a moderate portion of the property only is valid. The difficulty lies in the practical application of this principle. How is a Court to decide what is a moderate portion? In the case of *Ram Chunder Surmah* v. *Gunga Govind Bunhoojiah* (1), referred to in the Tagore Law Lectures of 1899, at page 307, the *Pandits* gave it as their opinion that the widow has the power of alienating from one to three-sixteenths of her husband's property for the "benefit of his soul," but I can find no case in which as large a portion as 3/16ths has been held valid in this respect. It is true that in *Churaman Sahu* v. *Gopi Sahu* (2), cited with approval in *Khub Lal Singh* v. *Ajodhya Misser* (3), the Court held that between 1/6th and 1/3rd of an estate was a reasonable amount to expend on the occasion of a daughter's *Gowna* ceremony but the principles upon which that case was decided can hardly be held to be exactly analogous to those under consideration here.

(1) (1826) 4 Mac. Sel. Rep. 147; 7 Ind. Dec. (O.S.) 110.

(2) 1 Ind. Cas. 945 : 37 C. 1 ; 13 C. W. N. 994 ; 10 C. L. J. 545.

(3) 81 Ind. Cas. 483; 43 C. 574 at p. 585; 22 C. L. J. 845.

MUNSHI LAL *v.* SHIV DEVI

In *Sardar Singh* v. *Kunj Behari Lal* (4), which came before the Privy Council in June of last year, Mr. Ameer Ali, who delivered the judgment of the Board, says as follows: —

"In their Lordship's opinion the Hindu Law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious sentiment and religious belief, and was not, therefore, in excess of her powers, having regard to the fact that the dedication related to one-seventy-fifth of the property; and was made specially for the creation of a permanent benefit."

The Hindu authorities are all agreed that a gift of a "moderate portion," or a "small portion" may be valid when made for the husband's spiritual benefit, but the difficulty is to fix the limit at which the portion gifted ceases to be moderate or small. It must, of course, depend largely upon the facts of each particular case, but I very much doubt if any Court could reasonably hold that a gift amounting to 1|4th of an inheritance could be fairly regarded as "a small fraction of the property."

As we do not intend to decide the present case on the question of the validity of the amount of the alienation, I need not discuss this aspect of the case further. I have only dwelt on it to the extent I have done, so that it may not be said that this Court has acquiesced in the view that an alienation of 1|4th of an inheritance is valid so far as *quantum* in concerned.

The second question is largely one of fact. The Court off first instance has decided it in favour of the appellant, holding that the gift was not made for the spiritual benefit of the husband, who had, at the time of the alienation, been dead for nearly eleven years, but for the alienor's own good.

In my opinion this finding is wholly in accordance with the facts of this case.

(4) 69 Ind. Cas. 86; 44 A. 503, (1922) A. I. R. (P. C.) 261; 16 L. W. 571; 31 M. L. J. 253; 37 C. L. J. 383, 44 M. I. J. 766; 27 C. W. N. 653; 25 Bom. L. R. 648; 2 P. W. R. 1923.

The deed of gift itself nowhere suggests that its object is in any way referable to the spiritual benefit of the husband. It in fact rebuts such a suggestion. The donor declares that the property in question is owned and possessed by herself absolutely and she recites that the donees "have been declared absolute owners of the gifted property like myself."

In her answer to the plaint she makes the case that the alienations in question were for consideration and lawful necessity, and further pleads that the land in question and the houses are not ancestral but were in fact purchased by the father-in law Gobind Ram. It must be conceded, however, that there were other alienations referred to in the plaint in addition to the one in question, and, moreover, a litigant in this country should not be too strictly bound by pleadings, but the fact remains that in her final defence the case now made, namely, that the alienation was for her husband's spiritual benefit, is nowhere even suggested.

In the defence to the amended plaint, it is true that she does suggest this plea, but in her statement in Court, made on the 25th June 1918, she definitely declares that her two sons, one of whom died at the age of 14 and the other at the age of 11 years, told her that the property should be given in charity and directed that it be given "in the name of the *Granth Sahib*."

In a further statement made on the 24th of August she appears to have re-considered her position and expressed her reasons as follows :—

"I am a Sikh woman. I believe in *Granth Sahib*. My husband gave me instructions to give the land and the site in charity. He was not a Sikh. This house, *i. e.*, stable, is haunted. My sons used to say that I should get the land and the site entered in papers in the name of the *Pujari* of the *Granth Sahib*."

This is the first time she makes any suggestion that the gift is in any way referable to her husband, and I have no doubt that the improvement in her statement is due to the progressive legal enlightenment which she received in the course of the suit.

The lower Appellate Court's view that her present contention that the gift was intended

to spiritually benefit her husband " can very well be inferred from the virtuous way in which she has made use of this portion of her husband's estate," is in my opinion inconsistent with the facts and unsound in law.

I am quite satisfied that, until the present suit was instituted, it had never even occurred to the widow to consider whether or not the gift might promote her dead husband's spiritual welfare.

It remains to be considered whether such a gift, which is admittedly for a pious and charitable purpose approved of by the Hindu religion, is valid merely for that reason. Dr. Narang in his able argument has relied strongly upon certain observations in the judgment in *Khub Lal Singh* v. *Ajodhya Misser* (2), which undoubtedly favours his contention that if a gift is of a recognized pious nature it must be deemed to accrue to the spiritual benefit of the departed husband. This view, however, has been expressly dissented from in a very recent case on the subject, *Sham Devi* v. *Birbhadra Prasad* (5). That case not only bears a close resemblance to the present one on the facts, but the very proposition advanced by Dr. Narang was discussed in the course of the judgment, where the learned Judges expressed themselves as follows :—

" We are not, however, in accord with the view pressed by the learned Counsel for Sham Dei that an act supposed to conduce to the spiritual benefit of the widow is necessarily an act supposed to conduce to the spiritual benefit of the husband. This proposition appears to have been looked at not with disfavour by the learned Judges who decided *Khub Lal Singh* v. *Ajodhya Misser* (3). We should not go so far as to say that they accepted it. Whatever be its application to persons governed by the Dayabhaga Law, it would not appear to be a doctrine applicable to persons governed by the Mitakshara Law. It is obvious that an act done by a widow supposed to conduce to the spiritual benefit of her husband would confer spiritual benefit on herself, but the converse does not appear to follow. An act done by the widow supposed to conduce to the spiritual benefit of herself would not confer spiritual benefit on her husband. In any circumstances we should have been precluded from accepting this view, in face of the decision in *Puran Devi* v. *Jai Narain* (6).

"The decision in *Khub Lal Singh* v. *Ajodhya Misser*(2) was recently discussed by a Bench of this Court in *Kunj Behari Lal* v. *Lalta Singh* (7). That Bench derived similar assistance to the assistance which we have derived from the exposition of the law therein.

" The conclusion at which we arrive is this, that, unless it can be established that the alienation in question was for the performance of religious acts which were supposed (in this case intended) to be for the spiritual benefit of Bal Kishen, the alienation cannot operate to the prejudice of the reversioners, even if the portion of the property alienated be not excessive."

This judgment, which is in agreement with the views expressed in the Privy Council decision already referred to, finally disposes of the last argument of the respondent. I have no doubt that it must now be held to be the law that a gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however pious or meritorious, cannot be enforced against the reversioners unless it is proved to be made with that object and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in question.

For these reasons, I think the appeal succeeds. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored, the appellant to have his costs throughout.

Raoof, J.—I entirely agree. The judgment of my learned colleague is so full and exhaustive that I have very little to add to it. The rule enunciated in the judgment was clearly and authoritatively stated so far back as the year 1882 in the decision of a Division Bench of the Allahabad High Court in the case of *Puran Devi* v. *Jai Narain* (6), Mr. Justice Tyrrell, who delivered the judgment,

(5) 62 Ind. Cas. 432 ; 43 A. 403 ; 19 A. L. J. 312.

(6) 4 A. 482 , A. W. N. (1882) 115 ; 2 Ind. Dec., (N S.) 1092.

(7) 48 Ind. Cas. 897 ; 41 A. 180 ; 16 A. L. J. 996

following the decision in the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah* (8) made the following observation at page 483 :—

"The point is now covered by authority that acts of alienation calculated to be of religious benefit and efficacy to the widow, or to any persons other than the deceased owner, will not justify an alienation of any part of the property in the hands of the widow. It has been justly pleaded in the second and third grounds of appeal that there is nothing on the record sufficient to show, nor other good reason for believing, that the gift of the house in suit, made some sixteen months after the death of Ram Kishen, without any reference to him or his funeral celebrations, and specifically declared to be '*Bishenprit*', or to the honour of Vishnu, was a gift made to benefit Ram Kishen in his after state, and was not, on the contrary, as indeed from the terms of the deed of gift in this case it plainly appears to be, an offering by the widow to a favoured idol for her own special credit and spiritual advantage."

Every word of this observation is peculiarly applicable to the facts of this case. Here, too, in the deed of gift no mention is made of the name of the husband, nor is it stated that the gift is made for his spiritual benefit. Similarly, the gift in this case was also made after a very long time, namely, 14 years after the death of the husband. Another significant fact is that, while the husband was an Arya Samajist, the gift had been made to *Kukas*. The rule laid down in the Allahabad case has been firmly established by the later decisions of the High Courts in this country as well as by the decisions of their Lordships of the Privy Council to which my learned colleague has referred in his judgment. I accordingly concur in the order made by my learned colleague.

Z. K. *Appeal allowed.*

(8) 8 M. I. A. 529 ; 2 W. R. 61 (P. C.) 1 Suth P. C. J 476 ; 1 Sar. P. C. J. 8 20 ; 19 E R. 631.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 395 OF 1922.

October 3, 1923.

Present:—Mr. Baker, J. C.

D. B. SETH BALLABHDAS AND OTHERS —DEFENDANTS—APPELLANTS

versus

SOBHA SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89, Sch. III, Para 11—Collector—Satisfaction of decree—Termination of powers—Deposit of 5 per cent, not made—Auction-sale whether can be set aside—Auction-sale wrongly set aside by Collector—Private sale by judgment-debtor, validity of.

The powers of a Collector under Schedule III of the Civil Procedure Code terminates when the decree transferred to him for execution is satisfied and the incompetency under para. 11 of the Schedule to transfer the property ceases. [p. 272, col. 1.]

A failure to observe the provisions of O. XXI, r. 89, Civil Procedure Code, is not a mere irregularity and an auction-sale cannot be set aside when the full amount of 5 per cent. of the purchase-money has not been deposited. No allowance has been made by the law for any miscalculation, even though it is based on a wrong information supplied by the Court. [p. 272, col. 1.]

The proceedings for the execution of decrees by a Collector should be regarded, for the purposes of transfers of the property in his hands, as continuing till their final disposal on appeal. So long as such proceedings are liable to revision or appeal, it is open to the Collector to set aside the sale or to order the property to be sold or take such other action as he is empowered to do by the Third Schedule of the Civil Procedure Code. [p. 273, col. 1.]

Appeal from the decree of the District Judge, Saugor, dated the 14th June 1922, in Civil Appeal No. 4 of 1922.

Messrs. *V. Bose* and *P. N. Rudra*, for the Appellants.

Mr. *C. B. Parakh*, for the Respondent.

JUDGMENT.—This appeal raises a rather difficult question of law, on which, so far as I am aware, no direct ruling exists. The facts are that the plaintiff Sobhasingh, defendant No. 5, Bhaironsingh and one Devisingh are brothers. The defendants Nos. 1-3 got a decree in suit No. 25 of 1918 for Rs. 3,310-9-6 against defendant No. 5, Bhaironsingh, and in execution of that decree they attached

his 2-annas 8-pies share in the village of Parsone, Tahsil Khurai. The decree was sent for execution to the Collector, the actual execution proceedings being conducted by one of his Assistants. The property was put to sale and purchased by the decree-holders for Rs. 4,150 on 15th March 1919. Shortly afterwards, the plaintiff and his brother Devisingh borrowed Rs. 6,499 by mortgaging their share of the village to one Pannalal, out of which the plaintiff says he gave Rs. 3,500 to defendant No. 5 to save his share of the family property. The mortgage is dated 16th April 1919. On 17th April 1919 the defendant No. 5 deposited Rs. 3,344-6 0 in Court, being the amount of the decree and something extra for commission. This purports to be a payment under O. XXI, r. 89, Civil Procedure Code, but it does not include 5 per cent. payable to the auction-purchasers under that rule. On 22nd April 1919 the Sub-Divisional Officer held that the decree was fully satisfied and struck off the proceedings by Exhibit P-12. On 24th April 1919 the plaintiff took a sale-deed for Rs. 3,344 from Bhaironsingh of his 2-annas 8-pies share in the village. On 18th July 1919 on appeal by the decree-holders the Collector reopened the proceedings as the full amount due under O. XXI, r. 89, of the Civil Procedure Code, had not been realized, the judgment-debtor having failed to pay the 5 per cent. due to the auction-purchasers. An order was consequently made by the Collector for its payment.

Meanwhile, on 12th February 1919, the decree-holders, the present appellants, filed suit No. 7 of 1919 against all the three brothers—plaintiff, Bhaironsingh and Devisingh—and on 24th March 1919 they applied for attachment before judgment of certain money due under the decree. On 20th August 1919 a decree was passed against defendant No. 5 alone, the other two defendants being discharged. The decree-holders then attached the same *patti* as had been attached in the previous execution proceedings as belonging to Bhaironsingh. The plaintiff objected that he had purchased his brother's interest. His objection was disallowed and he, therefore, brought the present suit under O. XXI, r. 63, Civil Procedure Code, to establish his right to the property.

The first Court dismissed the plaintiff's suit, but on appeal the District Judge, Saugor, set aside the decree and awarded the plaintiff's claim, hence the present appeal by the decree-holders.

The principal point raised on behalf of the appellants is that the sale-deed of Bhaironsingh and his brother, the plaintiff, is void under paragraph 11 of Schedule III, Code of Civil Procedure, as it was made during the period in which the Collector alone was competent to deal with the property.

The point which arises in this case for decision is, whether the sale is void under Schedule III, paragraph 11, Civil Procedure Code, in view of the fact that the Sub-Divisional Officer had struck off the proceedings, holding that the decree was satisfied, although the provisions of O. XXI, r. 89, Civil Procedure Code, had not been complied with. In other words, the question is, whether on the date of this sale, which is 24th April 1919, the Collector was competent to perform any of the duties imposed on him by that Schedule with regard to the judgment-debtor's property. Paragraph 11 of Schedule III of the Code of Civil Procedure is as follows: "So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, * * * * " This rule is based on the doctrine of *lis pendens* and is on the same principle as section 52 of the Transfer of Property Act. It has been laid down that the powers of the Collector terminate when the decree is satisfied. In *Khushalchand* v. *Nandram* (1) it was held that sections 323-325 of the old Code, which correspond to schedule III of the present Code, presuppose a decree which has to be satisfied and which is, therefore, capable of execution. In *Sonba* v. *Ganesha* (2) it was held that the incompetency created by section 325-A exists only for the period during which the execution of the decree remains in the Collector's hands. The moment the decree is satisfied, in or out

(1) 12 Ind. Cas. 572; 35 B. 516; 13 Bom. L.R. (977).
(2) 17 Ind. Cas. 887; 8 N. L. R. 182 at p. 184.

of Court, the Collector's power is at an end, and the incompetency to transfer created by section 325-A of the 1882 Code, which is now paragraph 11 of Schedule III of the new Code, ceases. The whole case, therefore, turns on the determination of the point whether, on the date of this sale the decree was satisfied.

Now, it is quite true that in this case there is an order of the Sub-Divisional Officer, to whom the decree had been transferred for execution by the Collector, to the following effect: " (Exhibit P-12). Judgment-debtor has deposited a sum of Rs. 3,301-1-6 on account of principal and Rs. 42-8-0 on account of commission within thirty days of the sale. The amount be transferred to the Civil Court concerned. The sale is set aside and the case be struck off as fully satisfied. The Court concerned and Treasury Officer be informed. Commission and the purchase-money be refunded. "

When, however, we come to examine the law on the point, as laid down in various decisions of the High Courts, it will appear that any failure to observe the provisions of Order XXI rule 89, Civil Procedure Code, is not a mere irregularity. It has been practically admitted in the present case that the order of the Sub-Divisional Officer referred to above is wrong. It was held by the Calcutta High Court in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3) that the provisions of law regarding the deposit of the 5 per cent. commission in addition to the amount specified in the proclamation of sale must be strictly complied with, and when the full amount of 5 per cent. on the purchase-money has not been deposited the sale should not be set aside. This has been followed in *Sarjoo Prasad Missir* v. *Nannoo Rai* (4), and it has to be observed that these cases make no allowance for any miscalculation even if the judgment-debtor is misinformed by the Court as to the amount which he has to pay. The law imposes the obligation upon the defendant himself to ascertain for himself, by whatever means he likes, the amount he has to pay into Court; hence it would appear that there has not been acompliance in the present case with the provisions of O. XXI, r. 89 of the Code of Civil Procedure, and the sale ought not to have been set aside. Hence I hold that the decree was not satisfied on the date of the sale by defendant No. 5 to plaintiffs.

It appears that the appeal by the auction-purchasers, who are also the decree-holders, was not made on the ground that the sale ought not to have been set aside as there was failure to pay the 5 per cent., but only on the ground that the 5 per cent. should be paid to them, and an order was made for its payment by the Collector to whom an appeal was preferred from the decision of the Sub-Divisional Officer. The execution of decrees by Collectors is governed by the rules made by the Local Government under sections 68 72 of the Civil Procedure Code. Section 70 (1) (c) provides for orders made by any gazetted subordinate Officer, being subject to appeal to and revision by superior revenue authorities as may be as the orders made by the Court would be subject to appeal to and revision by Appellate or Revisional Courts. The rules in the Central Provinces are contained in Notification No. 287 of the 12th February 1912, published in the *Central Provinces Gazette* of February 24th, 1912. Rule No 12 provides for the making over by the Deputy Commissioner of any case sent to him to an Assistant or Extra Assistant Commissioner subordinate to him, and rule 13 provides for appeals from such officers to the Deputy Commissioner. On reading section 68 and the following sections of the Civil Procedure Code it will appear that the provisions with respect to appeals is intended to follow, as nearly as possible, the procedure with regard to appeals from the decisions of ordinary Courts, and the question, therefore, arises as to whether the decisions of the Sub-Divisional Officer cancelling the sale and holding the decree as satisfied can be regarded as a final decision in view of the fact that it was subject to an appeal and that an appeal was actually preferred.

With regard to suits, it has been held by the High Courts that the proceedings must be held to continue till their final disposal on appeal; cf. *Settappa* v. *Muthia* (5), in which it was held that, for the purposes of section 52 of the Transfer of Property Act, proceedings in

(3) 26 C. 449; 3 C. W. N. 288; 18 Ind. Dec. (N.S.); 890.

(4) 85 Ind. Cas. 779; I. P. L.J. 459; 3 P. L. W. 48.

(5) 31 M. 268; 4 M. L. T. 77.

appeal must be treated as a continuation of the proceedings in the lower Court, and a transfer of property, which is the subject-matter of contentious litigation, by a party thereto after the date of the decree of the lower Court and before an appeal is preferred against such decree, will be affected by the principle of *lis pendens* under section 52 of the Transfer of Property Act. It is pointed out at page 270 of that ruling that it is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment and he ought not to suffer for the delay imposed by law. On this analogy it would appear that the proceedings for the execution of decrees by a Collector should be regarded as continuing till their final disposal on appeal. It would appear, therefore, that, so long as the proceedings are liable to revision or appeal, it would be open to the Collector to set aside the sale or to order the property to be sold or take such other action as he is empowered to do by the third Schedule of the Civil Procedure Code.

It is quite true that in this case the Collector, on appeal from the order of the Sub-Divisional Officer, only directed the recovery of Rs. 200 odd which represented the 5 per cent. of the purchase-money, but it would have been open to him to set aside the order declaring the decree satisfied and to direct the execution proceedings to be reopened and to confirm the sale. It has been held by this Court in *Mahadeo* v. *Krishnaji* (6) that the Collector's powers under paragraph 11 of Schedule III of the Civil Procedure Code do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist at least till the confirmation of the sale. In that case it was pointed out that even after the sale had taken place the decree-holder and the judgment-debtor could have applied under O. XXI r. 90 to have the sale set aside on the ground of material irregularity in conducting or publishing the sale which might necessitate a fresh sale. The fact that no such application was made and a resale became unnecessary would not entitle us to hold that the Collector's powers and duties had ceased.

(6) 60 Ind. Cas. 310; 16 N. L. R. 194.

The result of all these decisions is, to show that the powers and duties of the Collector continue until the execution of the decree is finally disposed of. In the present case it is clear that the provisions of O. XXI r. 89, had not been followed and that, therefore, under the Calcutta case quoted above, the sale ought not to have been set aside and the decree was not satisfied. Consequently, whenever an appeal was preferred against that order, it would have been perfectly open to the Collector to set aside that order aside and direct the sale to take place on the ground that the judgment-debtor had not complied with the provision of the law as continued in O. XXI, r. 89 of the Civil Procedure Code. I am aware that this was not the ground pleaded by the decree-holders, who are also the auction-purchasers, in their appeal and it might perhaps be contended that the judgment-creditors themselves considered that the decree had been satisfied The matter is somewhat complicated by the auction-purchasers and the decree-holders being the same persons. In spite of this, I am of opinion that the decree was not satisfied because the provisions of O. XXI, r. 89, were not complied with and that it was, therefore, open to the Collector on appeal to order the property to be sold in execution. I am also of opinion that the proceedings must be held to continue till their final disposal on appeal. The order of the Collector was merely to recover Rs. 207-8 0, but it would have been open to him to order that the sale should not be set aside without the payment of this amount. So long as the Collector had the power of making this order his duties under paragraph 11 of Schedule III of the Civil Procedure Code cannot be held to have ceased, and, therefore, I am opinion that the sale by defendant No. 5 made before the order of the Assistant Commissioner has been finally confirmed on appeal, is affected by the doctrine of *lis pendens* and is prohibited by paragraph 11 of Schedule III, Civil Procedure Code, and the alienation having been made without the written permission of the Collector, is void. This point does not seem to have been argued before the lower Appellate Court.

It is not necessary to go into the question of the payment of consideration or of the genuineness of the sale. The plaintiff's suit must fail. I set aside the decree of the lower Appellate

Court and direct that the plaintiff's suit be dismissed with costs, throughout.

G. R. D. *Appeal allowed.*
S. D.

MADRAS HIGH COURT.

CIVIL APPEALS NO. 332 OF 1920 AND 156 AND 157 OF 1921.

April 4, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

KUDITHIPUDI VENKATARAMAYYA—APPELLANT

versus

KUDITHIPUDI PITCHAMMA AND ANOTHER—RESPONDENTS.

Will—Construction—Earlier clause clear and unambiguous—Later clause ambiguous—Transfer of Property Act (IV of 1888), s. 35—Devise of property belonging to legatee—Legatee retaining his property in his own title—Election—Probate and Administration Act (V of 1881), ss. 128, 130—Demonstrative Legacy—Interest—Suit for account by residuary legatee against other legatee—Defendant suppressing account-books—Burden of proof.

The principle that the later clause of a Will should have preference over the earlier is inapplicable to a case where the earlier clause is clear and unambiguous and can be read in such manner as not to interfere with the later one. [p. 275, col. 2]

A testator has no right to devise property belonging to another person, but if he does devise such property and at the same time leaves a legacy for that person the latter must acquiesce in the devise if he wishes to receive the legacy. But if he choses to retain his property by virtue of his own title, under the doctrine of election he is not entitled to the legacy under the Will. [p. 275, col. 2]

A demonstrative legacy which partakes partly of the nature of a specific legacy and partly of a general legacy and which is directed to be paid out of a certain specified property bears interest from one year after the testator's death even in cases where no provision for interest is made in the Will, notwithstanding that the Probate and Administration Act does not deal with interest on demonstrative legacies' [p. 275, col. 2.]

Chinnam Rajamannar v. *Tandikanda Ramchandra Rao*, 29Mad. 155, followed.

In a suit for accounts by a residuary legatee against other legatees if it appears that the defendants had seized a large portion of the testator's property, were in possession of the accounts kept by the testator and were suppressing the same, it is not necessary for the plaintiff to prove each item of property he claims beyond the possibility of doubt, but if he makes a *prima facie* case the burden is cast upon the defendants to show that the property did not belong to the testator or was subsequently accounted for. [p. 276, col. 2]

Appeals against the decrees of the Additional Subordinate Judge, Guntur, dated the 29th April 1920.

Messrs. *P. Narayanamurti* and *K. Ramana*, for the Appellant.

Messrs. *A. Krishnaswamy Aiyar* and *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.

Phillips, J.—In this case the parties will be styled according to their designation in appeal No. 332 of 1920 presented against the decree in O. S. No. 25 of 1919. The plaintiff is the minor natural brother of one Raghavayya who was adopted by one Guruvarayudu and his wife Pitchamma, the 1st defendant. The 2nd defendant is Raghavayya's widow and the 3rd defendant is her father, the 4th defendant being the minor son of the 3rd defendant. This Raghavayya died on the 20th of November 1915 leaving a Will, Ex. A, which was executed on the 17th November 1915 and registered on the 20th. Under this Will he left certain properties to his mother, his wife and his father-in-law respectively and also the family house to the plaintiff and made the plaintiff his residuary legatee. Shortly after his death, disputes arose between the plaintiff's father and guardian and defendants 1 to 3, and a criminal complaint was filed by plaintiff's guardian against defendants 1 and 3 and their *gumastah* under section 404 of the Indian Penal Code, on the 6th of March 1916. Search warrants were issued and a large quantity of property was found in the 1st defendant's house and also in the house of one Sitamma. This property consisted of cash, jewels, house-hold utensils, promissory-notes and account-books and other papers. When Sitamma was examined, she said that the property so found did not belong to her but had been deposited with her by the 1st defendant for safe custody and

among the properties found in Sitamma's house were a number of promissory-notes executed in favour of the testator Raghavayya. No satisfactory explanation has been given as to why these properties were secreted in Sitamma's house and it can only have been with a view to evade the claims of the plaintiff who was entitled to the property under Raghavayya's Will. The Criminal case was eventually dismissed and the properties found at the search were returned either to the defendants or to their agent. Subsequently, there seems to have been some mediation, but in 1917 a notice was sent on behalf of the plaintiff to the defendants claiming the testator's property and, finally, in November 1918, these three suits were filed.

The plaintiff sues to recover the properties specified in his plaint schedules from the defendants, whereas the 1st defendant and the 2nd defendant have each filed a suit for the recovery of the legacy of Rs. 4,000 left to her by Raghavayya's Will. The minor plaintiff starts at some disadvantage because the defendants 1 to 3 have been residing in the testator's house since his death and were in possession of his properties from the time of his death. The testator besides owning considerable immoveable property had money-lending dealings and, according to the plaintiff, left outstandings of the value of Rs. 80,000, whereas the 3rd defendant only admits outstandings of Rs. 20,000. Admittedly, the plaintiff has obtained possession of the immoveable property and a considerable part of the promissory-notes, etc., left by his brother, and he now brings this suit for certain specified moveables detailed in schedule A to the plaint, for the promissory-notes specified in schedule B, and also for the family house schedule C.

Before dealing with the first two schedules I will deal with the third schedule C. The house referred to was given to the 1st defendant by her husband under Ex. I in 1907, but in his Will Raghavayya leaves expressly this to the plaintiff. No doubt later on in the Will he does say that, " defendants 1 to 3 shall enjoy the property as mentioned above after deducting the property executed and registered by my father in favour of my mother." It is contended for the 1st defendant that this clause nullifies the express devise of the family house to the plaintiff. It is, however, clear that the bequest to the plaintiff is expressed in unambiguous terms, whereas the restriction mentioned afterwards would seem to refer to a certain site specifically mentioned in the previous clause which was also included in the gift-deed, Ex. I, and, consequently, there is no occasion to apply the principle that the later clause of a Will should have preference over the earlier, for in this case the earlier clause is clear and unambiguous, whereas the later is ambiguous and can be read in such a manner as not to interfere with the earlier one. I, therefore, think that the Subordinate Judge was right in holding that this house was devised to the plaintiff. The testator had no right to make this devise as the property really belonged to his mother, but he has made a devise of Rs. 4,000 in favour of his mother. If, therefore, the mother wishes to receive the legacy of Rs. 4,000 she is bound to acquiesce in the devise of the family house. She has chosen to retain the house by virtue of her own title and, therefore, under the doctrine of election, she is not entitled to the legacy under the Will. This disposes of Appeal No. 156 which must be dismissed with costs.

Appeal No. 157 relates only to the question of interest. Raghavayya's minor wife, the 2nd defendant, obtained a decree in the lower Court for the payment to her of the legacy of Rs. 4,000 but interest was disallowed on the ground that no provision for interest was made in the Will and that, in view of the conduct of the defendants, interest could not be equitably awarded as damages. Section 128 of the Probate and Administration Act prescribes that " the legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death," and section 130 states that, "where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death." In the present case the legacy is a demonstrative legacy and has been directed to be paid out of certain specified property and the Probate and Administration Act makes no specific provision for the payment of interest on demonstrative legacies. In England, however, it has always been held that demonstrative legacies, like general legacies, bear interest from one year

after the testator's death, and this law has been applied in this Presidency in *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao* (1). It is argued that, as the Indian Act makes no provision for interest on demonstrative legacies, it must be deemed to have excluded them from the provisions as to payment of interest on general legacies and that, as the law has been codified by the Probate and Administration Act, it is not open to the Courts in India to apply the provisions of the English Common Law. A demonstrative legacy partakes partly of the nature of a specific legacy and partly of a general legacy and in legacies of both these kinds, provision is made either for payment of interest or for the receipt of the produce of the legacy. It is possible that, in some cases, hardship would be entailed upon the executor in being compelled to pay interest on a demonstrative legacy when the fund out of which it has to be paid does not come into his hands for some years after the testator's death, but these cases would be exceptional and I am not prepared to say that the decision in *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao* (1), is wrong and would, therefore, adopt it. Appeal No. 157 must, therefore, be allowed with proportionate costs in so far as interest from one year after the date of the testator's death is concerned.

I will now proceed to deal with the main appeal by the plaintiff in O. S. No. 25 of 1919. He has obtained a decree for part of item 1, item 2, part of items 4 to 10 and such of the items 11 to 53 as have been admitted by the 1st defendant and also for item 15 in schedule B, and the rest of his claim has been dismissed. This appeal relates to the items disallowed.

Before dealing with the evidence in the case, I may make a few remarks on the question of the amount of proof which should be required from either party. It is quite clear that defendants 1 and 3 seized a large portion of the testator's estate and attempted to make away with it. It is also clear that the property which was seized at the time of the criminal case was handed back to their possession and it is incumbent on them to show what has happened to the property in their hands. Among the properties so handed back were six bound account-books and a number of *cadjan* accounts, but neither these nor any other accounts have been produced in this suit. It is admitted by plaintiff's guardian as P. W. 3 that the bound account books did not contain the latest account of Raghavayya but it is, however, possible that they would contain information which would satisfactorily establish the details of the property of which the testator died possessed. The only witness examined for the defendants is the 3rd defendant himself and he has not attempted to explain the non-production of these accounts; in fact, he states that the testator's father who is his own father-in-law never kept any accounts, and would have it that the testator had no accounts to show what his estate was. Apart from the fact that certain accounts were found at the search, we have the recital in Exhibit M (18), a promissory-note executed to the 1st defendant in renewal of a note executed in favour of her son Raghavayya, that the amount was made up of an amount due according to the subsequent rough book. This recital shows clearly that Raghavayya did keep some accounts and it is also shown by the finding of account-books and *cadjan* accounts at the search. The 1st defendant has not chosen to go into the witness-box, whereas the plaintiff has been called upon to prove beyond doubt each and every item of property which he claims : and the Subordinate Judge has not dealt with the evidence in the case as if the burden of proof was wholly on the plaintiff but has not attached any weight to the inference to be drawn from the non-production of the accounts by the 3rd defendant and the absence of any independent evidence on his behalf. Considering the conduct of defendants 1 and 3 and the suppresion by them of the testator's accounts, I think it is not necessary that the plaintiff should prove each item he claims beyond the possibility of doubt, but that, if he adduces a *prima facie* case of the existence of certain property, the burden is cast upon the defendants to show that property did not belong to Raghavayya or has been subsequently accounted for. With these preliminary remarks, I will proceed to discuss the evidence as regards the several items claimed by the plaintiff. The defendants have also filed a memorandum of objections in respect of the items decreed to the plaintiff, and, consequently, all

(1) 29 M. 155.

the items in A and B schedules must now be dealt with.

His Lordship then dealt with the items in detail and, after discussing the evidence, concluded as follows:—

The Subordinate Judge's decree will, therefore, be modified in accordance with the above findings and the plaintiff will get his proportionate costs throughout from the defendants. The memo. of objections is dismissed with costs.

Venkatasubba Rao, J.—I agree.

V. N. V. *Decree modified.*

S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1052 TO 1060 OF 1922.

January 21, 1924.

Present: —Mr. Justice Stuart.

BHUP NARAIN RAI AND OTHERS —DEFENDANTS —APPELLANTS

versus

SRI THAKUR RADHA AND OTHERS —PLAINTIFFS —RESPONDENTS.

Landlord and tenant - Occupancy holding—Lands allotted to several villages—Rent, separate suits for, in respect of lands in each village, maintainability of.

Where lands comprised in one occupancy holding are distributed among several villages, the occupancy holding is split up into as many holdings as there are villages among which the lands are distributed and a separate suit for rent is maintainable in respect of the lands in each village.

Second appeals against the decrees of the District Judge of Ghazipur, dated the 20th April 1922.

Mr. *K. N. Laghate*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—These nine connected appeals arise out of nine suits for arrears of rent brought against the appellants. It appears that, as far back as 1868, certain *Zemindars* in what was known as the Taluka Birpur in the Ghazipur District agreed that the predecessors-in-interest of the present appellants should cultivate 96 *bighas* 19 *biswas* in the *taluka* at a certain rent. At the next Settlement the area and the rent were increased. As time has gone on, the fields held in tenure by these persons have been distributed amongst no less than nine villages and the fields in each village have been amalgamated into a separate area held in occupancy tenure. These appeals arise out of suits for arrears of rent in respect of these nine areas. The main point pressed in appeal by the learned Counsel for the defendants-appellants is that the suits should be dismissed *in toto* because nine suits have been brought instead of one. His argument is that all these nine areas are one holding and that under the law one suit should have been brought for the arrears of rent of one holding. The first point to consider is, whether these areas are one holding or nine holdings. Now, there might be some force in an argument to the effect that originally 96 *bighas* and 19 *biswas* were one holding because the whole area at that time consisted of parcels of land held under one tenure and one engagement, and it might be argued that, when the area increased at the time of Settlement it still remained one holding. But once the nine villages were formed (whenever they were formed) it seems to me impossible to hold that the area held in each village under occupancy rights was not a separate occupancy holding. I do not understand how there could be one occupancy holding consisting of fields which lay in nine different villages and nothing could be worse from the point of view of the appellants than deciding in their favour upon this point, for, if it were held that all this land was included in one holding, a decree for arrears of rent in respect of an occupancy holding in one village would suffice to eject them from all nine villages under the provisions of section 57, Local Act II of 1901. It certainly is true that in the past they were sued in single cases in respect of all the areas and that the areas were treated as one holding. But I think the Courts in the past were wrong, and that the Courts which decided these present cases have taken the right view of the subject. I rely in support of these views on the decision in *Jagannath Prasad* v. *Tore* (1). The facts there were certainly not the same as here, for in that case there was not the slightest doubt

(1) 3 A. L. J. 611; A. W. N. (1906) 253; 29 A 18.

as to the separation of the holdings and here the point, at any rate, is arguable. But the argument derived from the provisions of section 57 is the same here as it was there. For the above reasons, I consider that nine separate suits were rightly instituted.

I now come to the last point. There are a large number of defendants and some were impleaded so late in the day that the recovery of a small portion of the arrears against them was time-barred. The Courts below have awarded this amount against the remainder on the ground that they shared in the cultivation. I accept this view as correct.

I accordingfy dismiss these nine appeals with costs on the higher scale.

Z. K. *Appeals dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 73 OF 1923.

September 26, 1923.

Present :—Mr. Baker, J. C.

CHOONILAL—PLAINTIFF—APPLICANT,
versus
NANI SINGH AND ANOTHER—
DEFENDANTS—NON-APPLICANTS.

Transfer of Property Act (IV of 1882), s 6—Arrears of rent, whether can be transferred—Contract Act (IX of 1872), s. 24—Lambardari Haq, transfer of, whether illegal—Consideration partly illegal—Legality of entire contract.

Lambardari rights in a village cannot be transferred. [p. 278, col. 2.]

Bina Pujari v. *Biraj Mohan*, 3 C. P. L. R. 126, followed.

The assignment by a co-sharer of the right to profits (arrears of rent) is an assignment of a mere right to sue and the transfer of such a right is unlawful under section 6 of the Transfer of Property Act. [p. 278, col. 2.]

Lakhpat Sahai v. *Tikaram*, 47 Ind. Cas. 158 N. L. J. 17, followed

Section 24 of the Contract Act applies where the whole contract is one and the legal part cannot be separated from the illegal, otherwise the legal part can be enforced.

A suit on a bond which formed a part of consideration for the sale of 2-annas *malgusari* and *lambardari* rights cannot be maintained as it is covered by section 24 of the Contract Act

Revision against the decree of the Small Cause Court, Khandwa, dated the 8th January 1923 in Civil suit No. 2679 of 1922.

ORDER.—The facts of this case are peculiar and raise an important point of law.

The applicant held a 2-annas share in a village and was also *Lambardar*. He sold his share in the village to the non-applicants, including the *lambardari* rights and the right to recover arrears of rent. The consideration was partly previous advances and partly a bond for Rs. 475 passed by defendants. As defendants did not pay the amount of the bond, the plaintiff sued them upon it and the defendants pleaded that it was passed for the *lambardari* rights and the arrears of rent which could not be sold, so there was no consideration for the bond.

The Small Cause Court, Khandwa, allowed evidence on this point and, finding that there was a failure of consideration, dismissed the suit. The plaintiff applies for revision.

Admittedly, the *lambardari* rights cannot be transferred, but as the applicant's pleader appears disposed to argue that the arrears of rent can be transferred, I may commence by saying that it has been held by this Court that the assignment by a co-sharer of the right to profits prior to the sale is an assignment of a mere right to sue : of *Lakhpat Sahai* v. *Tikaram* (1), disposed of on 19th March 1917. It is clear, therefore, that the sale of the *lambardari* rights and the rental arrears is unlawful.

Section 21 of the Contract Act quoted by the applicant does not seem to me to apply. It is not a question of a mistake of law, but of a contract part of the consideration of which is forbidden by law. The transfer of a mere right to sue is expressly forbidden by section 6, Transfer of Property Act, and it was decided as long ago as 1889 in *Bina Pujari* v. *Biraj Mohan* (2) that the rights of a *Lambardar* cannot be transferred. Under section 24 of the Contract Act if any part of a single consideration for one or more objects, or any one

(1) 47 Ind. Cas. 158 ; 1 N. L. J. 17.
(2) 3 C. P. L. R. 126.

r any part of several considerations for a ingle object is unlawful, the agreement is oid.

This applies where the whole contract is ne and the legal part cannot be separated om the illegal. Where the legal and the legal parts can be separated the legal part an be enforced.

It has been contended on behalf of the pplicant that the whole transaction evidenced y Exhibits D. 1 and P. 1, the sale-deed and ond is one, and that the present bond forms art of the consideration of Rs. 3,275 for the le of the 2-annas share including the *mbardari* rights and the right to the arrears.

If the whole agreement is treated as one the laintiff must fail, because the promises made y plaintiff constitute a single consideration or defendants' promise to pay and there is no ossibility of apportioning the amount payable or the legal and illegal promises. The case ill be covered by the very similar English ase of *Hopkins* v. *Prescott* (3), where a man greed to buy for a lump sum a private busi- ess which of course may be sold, and a ublic office which is not lawfully saleable.

So also where the parties lumped together wo debts, a lawful and an unlawful one, and reated them as one, *Daulatsing* v. *Pandu* (4) r where the agreement to pay rent was void ecause the amount fixed exceeded the legal mit, *Laxmanlal* v. *Mulshankar* (5) the agree- ent could not be enforced in part, since that ould mean making a new agreement for the arties. But if in the cases mentioned above he lawful and unlawful parts could be sepa- ated, the lawful promise could be enforced.

In the present case I have not the least oubt that the plaintiff's suit must fail. If, s has been contended on his behalf, the whole ransaction is to be treated as one and the ond in suit is part of the consideration for he whole sale, then, on the authorities above uoted, the whole agreement being void no art of it can be enforced. If, on the other and, evidence is admissible to show that this ond was a separate consideration for the sale f the *lambardari* rights and the arrears of rent, then the consideration for it is unlawful and the agreement is void.

In this view of the case it is unnecessary to go into the question of whether oral evidence was admissible to add to the terms of the documents. As a matter of fact the bond (Exh. P. 1) on which the suit is brought recites that Rs. 475 are due out of the price of the 2-annas *malguzari* share and *lambardari* rights purchased from plaintiff, for which the bond is executed. It appears, therefore, to be clearly covered by section 24, Indian Contract Act.

The decree of the Small Cause Court dis- missing the plaintiff's suit is, therefore, correct, although it proceeds on a different ground to that taken by me. As a matter of fact, this aspect of the case was not argued at all. The application is dismissed with costs.

G. R. D. *Application dismised.*

(3) (1847) 4 C. B. 578; 16 L. J. C. P. 459; 11 Jur. 32; 136 E. R. 634; 72 R. R. 647.
(4) 9 B. 177; 5 Ind. Dec. N. S. 118.
(5) 32 B. 449 ; 10 Bom. L. R. 558.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 43 OF 1920.

September 17, 1923.

Present :—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

SIND BANK, LTD.—APPELLANT

versus

AMERSI DYAL AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Judgment-debtor should have saleable interest at the time of the Court sale—Transferee after mortgage not impleaded in mortgage suit, effect of.

The interest of a judgment-debtor contemplated in O. XXI, r. 90, Civil Procedure Code, is that which he has in the property sold at the time of the sale by the Court

If a purchaser of the equity of redemption from a mortgagor is not made a party to the mortgage-suit and a decree is obtained, it is not binding on him and the purchaser of the mortgaged property at the

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sale held in execution of the mortgage-decree acquires only the right of the mortgagee.

Muthammal v. *Rasu Pillai*, 44 Ind. Cas. 753 ; 41 M. 513 ; 28 M. L. T. 106 ; (1918) M. W. N. 251 ; 7 L. W. 420, relied on,

Shaik Abdulla Saiba v. *Haji Abdulla*, 5 B. 8 ; 3 Ind Dec. (N.S) 6 ; *Dadoba Arjanji* v. *Damodar Raghunath*, 16 B. 486 ; 8 Ind. Dec. (N.S.) 803 ; *Kanyaram* v. *Tirath Singh*, 31 Ind. Cas. 37 ; 9 S. L. R. 86, distinguished.

Appeal from an order of Mr. N. W. Kemp, Additional Judicial Commissioner, dated 1st November 1920.

Mr. *Kimatrai Bajra*, for the Appellant.

Mr. *Dharamdas Thawardas*, for the Respondents.

JUDGMENT.—The facts of this case are simple.

One Khanusing and his two sons, members of a joint undivided Hindu family, borrowed in October 1912 certain sums of moneys from the Sind Bank on hundis, and as security for repayment granted the Bank an equitable mortgage over ten *jirebs* of land by depositing with it the title-deeds to the property. The moneys not being repaid within the stipulated time, in August 1916, the Bank sued them for the amount due and prayed for sale of the mortgaged property. The usual mortgage-decree was passed in favour of the Sind Bank on the 31st August 1916. The final decree followed on the 1st February 1918. On the 3rd May 1914 Khanusing and his sons had sold the property equitably mortgaged with the Bank to one Jamila and she in turn sold it to Haji Haroon. Both the conveyances were effected by registered sale-deeds. The property since the sale to Haji Haroon has been in his possession.

Neither Jamila nor Haji Haroon were parties to the suit filed by the Sind Bank against Khanusing and his sons, as apparently the Sind Bank was not aware of the sales nor, as the decreewas *ex parte*, was the sale brought to the notice of the Court.

The decree was assigned by the Sind Bank to one Kalumal Tolaram and on the 21st August 1919 he applied for his name to be brought on the record as the transferee of the decree and for sale of the mortgaged property specified in the decree. The sale proclamation that was issued by the Court in March 1920 described the sale to be of the right, title and interest of the judgment-debtor (Khanusing and his two sons) in the ten *jirebs*of land. It was on the 17th April 1920 that Haji Haroon notified by a public notice that the land in question had been sold to them and that they were not aware of the mortgage with the Sind Bank. At the auction-sale held by the Court the property was purchased by the Respondent Amersi Dyal, for the sum of Rs. 8,250-0-0. The auction-sale was held on the 17th April 1920.

On the 15th May 1920 the auction-purchaser, being made aware of the sale of the mortgaged property subsequent to the mortgage, applied under O. XXI, r. 91, Civil Proceaure Code for sale to be set aside on the ground that the judgment-debtors had no saleable interest in the property as the time of the auction-sale by the Court and the sale proclamation did not disclose that the property had been sold subsequent to the mortgage.

The Learned Additional Judicial Commissioner, Mr Kemp, set aside the auction-sale on the ground that the mortgagors-judgment-debtors had no saleable interest in the property and directed the refund of the purchase-money to the auction-purchaser.

The Sind Bank by their assignee appeal against this order. The main point raised in appeal is that the lower Court was in error in regarding the position of the mortgagors-judgment-debtors at the time of the auction-sale, whereas the Court should have considered their interest in the property at the time of the mortgage. O. XIX, r. 91, Civil Procedure Code as follows : — "The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold." It is obviously the intention of the Legislature that if the judgment-debtor has no saleable interest in the property sold the sale should be declared null and void. And, according to the plain reading of the rule, it contemplates the interest of judgment-debtor in the property at the time of the sale by the Court. Now, after the execution of the mortgage with the Sind Bank, the only interest that the mortgagors retained in the

mortgaged property was their equity of redemption which they disposed of and, consequently, at the time of the sale by the Court it was not that the mortgagors-judgment-debtors had no appreciable interest in the property sold but they had absolutely none, and it is on this ground that the application was made to set aside the sale. Now, Mr. Kimatrai for the appellants contends that what was sold at the auction-sale by the Court was the right, title and interest of the mortgagors subsisting at the time of the mortgage and that the auction-purchaser was not bound by the sales subsequent to the mortgage. In support of his contention he relies on the authority of *Shaikh Abdulla Saiba* v. *Haji Abdulla* (1) and on the following remarks in the judgment, at p. 15: "In fact the intention of the Court is (in mortgage-decrees) to pass to the purchaser the right, title and interest both of the mortgagor and mortgagee. And, in order to surmount the difficulty caused by the form of sale in mortgage-suits, this Court has ruled that the 'right, title and interest' of the mortgagor as it stood when he was making the mortgage (and not merely as it stood at the time of the Court-sale) is what passes under the certificate of sale to the purchaser." He also relies on *Dadoba Arjunji* v. *Damodar Rughnath* (2), "where it was observed in the judgment that, the authorities are clear that he (purchaser) acquires the estate of the mortgagor as it existed when he executed the mortgage." This ruling was followed in *Kanyaram* v. *Tirathsing* (3), where it was held that, what is sold at the sale in execution of the first mortgagee's decree is the right, title and interest of the mortgagor as it existed at the time of the first mortgage.

Now, in the present case, it cannot be overlooked that in the suit by the Sind Bank against the mortgagors for sale of the mortgaged property neither of the purchasers was a party to it as they should have been in a regularly constituted suit. Neither of them, therefore, was bound by the decree passed in the mortgage-suit. As stated by Ghose on Mortgages 3rd Ed., p. 733, if a suit has been properly constituted, that is, if the mortgagor and all subsequent assignees are parties to it, the title of the purchaser will be absolute relating back to the time of the execution of the mortgage. He will not, therefore, be bound by any subsequent dispositions made by the mortgagor as the sale will cut off all such interests.

In *Muthammal* v. *Razu Pillay* (4) the following observations appear in the body of the judgment, at p. 515: "A mortgagee who sues for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of the mortgage, or transfers that title to the purchaser, free from all interests and liens subsequently created by the mortgagor, provided he makes the owner of such interests or liens parties to the suit, but if he omits to make any of them parties, their rights or liabilities are not affected;" and at p. 516 it is said: "If the mortgagor or owner of the final equity of redemption is not made a party to the suit the purchaser at the sale at the best acquired only the interest of the mortgagee."

Now, it has been established that the possession of the property mortgaged is with Haji Haroon, who had purchased it from the mortgagor prior to the suit by the mortgagee. To this suit, as I have already observed, Haji Haroon was not impleaded as a party and consequently was not bound by the decree for sale of the mortgaged property. At the Court auction-sale, therefore, what the respondent purchased was only the right of the mortgagee, the whole of the equity of redemption being vested in Haji Haroon. A suit for possession of the mortgaged property by the respondent would not be entertainable as held by the Full Bench in *Hargulal Singh* v. *Gobind Rai* (5) on facts identical with the present case. This decision was followed in *Entholy Kizakik* v. *Vallath Koylil* (6). In both these cases there was a sale by the mortgagor subsequent to the mortgage and after the sale the mortgagee instituted a suit for the sale of the mortgaged property without impleading the purchaser as a party to it, and obtained a decree for sale. The purchaser at the sale in execution of the decree brought a suit for possession and it was held

(1) 5 B. 8; 3 Ind. Dec. (N.S.) 6.
(2) 16 B 486; 8 Ind. Dec. (N.S.) 803.
(3) 31 Ind. Cas. 87; 9 S. L. R. 86.
(4) 44 Ind. Cas. 753; 41 M 513; 23 M. L. J. 106; (1918) M. W. N. 251; 7 L. W. 420.
(5) 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 350. (F. B.).
(6) 30 M. 500; 17 M. L. J. 481.

that he was not entitled to possession as all that passed to him at the sale was the right of the mortgagee on a simple mortgage.

This is all that the respondent in the present case can be deemed to have acquired by his purchase at the sale held in execution of the decree, for at the sale of the mortgaged property the mortgagors-judgment-debtors had no interest in the property as they had parted with the only interest that they retained after the mortgage, *viz.*, the equity of redemption, and, as observed, the decree for sale of the mortgaged property was not binding on the purchasers from the mortgagors as they were not parties to it. The result, therefore, is that the judgment-debtors had no saleable interest in the property at time of the Court auction-sale and the appeal must stand dismissed with costs.

P. M. A. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 24 OF 1923.

January 11, 1924.

Present :—Mr. Wazir Hasan, A. J. C.

ABDUL SHAKUR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Muhammadan Law—Succession—Co-heirs, possession of, whether adverse—Exclusive enjoyment of profits.

The possession of some co-heirs of a deceased Muhammadan over the undivided estate of the deceased is the possession of all the co-heirs who are co-sharers in the estate. [p. 283, col. 1.]

The mere fact that the co-heirs who are not in possession have not been in the enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the co-heirs who have been in possession and have enjoyed such profits. [p. 283, col. 2.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 30th October 1922.

Messrs. *Muhammad Ayub*, *Ali Zahir* and *Niamatullah*, for the Appellants.

Messrs. *Wasi Hasan* and *Kalbe Husain*, for the Respondents.

ORDER.—The plaintiffs-appellants claim a 7|40ths share in the inheritance of Mt. Amina Bibi, who died on the 3rd June 1919. Plaintiff No. 1 is her husband. The other plaintiffs are her sons and one daughter. The estate of Mt. Amina Bibi, with regard to which this claim is preferred, consisted of her share in the inheritance of her father, Ahamad Ali Khan, who died in April 1907. Ahmad Ali Khan was married twice. Mt. Amina Bibi, deceased, and Muhammad Ali Khan, defendant No. 1, were his children born of the first wife. The second wife is Mt. Naima Bibi, who is defendant No. 3 in the present litigation. Her son Mahmud Ali Khan, is defendant No. 2. Muhammad Ali Khan, defendant No. 1, sold a half share in a certain grove to defendant No. 4. This grove admittedly belonged to Ahmad Ali Khan and is item No. 6 in the list of properties mentioned in paragraph 3 of the plaint of the present suit. That Mt. Amina Bibi was one of the heirs of Ahmad Ali Khan under the Hanafi Muhammadan Law is admitted. It is also admitted that her share of inheritance in the estate of her father was 7|40ths. It is further admitted that the plaintiffs, the husband and the children of Mt. Amina Bibi, respectively, are the heirs under the same law of Mt Amina Bibi. It follows that if Mt. Amina Bibi had a title to the property to the suit, as it is admitted she had, that title devolved on the present plaintiffs. It is again a common ground that defendants Nos. 1 to 3 are the other heirs of Ahmad Ali Khan and entitled to his estate less than the share of Mt. Amina Bibi. On this state of pleadings it is perfectly clear that this is a dispute with regard to a share in an estate in which all the parties to the suit have title as co-sharers. Amongst the pleas raised in defence the only plea tried by the lower Appellate Court is one of limitation. That plea has been found by that Court in favour of the defendants with the result that the suit has been dismissed. This was done in agreement with the decision of the Court of first instance on the same plea. Other issues which arose in the case have not been decided by the lower Appellate Court though

they were all decided by the Court of first instance.

The only point, therefore, in second appeal urged on behalf of the plaintiffs-apellants is one of limitation and the finding of the lower Courts on that point is challenged. The lower Appellate Court has found that the plaintiffs have failed to prove their possession within limitation and that the defendants have succeeded in proving adverse possession.

The first finding can be disposed of in a few words. It is a well accepted principle of law, to which no attention seems to have been given by the learned Judge in the Court below, that the possession of one co-sharer is in law the possession of the other, unless it is shown to be otherwise. The defendant's possession, therefore, in the circumstances of this case, must be deemed to have been not only exclusively in their own interest but also for and on behalf of the other co-sharers in the common estate. The title being with the plaintiffs, as is shown above, it subsists certainly in a case where the opposite party in possession is a co-owner. In the case of *Hardat Singh* v. *Gurmukh Singh* (1), Lord Buckmaster, in delivering the judgment of His Majesty's Privy Council, made the following observation :—" Possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former." Further, in the case of *Kennedy* v. *De Trafford* (2), Lord Herschell, in speaking of the character of the possession of a co-owner, made the following ovservation : —"Dodson was an owner of this property—the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner." It must, therfore, be held that the possession of the defendants over the undivided estate of the common ancestor of the parties is the possession of all the co-sharers in that estate.

The second question is one of adverse possession. The Court below has found that mutation of names in the Rrevenue Registers on the death of Ahmad Ali Khan was made in favour of his sons only, though this was done with the knowledge and with the consent of their sister, Mt. Amina Bibi. It has further found that neither Mt. Amina Bibi nor the plaintiffs in the present case ever lived together with the defendants. It has also found that neither she nor her heirs ever enjoyed the fruits of the common estate. These are the findings of fact and must be accepted as conclusive in second appeal. The question of law which now arises for determination is, whether, in the circumstances of this case, these facts found by the lower Appellate Court constitute adverse possession as understood in law in a case between co-sharers. Here, again, the finding of the Court below that adverse possession has been proved must be set aside.

It is clear beyond any shadow of doubt that the fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the defendants who have enjoyed such profits. The simple reason for this view of law is that the fact is consistent with the legal title in the co-tenant in possession ; but having the title to possession his act of exclusive enjoyment of the profits cannnot amount to a hostile assertion on his part as against the title of the co-tenant not in possession. See the decision of Mr. Justice Mookerjee in the case of *Jagannath Marwari* v. *Sm. Chandin Bibi* (3). The fact that mutation in the name of the sons of Ahmad Ali Khan was made with the knowledge and with the consent of Mt. Amina Bibi is tending more in the direction of negativing the plea of adverse possession rather than in support of it.

I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and, as the appeal in the Court below was disposed of upon a preliminary point, the case is remanded to that Court with direction that it shall be restored to its original number in the Register of Appeals in that Court and tried according to law. The costs shall abide the event.

Z. K. *Appeal allowed.*

(1) 47 Ind. Cas. 626 ; 28 C. L. J. 487; 58 P. W. R. 1918 ; 64 P. R. 1918 ; 24 M. L. T. 389 ; 20 Bom. L.R. 1064 ; (1919) M. W. N. 1 ; 9 L. W. 123 ; 1 U. P. L. R. 8 (P. C.).

(2) (1897) A. C. 180 ; 66 L. J. Ch. 418 ; 76 L. T. 727 ; 45 W. R. 671.

(3) 26 C. W. N , 65.

ANNAPURNABAI *v.* RUPRAO

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 11-B. OF 1922.

September 26, 1923.

Present:—Mr. Kotval A. J. C., and Mr. Prideaux, A. J. C.

Must. ANNAPURNABAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RUPRAO—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Suit by adopted son for possession of property—Limitation Act (IX of 1908), Sch. I, Art. 118—Partition between co-widows, whether binding on adopted son.

A suit by a person alleged to be the adopted son of another for the possession of the estate belonging to the latter after his death where the relief sought is possession, and the validity or factum of adoption is incidentally in issue, is not governed by Art. 118 of Sch I to the Limitation Act. [p. 285, col. 1.]

A partition between co-widaws of the husband's estate before the adoption is not binding on the adopted son who divests both of them of the estate as all co-widows must in law be treated as one person. [p. 285, col. 2.]

Appeal against the decree of the 2nd Additional District Judge, East Berar, Amraoti, in Civil Suit No. 56 of 1919, dated the 28th October 1921.

Messrs. *J. K. R. Cama*, K. B., *M. Gupta*, *N. G. Bose*, R. B. and *T. L. Shevde*, for the Appellants.

Sir *B. K. Bose* and Mr. *S. B. Tambe*, for the Respondent.

JUDGMENT.—One Shankar Rao Patel of Ghuikhed, Taluq Chandur, District Amraoti, died in February 1908 leaving behind him two widows, Ambu Bai and Annapurna Bai. Ambu Bai is the elder of the two. The plaintiff, Ruprao, claims to have been adopted by Ambu Bai on the 12th January 1912 when he was a minor. He states that he attained majority in October 1915. He sues for possession of certain property belonging to the deceased Shankar Rao. The defendants are (1) Annapurna Bai and (2) Kashinath, a minor. Kashinath claims to have been adopted by Annapurna Bai with Ambu Bai's consent in June 1908 in Benares where the widows had gone to immerse the deceased Shankar Rao's bones in the holy waters. It is said that Shankar Rao had given express authority to both his wives to adopt. The defendants contend that the suit is barred as the plaintiff and his guardian Ambu Bai had knowledge of his adoption more than six years before suit and the suit was not brought within six years from the date of the knowledge or three years after the plaintiff attained majority. They denied the plaintiff's adoption by Ambu Bai. Defendant Annapurna Bai claims maintenance in case Kashinath's adoption is not proved. These are the pleadings material to this appeal.

* * * * *

The question to be next dealt with is that of limitation. It is urged on behalf of the appellants that the main object of the suit was to have it declared that plaintiff is, and defendant No. 2 is not, the adopted son of Shankar Rao; that there is evidence that defendant No. 2 has been treated as the adopted son since about 11 years before suit; that the plaintiff and Ambu Bai must have known of the allegation of adoption during all those years, and that as the suit is brought admittedly more than three years after the plaintiff attained majority it is time-barred. It is further urged that the knowledge of Ambu Bai must be attribued to the plaintiff. In the plaint the only reliefs asked are possession and profits of the property of Shankar Rao, In the course of the statement of his case the plaintiff mentions the fact that in Patelki proceedings in 1913 Annapurna Bai alleged that Kashinath was adopted by her. He denies the adoption by defendant No. 1 or defendant No. 1's power to adopt and states that defendant No. 2 has been joined only to have a full decision of the plaintiff's right in connection with the property in suit. It is said that this constitutes an implied prayer for the relief of declaration that defendant No. 2's adoption is invalid and never in fact took place. There are a number of witnesses who say that defendant No. 2 was said to be or known as Shankar Rao's adopted son, but from the conduct of Annapurna Bai with regard to Patelki and mutation proceedings after Shankar Rao's death, the partition of the property of Shankar Rao, the suits filed by Annapurna Bai and Ambu Bai, and the failure to mention the adoption in Exhibit P-36, any allegation of the adoption is not very likely. The first time that the allegation of the adoption appears to have been definitely made is on the 8th November 1913 in the Patelki proceedings, Exhibit P-37.

Assuming that Ambu Bai knew before 1913 that defendant No. 2 was alleged to be adopted and, further, that Ambu Bai's knowledge can be attributed to the plaintiff, so far as this Court is concerned, it has always been held that Article 118 has no application in a suit like the present, where the relief sought is possession of property and the validity or factum of adoption is incidentally in issue: vide *Chintaman* v. *Seth Mohanlal* (1), *Deorao Zamindar* v. *Mt. Saku Bai* (2) and *Soni Bai* v. *Dhanraj* (3), (Bench) dissenting from the Bombay ruling *Shrinivasa Sarjerao* v. *Balwant Venkatesh* (4) which follows *Shrinivas* v. *Hanmant* (5) on which the appellants rely. The view in this Court is in consonance with that of the Allahabad and Calcutta High Courts in *Nathu Singh* v. *Gulab Singh* (6) and *Ram Chandra Mukerjee* v. *Ranjit Singh* (7). *Velaga Mangamma* v. *Bandlamudi Veerayya* (8) was a case under Article 119. The Bombay High Court has in *Doddawa Purshya* v. *Yellawa Mallappa Beni* (9) taken the same view as the other High Courts: see also *Radha Dulaiya* v. *Bashik Lal* (10). We hold that the suit is not barred by limitation.

Another point argued is this. It is said that an adopted son has the right to set aside such acts of the widow as were beyond her power but not such as were within it; that in the present case since the widows quarrelled and it was necessary that they should have separate maintenance the allotment of a share to Annapurna Bai was a prudent act within the power of the widows and the adopted son had no right to take away the property allotted to Annapurna Bai. It is said that the income of this property was not more than an adequate maintenance of her. Reference is made to Mayne's Hindu Law, page 270, paragraph 197, where it is said that any encumbrances or alienations created or made by the widow are binding on the adopted son if they are within the widow's powers. These remarks do not, in our opinion, apply to a case like the present of a partition between the widows. All co-widows must in law be treated as one person and the adopted son divests that person. The partition between the co-widows was a mode of separate enjoyment binding on themselves and cannot enlarge their legal rights so as to affect the adopted son. As to the argument that the partition should be maintained on the ground that the income of the moiety alloted to Annapurna Bai under it represents not more than an adequate maintenance, the answer is that, what was a fair arrangement as regards the amount and form of maintenance when the rights of only the two widows were to be considered, cannot possibly be fair when the rights of the adopted son have come into existence. The widows are no doubt entitled to maintenance but it cannot be in consonance with the rights of the adopted son to hold that each of them is entitled to keep a portion of the family lands in lieu of maintenance, and we think that there is no justification for allowing Annapurna Bai to be in possession of the property in her hands which is half of Shankar Rao's property or any part thereof in lieu of maintenance.

* * * *

G. R. D.
S. D.

(1) 3 C. P. L. R. 32.
(2) 11 C. P. L. R. 49.
(3) 56 Ind. Cas. 620; 3 M. L. J. 191.
(4) 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 538.
(5) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. S.) 709.
(6) 17 A. 167; A. W. N. (1895) 36; 8 Ind. Dec. (N. S.) 438.
(7) 27 C. 242; 4 C. W. N. 405; 14 Ind. Dec. (N. S.) 160.
(8) 30 M. 808; 2 M. L. T. 178; 17 M. L. J. 182.
(9) 67 Ind. Cas. 134; 46 B. 776; 24 Bom. L. R. 158; (1922) A. I. R. (B.) 228.
(10) 75 Ind. Cas. 14; 45 A. 1; 20 A. L. J. 814; (1923) A. I. R. (A.) 25.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1556 of 1923.

January 31, 1924.

Present:—Mr. Justice Moti Sagar.

THE COURT OF WARDS OF NAWABZADA MUHAMMAD ZULFIKAR ALI KHAN —JUDGMENT-DEBTOR—APPELLANT

versus

ABRAR ALI—DECREE-HOLDER —RESPONDENT.

Limitation Act (IX of 1908), s. 7—Adult and minor decree-holders — Execution of decree—Limitation— Adult decree-holder, whether can grant discharge—

COURT OF WARDS v. ABRAR ALI

Muhammadan Law—Guardianship—Uncle, whether guardian of nephew's property.

Where one of two joint execution creditors is a minor, the other execution-creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor within the meaning of section 7 of the Limitation Act. [p. 286, col. 1.]

Jagannath Singh v. *Mohabir Das*, 15 I. C. 664, followed.

Case law discussed

Under the Muhammadan Law the uncle is neither the legal nor the natural guardian of the property of his minor nephew, and where he obtains a decree jointly with his nephew he is not competent to grant a valid discharge of the decree within the meaning section 7 of the Limitation Act, and limitation for execution of such a decree does not, therefore, begin to run till the disability of the minor decree-holder ceases. [p. 287, col. 1.]

Second appeal against the order of the District Judge, Karnal, dated the 4th April 1923.

Mr. *Mukand Lal Puri*, for the Appellant

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The sole question for determination in this appeal is, whether an application for execution of a decree is or is not barred by limitation. The decree was made on the 20th of December 1916 in favour of three persons of whom two, Sajid Ali, and Zahid Ali, were minors represented by their next friend, Mst. Kazimi Begam and the third, Syyid Abrar Ali, was *sui juris*. The present application for execution was presented on the 9th of May 1922 when more than three years from the date the decree was passed had expired. It was contended on behalf of the judgment-debtor, who is now the appellant before me, that a valid discharge could be given by the adult decree-holder without the concurrence of the other decree-holders, and that the application was, therefore, time-barred. The learned Judges of the Courts below have held that as two of the decree-holders were minors, the application of the 9th of May 1922 was in time by reason of section 7 of the Indian Limitation Act of 1908. That section lays down that where one of several persons jointly entitled to make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. The only question, therefore, that arises for consideration is whether in the present case the adult decree-holder could or could not have given a discharge without the concurrence of the minor decree-holders.

It is argued by Mr. M. L. Puri, who appears on behalf of the appellant, that Sayyid Abrar Ali, the adult decree-holder, was competent to give a valid discharge and relies in support of this contention upon the cases reported as *Daulat Ram* v. *Syad Abdul Kasim* (1) and *Challagundalla Varamma* v. *Madala Gopaladasayya* (2). Now the first case was considered in a recent Full-Bench judgment of this Court reported as *Mathura Das* v. *Nizam Din* (3) but not approved of. The second case is a Madras case and it is well known the Madras High Court has always taken a view in relation to this question which has not been accepted by any of the other High Courts in India, see *Ghulam Gous Mia Khat* v. *Shriram Pandurang Jairamrao* (4), *Zamiv Hasan* v. *Sunder* (5), *Surja Kumar* v. *Arunachunder Roy*, (6), *Mathura Das* v. *Nizam Din* (3). In *Jagannath Singh* v. *Mohabir Das* (7) it was held that "where one of two joint execution-creditors is a minor, the other execution-creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor." This view was based mainly on the provisions of section 461 of the Code of 1882, which corresponds to Order XXXII, rule 6, of the present Code of Civil Procedure. This rule lays down that, "where there is a decree for money or other moveable property for the benefit of a minor, the next friend for the suit, who is other than a statutory guardian, cannot receive the money unless the Court grants him leave to receive the property." It is also clear that under the Muhammadan Law the uncle is neither the legal nor the natural guardian of the property of a minor, and it is difficult to

(1) 60 P. R. 1893.

(2) 46 Ind. Cas. 202; 41 M. 659 at p. 682; 35 M.L.J. 57; 24 M. L. T 115; 8 L. W. 62; (1918) M. W. N. 461 (F. B.).

(3) 41 Ind. Cas. 921 ; 68 P. R. 1917 ; 107 P. L. R. 1917 ; 81 P. W. R. 1917.

(4) 51 Ind. Cas. 79; 43 B. 487 ; 21 Bom. L.R. 853.

(5) 22 A. 199 ; A. W. N. (1900) 8 ; 9 Ind. Dec. (N S.) 1163.

(6) 28 C. 465 ; 5 C. W. N. 767.

(7) 15 Ind. Cas. 664.

understand how, in these circumstances, the adult decree-holder could have given a valid discharge so as to bind the interest of the other decree-holders. In my opinion the first contention of the appellant cannot, therefore, be supported.

Next, it was argued that, at any rate, Abrar Ali's application should be regarded as time barred, especially as in the plaint individual shares were specified. This contention, in my opinion, is equally untenable. The decree was a joint decree in favour of the plaintiffs for possession of 153 *bighas* of land on payment of Rs. 974 to the defendant and no shares were specified in the decree to which, according to the judgment-debtor, the decree holders were entitled under Muhammadan Law. Moreover, the limitation was clearly saved by the operation of section 7 of the Indian Limitation Act and the contention cannot possibly, therefore, have any force. In my opinion the case is completely covered by the above section and the order of the District Judge must be affirmed.

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

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 452 AND 453 OF 1922.

October 24, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswamy Sastri.

MULPURI VEERABHADRADU AND ANOTHER —APPELLANTS

versus

MEDAPUDI SUBBARINA AND OTHERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3, cl. (2) (e) and (5)—Pre-settlement Inam in Zemindari—Inam treated as part of Zemindari in Permanent Settlement, whether "Estate"—Exchange of Inam lands for patta lands, whether changes character of Inam lands—Minor Inamdar in **mokhasa**, *whether land-holder—* "**Mokhasa**" *tenure,* "**Chathurbagham**" *tenure, meanings of.*

Where a pre-Settlement *mokhasa Inam* in a *Zemindari* had been granted by the holder thereof on favourable quit rent and at the time of the Permanent Settlement, the *mokhasa* was, notwithstanding s. 4 of Madras Regulation 25 of 1802, treated as part of the *zemindari* assets and in the income taken into account for the purposes of grant of *sanad*-

***Held*, that the Inam formed part of an "Estate" within the meaning of s. 3 cl. (2) (e) of the Estates Land Act, even if the Inam land had been exchanged for lands held under Government *Pattas*.** [p. 290, col 2]

A pre-settlement grant would not form part of a *Zemindari* unless it can be brought under any of the sub-clauses of s. 3, cl. (2) of the Estates Land Act.

Where, at the time of the Permanent Settlement, lands which the Government might have excluded from assessment by reason of the various grounds set forth in cl. 4 of the Regulation were, as a matter of fact, included in calculating the assessment payable by the *Zemindar*, and where both the Government and the *Zemindar* from 1802 have acted on the footing that the Inam forms part of the *Zemindari*, the tenants who were subsequently introduced into the property have no right to question the acts of the person entitled at the time of the *sanad* to enter into those arrangements.

A minor Inamdar in a *Mokhasa* is a land-holder within the meaning of s. 3, cl. (5), of the Estates Land Act. [p. 291, col. 1]

"*Chathur Bhagam*" is the fourth part of the annual crop received by Government from holders of certain alienated Inam lands. [p. 288, col. 1.]

"*Mokhasa*" tenure is one which is created by an assignment of village or land to an individual either rent free or at a low quit rent on condition of service. [p. 288, col. 1.]

Appeal against the orders of the Subordinate Judge, Bezwada.

Mr. *V. Ramadoss*, for the Appellants.

Messrs. *P. Narayanamurthi* and *V. Suryanaryana*, for the Respondents.

JUDGMENT.—These appeals arise out of two suits filed by the plaintiff in the District Munsif's Court of Nuzvid, to eject the defendants who are alleged to be his tenants.

The land in dispute is situate in Arugolanu *Mokhasa* within the ambit of the Nuzvid *Zemindari* It is alleged to have been exchanged for *patta* lands held under Government *pattas*. The defendants pleaded *inter alia* that the Civil Court had no jurisdiction to entertain the suits as the land forms part of the estate within the meaning of the Estates Land Act. The District Munsif found the 5th issue, namely, whether the suit village is an estate, in favour of the defendants, and dismissed the plaintiffs' suits on the ground

that the land in question was part of an estate within the meaning of the Estates Land Act. On appeal the Subordinate Judge held that the village in which the suit land is situate forms part of the Nuzvid *Zemindari* and is an 'estate' as defined in section 3, cl 2 (*e*) of the Estates Land Act, that the character of the land has not changed by reason of the exchange referred to in the plaint, and that the plaintiff is, therefore, a landholder. He returned the plaints for presentation to the Revenue Court and against those orders the plaintiff has filed the present appeals.

The land in dispute was admittedly part of the Nuzvid *Zemindari*. The village of Arugolam in which the land is situate appears to have been granted as *Mokhasa* in 1747 by the then holder of the *Zemindari* Jaggannatha Appa Rao. The original grant has not been produced but the terms of the grant can be gathered from Ex. I which is an extract from the *Inam* Register. The *Inam* is classed as personal *Inam*. The *Ayakat* is said to be 1781-85, *Poramboke* 542-54 and the *Inams* 50 acres, 91 cents. Under the column of the description of *Inam*, the entry is *Bhata Vrilti*. The original grantees were Desapandayas. It is admitted before us that Desapandayas were the persons who were doing the duty of collecting the revenue. Under the heading of tenure, the entry is : "The tenure is *Chaturbhagam* now also settled on the same tenure on produce 450-0-0." The grant is said to be hereditary by prescription and is said to have been granted by Jaggannatha Appa Rao in Fasli 1156 or A. D. 1747. The East India Company acquired the Government of the Circars in 1768 and the grant, therefore, was one made not only before the Permanent Settlement but before the acquisition by the Company of the Government of the Circars. "*Chatur Bhagam*" is defined in Wilson's Glossary as the fourth part of the annual crop received by Government from the holders of certain alienated lands. In *Sri Rajah Sobhanadhri Appa Rao Bahadur* v. *Sri Rajah Venkatanarasimha Appa Rao Bahadur* (1) the tenure known as '*Mokhasa*' has been defined as one which is created by an assignment of village or land to an individual either rent free or at a low quit rent on conidtion of service.

(1) 26 M. 403.

It is argued for the appellant that the grant was on favourable quit rent which means something less than the actual *melwaram* which the landlord would be entitled to but for the grant and that in case of *Chatur Bhagam Mokhasas*, the grant was on condition that only a fourth of the produce was paid to the *Zemindar*, that the very fact that the *Mokhasa* was granted for *Bhata Vritti*, that is, service, and that the grantees were Desapandayas or Collectors of Revenue shows that the benefit to the grantees by reason of the grant of the *Mokhasa* was the difference between the rent which would ordinarily have been paid and the fourth which the grantees have to pay. It seems to us to be clear that the grant being a pre-Settlement grant, it would not form part of the *Zemindari* unless it can be brought under any of the clauses of section 3, clause (2) of the Estates Land Act, and for this purpose it is necessary to see whether at the time of the Permanent Settlement, this pre-Settlement Inam was treated as part of the *Zemindari* assets and the income taken intc account for the purpose of the grant of the *sanad*. In this connection, reference has to be made to Regulation XXV of 1802. Section 4 of the Regulation runs as follows :—"The Government having reserved to itself the entire exercise of its discretion of cuntinuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of salt and saltpetre of the *Sayar*, or duties by sea or land—of the *abkari*, or tax on the sale of spirituous liquors and intoxicating drugs—of the excise on articles of consumption—of all taxes personal and professional, as well as those derived from markets, fairs or *bazaars*—of *lakhiraj* lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

The contention of Mr. Ramadoss is that the *Mokhasa* being a pre-Settlement inam granted on favourable quit rent, it must have been excluded by section 4 at the time when the revenue of the *zemindari* was taken into account for the purpose of the Permanent Settlement and that, even if it was included, it could

not affect the rights of the *Mokhassadars* as such inclusion would be opposed to the provisions of the Permanent Settlement Regulation. Reliance has been placed on *Kuppu Reddi Nookayya* v. *Bheemanna* (2). In that case the *Zemindar* of Pittapur granted in 1880 an *Inam* of certain lands in the *Zemindari*. It was made free of Kattubadi and purported to be *sarva dumbala* or absolute. It was held that the *Inam* was not part of the Pittapur *Zemindari* as it was a pre-Settlement Inam excluded from the assessment of the *Zemindari*. Oldfield and Ramesam, JJ., after referring to Regulation XXV of 1802, were of opinion that in view of the unqualified terms of section 4 there was no relevancy in the enquiry whether the *Inam* was in fact included in the assets of the *Zemindari* on which the *peishcush* was fixed with regard to the Circuit Committee's accounts prepared before 1786. In another Second Appeal, *Varhaliah* v. *Venkatasuryanarayana* (3), Ayling and Odgers, JJ., held that though the fact of an *Inam* having been granted prior to 1802 raised a presumption that the lands granted were excluded from the Permanent Settlement, that presumption was capable of being rebutted. As pointed out by their Lordships of the Privy Council in *Secretary of State for India* v. *Rajah of Venkatagiri* (1), the draft of section 4 can by no means be commended for preciseness or lucidity. Objection is now taken by Mr. Ramadoss that, even assuming that the income from this *Mokhasa* was taken into account for the Permanent Settlement, it should be ignored because of the express provisions of the Regulation. The effect of section 4 was considered by their Lordships of the Privy Council at p. 875 of the report. After pointing out that, so far as the actual settlement of the Venkatagiri *Zemindari* was concerned, the Government fixed a definite specific assessment on the whole *Zemindari* irrespective of the particular assets derived from each particular unit of property within the estate, their Lordships observe : "The question now is whether the action of the Government was, in view of the provisions of Regulation XXV of 1802, valid or otherwise. As already stated, Counsel for the appellant have strongly argued that, in view of the provisions of section 4 of that Regulation, excluding *Lakhiraj* lands (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents from the permanent assessment of the land tax, it was not competent for the Governor-in-Council to grant *sanad* of the character that is in issue in this case." Their Lordships of the Privy Council were of opinion that the question had to be decided with reference to sections 3 and 4 of the Act and the conditions of the *sanad* and that where the *sanad* contained no reference to *Lakhiraj* lands, section 4 could have no application and the assessment fixed upon the *Zemindari* by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in section 4 of the Regulation.

The question, therefore, in this case cannot be decided without reference to the terms of the *sanad* granted by the *Zemindar* and to what actually took place at the time of the Permanent Settlement. We are of opinion that where, at the time of the Permanent Settlement, lands which the Government might have excluded from assessment by reason of the various grounds set forth in section 4 of the Regulation were as a matter of fact included in calculating the assessment payable by the *Zemindari*, and where both the Government and the *Zemindar* from 1802 have acted on the footing that the *Inam* forms part of the *Zemindari*, the tenants who were subsequently introduced into the property have no right to question the acts of the persons entitled at the time of the *sanad* to enter into those arrangements.

Reliance has been placed by the Subordinate Judge on the fact that at the time of the *Inam* Settlement an attempt was made to enfranchise the whole village but that after some enquiry the Government gave up the attempt and the matter went up to the Secretary of State with the result that the enfranchisement proceedings were given up. It is argued that the fact that the Government gave up enfranchising the village after so much correspondence shows that the income of the village must have been included in the assets of the *Zemindari*. It was stated

(2) 78 Ind. Cas. 788 ; (1923) M. W. N. 176 ; 17 L. W. 712 ; (1923) A. I. R. (M.) 454; 44 M. L. J. 91.
(3) 75 Ind Cas. 465; (1923) M. W. N. 782; 18 L. W. 324 ; (1924) A. I. R. (M.) 117.
(4) 78 Ind. Cas. 741; 44 M. 864 ; 41 M. L. J. 624 ; (1922) M. W. N. 1 ; 30 M. L. T. 164 ; 26 C. W. N. 809; (1922) A. I. R. (P. C) 168

before us that the order of the Government at the time of the Settlement was subpœnaed for but that the order was not filed owing to objections taken by the Board of Revenue. As it appeared that copies were obtained by the *Zemindar* and were filed in other proceedings relating to the same village, and as Ex. II which is a judgment of the Subordinate Judge of Masulipatam in the A.S. No. 466 of 1912 relating to another portion of the same village and where the Government order is referred to, was filed without any objection in both the lower Courts, we thought it desirable in the interests of justice to call for the Government Order No. 2374, dated 24th December, 1861. The order of the Government and the connected papers have now been produced. The letter from Mr. Taylor, the *Inam* Commissioner, to the Government, dated July 23rd, 1860 refers to the *Mokhasas* of the old Masulipatam District and it states that the full value of the *Mokhasas* in the Nuzvid *Zemindari* was included in the accounts of the Permanent Settlement. After dealing with the several reports he states as follows :—"It was necessary to devote the most careful scrutiny to the above references as the original nature of these *Mokhasas*, and the circumstance of their being included in the assets of the *Zemindaries* had not been generally understood. The villages of the *Zemindari* Estates are distinguished on the back on the permanent *Kaul* as *Seri* (*i. e.*, under the direct management of the *Zemindar*) *Mokhasas* and *Aggraharams*. But this distinction affords no ground for classing the *Mokhasas* with the *Lakairaj* lands excluded by the *sanad* ; whilst a different conclusion is fully established by the accounts upon which the Permanent Settlement was based, and which ought to explain the terms of the *Kaul*. Should the Government concur in the justice of these observations, I submit we possess no reversionary interest in the *Mokhasas* nor can we claim to derive a quit-rent by their enfranchisement." The Government on the 11th of August 1860, after referring to Mr. Taylor's letter, were of opinion that as the question was one of importance, the letter of Mr. Taylor should be referred to the Board of Revenue for report. An exhaustive enquiry was made by the Board though the Collector and the Board of Revenue agreed with the opinions of the *Inam* Commissioner and the Collector that Mr. Taylor was right and the *Mokhasas* could not be enfranchised. On the 24th of December 1861 the Government passed the following order :—" In their order of 11th August 1860, No. 1335, the Government referred to the Board of Revenue for report a letter from the *Inam* Commissioner relating to the *Mokhasa* villages of the *Zemindaries* in the old Masulipatam District. Mr. Taylor was of opinion that these villages were not excluded from the assets of the estates, as had usually been supposed, and that, therefore, they would not come under his operations.

" 2. The Board were at first doubtful on the matter and resolved to refer the subject for enquiry by the Collector. The result is now submitted with the proceedings recorded above.

" 3. Mr. Thornhill has conclusively shown that Mr. Taylor was correct in his surmise and the Board now agree both with him and the *Inam* Commissioner that Government cannot claim the reversionary right to the villages, and, therefore, that the rules for redeeming that right are inapplicable to them.

" 4. In this view the Government Concur."

It is now clear that these *Mokhasas* were not excluded from the *Zemindari* at the time of the Permanent Settlement and that they were treated as part of the *Zemindari*. They are, therefore, part of an "estate" within the meaning of the Estates Land Act and Civil Courts have no jurisdiction.

As regards the exchange alleged by the plaintiffs, we do not think that it would, even if true, change the character of the plaint lands. It has not been shown that the consent of the *Zemindar* had been obtained. The question is concluded by the decision of their Lordships of the Privy Council in *Parthasarathy Appa Rao* v. *Raja Bommadeva Satyanarayana* (5). The acts of the *Inam* Commissioner are not by themselves sufficient to affect the *Zemindar* : [see

(5) 49 Ind. Cas. 818 ; 42 M. 855 ; 17 A. L. J. 273; 36 M. L. J. 279 ; 9 L. W. 411 ; 28 C. W. N. 673 ; 21 Bom. L. R. 622 ; 26 M. L. T. 32. 30 C. L. J. 82 ; (1919) M. W. N. 496 ; 46 I. A. 38 (P. C.).

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Sobhanadri Appa Rao v. *Gopalakrishnamma* (6).]

It is argued that the plaintiff is not a landholder within the meaning of section 3, cl. (5) of the Estates Land Act as he is a minor *Inamdar* in a *Mokhasa*. It has been held by a Full Bench of this Court in *Brahmayya* v. *Ackirazu* (7) that such an *Inamdar* is a landholder within the meaning of the section. This decision is binding on us.

The decision of the District Munsif and the Subordinate Judge are right. The appeals fail and are dismissed with costs.

V. N. V. *Appeals dismissed.*

S. D.

(6) 16 M. 84 at p. 86; 5 Ind. Dec. (N. S.) 731.
(7) 70 Ind. Cas. 615 ; 45 M. 716 ; (1922) M. 280 ; 31 M. L. T. 91 ; 43 M. L. J. 229 ; (1922) A. I. R. (M) 378.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 64 OF 1922.

October 8, 1923.

Present :—Mr. Baker, J. C., and Mr. Hallifax, A. J. C.

Musammat PERABAI—APPELLANT

versus

BHAWANI PRASHAD AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, O. XXI, r. 11 (2)—Minor decree-holder—Execution proceedings—Compromise by next friend or guardian—Managing member or father—Adjustment of decree by Collector without sanction of Court—Adjustment whether voidable or void—Omission to mention adjustment in execution application, effect of—Application to Collector regarding adjustment not signed by all decree-holders, validity of—Powers of Collector to record adjustment—Application for sanctioning and recording adjustment, whether "step-in-aid of execution."

The provisions of r. 7 of O. XXXII of the Civil Procedure Code apply to proceedings in execution, and the next friend or guardian of a minor cannot, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, even if he happens to be the father of the minor, or the managing member of the family. [p. 292, col. 2.]

Ganesha Row v. *Tulsaram Row*, 19 Ind. Cas. 515 ; 36 M. 295 ; 17 C. W. N. 765 ; 11 A. L. J. 589 ; 18 C. L. J. 1 ; 15 Bom. L. R. 626 ; 14 M. L. T. 1 ; (1913) M. W. N. 575 ; 25 M. L. J. 150 ; 40 I. A. 182, (P.C.), relied upon.

An adjustment of a decree by a Collector is voidable at the option of a minor, under r. 7 of O. XXXII if it has not been sanctioned by the Court. [p. 292, col. 2.]

Till it is avoided it is a subsisting adjustment and the decree-holder is bound to mention it in the application for execution under clause (e) of rule 11 (2) of O. XXI. An omission to mention such an adjustment vitiates the application and it is not in accordance with law. [p. 292, col. 2.]

It is not necessary that an application to the Collector for certifying an adjustment of a decree should be signed by all the decree-holders nor is it necessary that there should be any written application at all. [p. 293, col. 1.]

The Collector is invested with powers of recording the adjustment of a decree. [p. 293, col. 1.]

An application for sanctioning and recording an adjustment made by the judgment-debtor and decree-holders is an application to the Court to take a step-in-aid of execution of a subsisting decree. [p. 293, col. 2.]

Appeal from the order of the Additional District Judge, Narasingpur, dated the 11th March 1922, in execution case arising out of Civil Suit No. 12 of 1908, decided on the 24th January 1914.

Mr. *N. G. Bose*, R. B. for the Appellant.

Messrs. *V. Bose* and *A. C. De*, for the Respondents.

JUDGMENT.—A final decree for sale on a mortgage was passed on the 21st of October 1916 against the appellant Pera Bai and others in favour of the respondent Bhawani Prasad and four others. Two of these four were then and are still minors and members of a joint Hindu family along with Bhawani Prasad who was the manager of the family and had made them co-plaintiffs with himself in the suit as their next friend. The amount to be recovered by sale of the property was Rs. 43,549-9-5. In 1917 the mortgaged villages were attached and the decree was then transferred for further execution to the Collector. During the proceedings before the Collector the parties arrived at an agreement under which Pera Bai paid Rs. 20,000 and promised to pay the remainder in annual instalments of Rs. 2,000 with interest and the decree-holders agreed that the village of Khurpa alone should remain as security for the payment of those instalments, the rest being released from the mortgage lien. This adjustment was recorded by the Collector on the 29th of May 1919 according to the provisions of rule 2 of Order XXI of the Civil Procedure Code,

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A payment of Rs. 2,500 was duly made in June 1920, and doubtless punctual payments would have been made of the instalments that fell due in June of each of the two following years but for the proceedings out of which this appeal has arisen.

The proceedings were initiated by an application made on the 11th of April 1921 for execution of the decree as it stood originally. The petition does mention the payments of Rs. 4,250 on the 26th of August 1919 and Rs. 15,750 on the 25th of September1919 and Rs. 2,500 on the 6th of June 1920 made by Pera Bai and one of Rs. 850-9-0 on a date not stated made by Rao Sheobara Singh in partial discharge of a liability under the same decree which is different from that of Pera Bai's. There is, however, no mention at all of the adjustment by the agreement that the rest of the debt should be paid by instalments. Pera Bai naturally pleaded the adjustment, to which the reply of the decree-holders was that the agreement was never finally made and in any case it was not binding on the two minor decree-holders on account of its never having been expressly sanctioned by the Collector on their behalf. It was admitted later, and is not now denied, that the agreement was made and was duly recorded by the Collector, and the learned Additional District Judge found that the adjustment was not binding on the minor decree-holders in that it had not been expressly, or even impliedly sanctioned by the Collector, holding that r. 7 of O. XXXII of the Civil Procedure Code applies to execution proceedings as well as to pending suits. He, therefore, ordered, with an expression of regret at the dishonourable conduct of the decree-holders with which it is impossible not to sympathise, that execution should proceed.

The application of the provisions of r. 7 of O. XXXII to proceedings' in execution was affirmed by the Bombay High Court in *Virupakshappa* v. *Shidappa* (1) and by the Madras High Court in *Arunachellam Chetty* v. *Ramanadhan Chetty* (2) and *Shaik Davud Rowther* v. *Paramasami Pillai* (3) and is not now disputed. Pera Bai's appeal against the order was supported mainly on the ground that the compromise did not require the sanction of the Court to make it binding on the minors because it was made on their behalf by the manager of the joint Hindu family of which they are members; his being shown formally and unnecessarily as their guardian for the purposes of this suit in addition makes no difference. It is just this proposition that was rejected by the Privy Council in *Ganesha Row* v. *Tuljaram Row* (4) where their Lordships said: "How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and that he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment."

In this Court, however, another point arose. The adjustment of the decree having been duly recorded by the Collector was voidable at the option of the minors under rule 7 of Order XXXII, because it had not been sanctioned by the Court. But till it was avoided it was a subsisting adjustment, and by clause (e) of rule 11 (2) of Order XXI it had to be mentioned in the application for execution. This the decree-holders deliberately refrained from doing, and their application is, therefore, not in accordance with law. They were given an adjournment in order to consider and argue this point and it was explained to them that if it prevailed they would get nothing, as their application for execution would be dismissed and further execution of the decree would then be barred by time, but this could be avoided by admitting the contentions of the appellant as originally set out, when it would be unnecessary to raise the question at all. The admission would have to be in the form of a compromise, to be examined and sanctioned by this Court on

(1) 26 B. 109; 3 Bom. L. R. 565.
(2) 29 M. 309.
(3) 35 Ind. Cas. 70; 31 M. L. J. 207.
(4) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A.L.J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 182 (P. C.).

behalf of the minors, but there could not be difficulty about that, and Pera Bai, in striking contrast to their attitude all along declared her willingness to pay what is justly due by her and to waive this plea, which may be somewhat technical but is very much less so than that on which the decree-holders have succeeded so far.

The decree-holders elected at first, however, to take all or nothing, doubtless hoping still to get all, and it was strenuously but ineffectively and hopelessly argued for them that their application for execution is not liable to dismissal on account of their failure to mention the adjustment in it. Something was said about Pera Bai's application to the Collector to record the adjustment not being signed by the fifth decree-holder Tarachand or on his behalf, but only by an agent of Bhawani Prasad and his sons. There was no need for the signature of any one of the decree-holders on the application, or indeed for any written application at all ; all the members of both parties were before the Collector in the proceedings either personally or by representation when he recorded the adjustment on the application of Pera Bai and all but one of them, and all of them, therefore, admitted it. It was further faintly urged that the Collector had no power to record the adjustment. That is, however, undoubtedly one of "the powers which the Court might exercise in the execution of the decree," with which, as was explained in *Harlal* v. *Narayan* (5), the Collector was invested.

After the judgement in this case was written but before it was delivered the decree-holders appreciated the hopelessness, if not the dishonesty, of the position they had taken up and accepted the terms offered to them by Pera Bai, that is, that they should be allowed to execute their decree as modified by the compromise. Both parties have accordingly put in a petition asking that this should be done. For this purpose it is necessary, first, for the Court to sanction the adjustment of decree on behalf of the minors. The terms of the compromise are as follows. Pera Bai is to pay within three months a sum of Rs. 6,000 with interest at 3 per cent. per annum on the three instalments that would have already fallen due under the original arrangement, up to the dates fixed in that arrangement. The total sum so payable is Rs. 8,097-3-0. She will pay a further instalment of Rs. 2,000 by the 1st of June 1924 with interest at 3 per cent. on the amount of the original debt then due, that is on Rs. 15,419-13-0 The balance of Rs. 13,419-13 0 will be paid in six instalments of Rs. 2,000 each and one of Rs. 1,419-13-0 on the 1st of June of each year after 1924, together with interest at 3 per cent. on the amount of the original debt still due on the date of each payment. In case of two successive defaults in the payment of instalments, she will be liable to pay the whole amount still due in a lump sum. The village of Khurpa alone is to remain liable to sale in satisfaction of this debt.

It is obvious that this arrangement is very favourable to the minors, as the only alternative is the practical wiping out of the whole decree. We accordingly sanction it. The order of the lower Court is set aside and the application for execution is dismissed on the satisfaction of the decree by adjustment. It will be for the decree-holders to apply again for execution according to the terms of the adjustment of the decree as soon as any further payments fall due. They must pay all the costs incurred by Pera Bai in this appeal and in the lower Court. The sum so due to her will be taken in part payment of Rs. 6,000 she has to pay within three months.

From something that has been said it is apparently necessary to point out that it is no longer open to either party to plead that execution of the decree is barred by time for any of the reasons mentioned in this judgment. The application of the 22nd of September 1923 for sanctioning and recording the adjustment, which is made by all the decree-holders along with Pera Bai, is an application to the Court to take a step-in-aid of execution of a subsisting decree. It is not necessary to correct the formal defect in the last application for execution by going through the formality of amending it. That can be regarded as having been done.

G. R. D.

S. D.

(5) 64 Ind. Cas. 420 ; 18 N. L. R. 152 ; 4 N. L. J. 118 ; (1922) A. I. R. (Nag) 267.

SANAKARA RAO *v.* RAMAKRISHNAYYA

MADRAS HIGH COURT.

CIVIL APPEALS NO. 56, 57 AND 58 OF 1922.

October 12, 1923.

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

In Nos. 56 and 57.

KAVALI SANAKARA RAO GARU—APPELLANT

versus

TURLAPATI RAMAKRISHNAYYA AND OTHERS—RESPONDENTS.

In No. 58.

PATILBANDA VENKATARAMANIAH —APPELLANT

versus

TURALAPATI RAMAKRISHNAYYA AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 68, 80, scope of—Official Receiver when can deal with properties of insolvent—Invalid sale, application for setting aside—Limitation.

Under section 80 of the Provincial Insolvency Act, 1920, the power to make the vesting order is not delegated to the Official Receiver. [p. 294, col. 2.]

The Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order. [p. 295, col 1.]

Vythilinga Padayachi v. *Ponnusami Padayachi*, 62 Ind. Cas. 396 ; 41 M. L. J. 78 ; (1921) M W. N. 243 ; *Muthuswami Swamiar* v. *Souner Kandiar*, 59 Ind. Cas. 507 ; 89 M. L. J. 438 ; (1920) M. W. N. 537 ; 48 M. 869 ; 12 L. W. 262; *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*, 34 Ind. Cas. 602 ; 30 M. L. J. 415 ; *Subba Aiyar* v. *Ramaswami Aiyangar*, *Official Receiver, Madras*, 62 Ind. Cas. 346 ; 44 M. 547 ; 40 M. L. J. 209 ; 18 L. W. 227 ; (1921) M. W. N. 185 ; 29 M L. T. 288, followed.

Avanashi Chetti v. *Muthukaruppan Chetti*, 44 Ind. Cas. 885 ; 28 M. L. T. 319 ; 7 L. W. 406 ; (1918) M. W. N. 345, distinguished.

Section 68 of the Provincial Insolvency Act presupposes that the decision is by a Receiver properly appointed and does not apply where the sale is invalid as being made by a person who was not authorised to sell. [p. 295, col. 1.]

An insolvency petition having been filed in the District Court, the District Judge made an endorsement on it that it was "transferred for disposal to the Official Receiver." No further orders were made by the Court in the case. After the adjudication of the insolvent the Official Receiver sold two properties belonging to the insolvent and two creditors, therefore, applied to the District Judge to get the two sales set aside. The District Judge dismissed their application on the ground that they were out of time having been filed more than 21 days from the date of the two sales. The creditors appealed to the High Court :

***Held*, that the order of the District Judge could not be taken to include a vesting order made in anticipation of the adjudication of the insolvent and the Receiver had, therefore, no power to deal with the properties [p. 296, col. 2.]**

(2) that the sales being invalid, s. 68 of the Provincial Insolvency Act did not apply and the rules were liable to be set aside. [p. 296, col. 2.]

Appeals against the orders of the District Court of Kistna.

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.

Messrs. *Viswanatha Sastri* and *V. Surya-Narayana*, for the Respondents.

JUDGMENT.

Krishnan, J.—These are three appeals by two creditors of one Ramakrishnayya, an insolvent, who sought to get set aside by the lower Court two sales by the Official Receiver of Kistna, of two items of properties belonging to the insolvent. Their applications were dismissed by the learned District Judge on the ground that it was out of time under section 68 of the Provincial Insolvency Act, the appplications having been filed more than 21 days from the date of the two sales.

In appeal it is argued before us by the learned Vakil for the creditors that section 68 does not appply to this case as the sales cannot be considered to have been made by a properly authorized Receiver but by some one who had no power to deal with the properties. The argument is that, after the adjudication of the insolvent in this case, no order vesting the property of the insolvent in the Official Receiver was made, and without such an order the Official Receiver gets no right to deal with the insolvent's properties. What happened in this case was, when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was "transferred for disposal to the Official Receiver." It is not denied by the other side that the District Court made no further orders in the case. The Official Receiver has been authorised under section 80 to hear an insolvency petition and make the order of adjudication: but under that section, the power to make the vesting order is not delegated to the Official Receiver; and it is clear from the authorities

which have been cited before us, *Vythilinga Padayachi* v. *Ponnuswamy Padayachi* (1) *Muthuswamy Swamiar* v. *Souner Kandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3), that the Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order by the District Judge. Such an order has to be made under the Act by the District Judge after the adjudication of the insolvent. It is, therefore, quite clear that the argument that the endorsement made by the Judge on the Insolvency Petition is tantamount to vesting the property of the insolvent in the Official Receiver cannot be accepted I agree with my learned brother that the wording of the order itself does not convey the idea of any vesting at all. The order in the case cannot be taken to include a vesting order made in anticipation of the adjudication of the insolvent ; for even if we suppose that the District Judge meant, when he transferred the insolvency application to the Official Receiver, to make him the Receiver of the properties, it would be illegal There is thus a difficulty in the way of the respondents. We must take it that the sales in the present case were made by a person who was not authorised to sell and are thus invalid. In a case like that, it is impossible to hold that the limitation under section 68 will apply, as section 68 presupposes that the decision is by a Receiver properly appointed. It follows, therefore, that the three appeals must be allowed, the two sales must be set aside, and the cases sent back to the District Judge for a proper vesting order being made and further proceedings in insolvency conducted thereafter. The petitioners-appellants are entitled to their costs in this Court and in the Court below to be paid from the insolvent's estate.

Odgers, J.—These are appeals against the Order of the District Judge of Kistna on an application by two creditors of an Insolvent, called Thurlapathi Ramakrishnayya, praying to set aside two sales by the Official Receiver held on 27th August 1919 and 26th February 1920. The District Judge held the application was out of time as having been made more than days after the sales. The Court, on the application of Thurlapati Ramakrishnayya to be adjudicated an insolvent, passed the following order :—" Transferred to the Official Receiver, Kistna, for disposal, " and it is contended by the respondent that this has the effect of transferring the whole matter to the Official Receiver and thus of incidentally appointing him Receiver of the Insolvent's property. This contention is necessary in face of the following decisions : *Vaithilinga Padayachi* v. *Ponnuswmy Padayachi* (1), which held that the property of an insolvent does not *ipso facto* vest in the Official Receiver but an order must be passed in every case appointing a Receiver and that, failure to do this, entails as a consequence failure of title in those purchasing from an Official Receiver not so appointed. In the present case there was no special appointment unless the order above set out can be so construed. *Vythilinga Padayachi* v. *Ponnuswamy Padayachi* (1) followed earlier authorities, *Muthu Swamy Swamiar* v. *Souner Kandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3). I was a party to the decision in *Vythilinga Padayachi* v. *Ponnuswamy Padayachi* (1), and I adhere to my decision there. Therefore, I must hold that unless the order appointed the Official Receiver, Receiver of the insolvent's property, there was no Receiver appointed in this case and the sales by a person purporting to act as such would be void. Now it is said that the Court by its order set out above practically made a vesting order under the Act. What the Court did was to transfer the petition to the Official Receiver " for disposal, " I do not think that the fact that the petitioner (debtor) asked that his immoveable property should be sold and his debts settled can give any other or wider meaning to the order of transfer. The Court has certain powers of delegation—section 80 of the Act V of 1920 provides that the High Court may delegate to official Receivers certain specified powers; *inter alia*, the hearing of insolvency petitions, examination of debtors and the making of orders of adjudication. The Official Receiver has no delegated power to appoint a Receiver. The respondent contends that the procedure prescribed for the Court and for Official Receivers when acting under their delegated powers are different and that the latter

(1) 62 Ind. Cas. 396; 41 M. L. J. 78; (1921) M. W. N. 243.
(2) 59 Ind. Cas. 507; 39 M. L. J. 488; 12 L. W. 262; (1920) M. W. N. 587; 48 M. 869.
(3) 84 Ind. Cas. 602; 30 M. L. J. 415.

are in fact under such circumstances Courts in themselves. *Subba Ayyar* v. *Ramaswamy Ayengar, Official Receiver, Madras.* (4) is cited as an authority for this proposition. There the order was : 'The petition is transferred to the Official Receiver for adjudication and for the administration of the estate. The learned Judges held that the combined effect of section 20 (*c*) and (*e*) and section 23 of the Act of 1907 (section 59 (*c*) and (*e*) (and section 58 of the present Act) was that the order to administer enabled theOfficial Receiver to sell the insolvent's estate. They distinguished the case in *Muthusami Swamier* v. *Souner Kandian* (2) while deploring the deficiency in the Act which does not provide that immediately on adjudication the estate shall vest in the Official Receiver. Their decision was that the Official Receiver was the agent of the Court and as under section 23 (=s. 58) the latter has all the powers of a Receiver,' it was capable [section 20=section 59 (*e*)] of appointing an agent to take any proceedings sanctioned by the Court and that the Court might under section 20 (a)=section 59 (a) sell the property of the insolvent through such agent. The difficulty as to appointment of a Receiver was thus obviated in this case. The learned Judges did not give an opinion on the other argument advanced in that case, *viz.*, that the order of transfer may be construed as an order under section 18 (=section 56) vesting the property in the Receiver to take effect if and when adjudication took place. It will be observed that the order of transfer in the present case did not contain the words "for the administration of the estates," and this, in my opinion, is sufficient to distinguish it from the case in *Subba Aiyar* v. *Ramaswami Aiyangar, Official Receiver, Madras* (4). The present petition was not even transferred for adjudication but merely for disposal. I am unable to agree that the transfer in the present case had any further operation than to transfer to the Official Receiver for disposal of the petition for adjudication and I think the Official Receiver under his delegated powers under sectoin 80 was *functus officio* when he has carried out the duties delegated to him, in this case the disposal of the petition. The next contention by petitioner is that section 68 applies to this case ; and that the Official Receiver was certainly a Receiver in this case though one of his acts is impugned. If he was never legally appointed a Receiver, he is a mere intermeddler with the property and, if so, it is said the District Judge had no power to set aside the sales under the Act (cf. *Avanashi Chetty* v. *Muthukaruppan Chetty* (5) there being no 'person aggrieved by an act or decision of the Receiver'. The answer to this appears to me to be that in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3) ; the sale was either set aside or declared to be void—it is not clear which. In it was held that defendant had no title to the property. Both cases were under the Insolvency Act and both were cases of sales by Official Receivers not legally appointed Receivers in the respective insolvencies. This seems to me to conclude the respondents' contention on this point. As to limitation—section 68 prescribes a period of 21 days for an application by a person aggrieved by act or decision of the Receiver. It is quite clear that a Receiver means one legally appointed, *i. e.*, one appointed under the provisions of section 56 of the Act. I am, therefore, of opinion that the Official Receiver not having been appointed Receiver in this Insolvency, the sales by him are void and ineffective to pass any title to the purchasers and these Civil Miscellaneous Appeals must be allowed with costs.

I agree with my learned brother in the order he proposes.

S.D. *Appeals allowed.*

(4) 62 Ind. Cas. 846 ; 44 M. 547 ; 40 M. L. J. 209 ; 18 L. W. 227 ; (1921) M. W. N. 135; 29 M. L. T. 288.

(5) 44 Ind. Cas. 885 ; 23 M. L. T. 319 ; 7 L. W. 406; (1918) M. W. N. 845.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 7 OF 1923.
October 30, 1923.

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

GANGABATTULA KANTHAMMA—APPELLANT

versus

MANCHIRAJU REDDI PANTULU AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 71—Contract Act (IX of 1871), s. 230—Auction-sale, parties to—Auction-purchaser's default—Resale resulting in deficit—Judgment-debtor, right of—Plea of agency when can be sustained—Interest whether can be recovered.

GANGABATTULA KANTHAMMA *v.* MANCHIRAJU REDDI

In a Court auction-sale, the auction purchaser is one party to the contract; the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in Court-auction, the Court acts under the statutory powers given to it by the Code and not as the agent of any party and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side and the auction-purchaser whose bid is accepted on the other. [p. 297, col 2; p. 298, col. 1.]

Therefore, where on account of the action of an auction-purchaser in not completing a Court sale by depositing 25 per cent of the purchase money a resale is ordered and a deficit is caused, O. XXI, r. 71 of the Civil Procedure Code empowers the Court to collect, at the instance of the judgment-debtor, the deficit that has been caused in a summary manner by way of execution. [p 298, col. 1.]

Machinnon, Mackenzie & Co. v. *Lang, Moir & Co.*, 5 B. 584; 3 Ind. Dec. (N. S.) 385; *Lyallpore Sugar Co.* v. *Mul Raj*, 65 Ind Cas. 473, distidguished.

The defaulting auction-purchaser, however, is not liable for interest on the deficit amount from the date of the sale to the date of the order of the Court directing him to repay. [p. 298, col. 2.]

The auction-purchaser at a Court sale is personally liable to the judgment debtor for the deficit on a re-sale. He cannot plead that he was merely the agent of some other person at the auction. [p. 298, col. 2.]

In such cases before cl. (2), of s. 230. of the Contract Act can be excluded it must be alleged and proved by the party wishing to take advantage of s. 230, cl. (1) that when making the bid or before doing so, he has informed the Court or the Court officer who was acting on behalf of the Court in selling the property, that he was making the bid only as the agent of some named third party. [p. 298, col. 2.]

Appeal against the order of the Subordinate Judge of Cocanada, dated the 5th September 1922.

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

Messrs. *B. Jagannada Das* and *C. Rama Rao*, for the Respondents.

JUDGMENT.—This is an appeal against the appellate order passed by the Subordinate Judge of Cocanada in an appeal to him from an order of the District Munsif of Cocanada in an execution proceeding. The appellant before us was the judgment-debtor under a decree passed by the District Munsif's Court which was under execution, and her property was advertised for sale in Court auction. The sale was actually held by the Nazir, the Court Officer, in the usual way and the 1st respondent bid for the property and offered a price of Rs. 4,600 which was accepted by the Court Officer and the bid was knocked down in his favour. Under O. XXI, r. 84, Civil Procedure Code, the purchaser is bound to pay 25 per cent. of the purchase-money on the completion of the auction. The 1st respondent made default in making the payment and, in consequence, under the same rule, the property was again put up for sale. This time the property was knocked down for a lower sum, namely, Rs. 3,750, thus leading to a deficit of Rs. 850. The judgment-debtor applied to the Court under O. XXI, r. 71, Civil Procedure Code, that the auction-purchaser, the 1st respondent, should be made liable for this deficit and should be called upon to pay the amount of the deficit into Court, and the District Munsif passed an order in her favour. The appeal from this order was heard by the Subordinate Judge, and he was of opinion that the 1st respondent might have bid for the property as the agent of the 2nd respondent and that as an agent he would not be responsible to pay this deficit amount under clause (1) of section 230 of the Contract Act, which says that an agent cannot personally enforce contracts which he has entered into on behalf of his principal nor can he be personally bound by them. No evidence had been taken on this point in the first Court and, therefore, the Subordinate Judge remanded the case to the first Court to take evidence in order to ascertain whether the 1st respondent was actually the agent of the 2nd respondent as he subsequently alleged after the sale was over; and it was pleaded that, in any case, even if 1st respondent was an agent as he did not disclose the name of his principal at the time of the bid, clause (1) would not apply. The Subordnate Judge, thinking that if the judgment-debtor whose property was sold in auction did actually know that the 1st respondent was bidding as the agent of the 2nd respondent, that would take the case out of clause (2) of section 230 of the Contract Act, directed evidence on that point also. In taking this latter view he treated a sale in Court auction as a contract between the owner of the property sold, namely, the judgment-debtor, and the auction-purchaser, apparently considering that the Court and its Officer were merely acting as agents for the judgment-debtor for selling the property. We are unable to accept this view which he had adopted. Where in a Court-auction a property is sold, the auction-purchaser is one party to

the contract, but the other party to the contract is not, in our view, the judgment-debtor or the decree-holder but the Court itself. In selling property in Court-auction, the Court acts under the statutory powers given to it by the Code and not as the agent of any party and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side and the auction-purchaser whose bid is accepted on the other: and, therefore, before clause (2) of section 230 of the Contract Act can be excluded, it must be alleged and proved by the party wishing to take advantage of section 230, clause (1) that when making the bid or before doing so, he had informed the Court or the Court officer who was acting on behalf of the Court in selling the property that he was making the bid only as the agent of some named third party. It would then be open to the Court Officer, the Nazir, either to accept his bids or decline them if he is not fully satisfied that he had a proper power-of-attorney to make the bid. In this case it is not pretended that there was any power-of-attorney with the 1st respondent or that any power-of-attorney was shown to the Nazir, nor is it even alleged that before the sale took place the 1st respondent informed the Nazir or the Court that he was bidding as an agent. Therefore, even if we assume that the 1st respondent was really the agent of the 2nd respondent we have here a case where the agent did not disclose the name of his principal, and did not even inform the other party, the Court, that he was acting as agent of a principal. The question whether the judgment-debtor knew or not that the 1st respondent was bidding as an agent of the 2nd respondent is, therefore, quite immaterial. The Court was entitled to enforce the contract against the 1st respondent personally and as the 1st respondent made himself personally liable for the deficit that has been caused by his action in not completing the sale by depositing 25 per cent of the purchase, money, O. XXI, r. 71, Civil Procedure Code, gave the Court power, at the instance of the judgment-debtor, to collect the deficit that has been caused in a summary manner by way of execution. In these circumstances, we think that the order of the District Munsif was right and that there is no object in taking evidence which the Subordinate Judge has directed to be taken as to whether the 1st respondent was really the agent of the 2nd respondent or not, and whether the judgment-debtor knew of it, for even assuming that he was an agent, as he never disclosed to the Court Officer that he was bidding as an agent till a long time after the bid was offered and accepted, he is liable for the deficit personally. Whatever rights there may be between him and the 2nd respondent he may enforce as advised, but they need not be considered now at all. The order of the Court directing him to pay the money into Court is, therefore, correct.

The ruling relied upon by the Subordinate Judge in *Mackinon, Mackenzie & Co*, v. *Lang Moir & Co.* (1) followed in Lahore in *Lyallpur Sugar Co.* v. *Mulraj* (2) is not relevant here, for it is only in the view that the judgment-debtor is a party to the contract of the auction-sale that they became of any importance and necessitate a finding on the question whether the judgment-debtor did actually know that the 1st respondent was acting as the agent of the 2nd respondent.

There is one other small point which has been dealt with in the argument and that is the question whether the defaulting auction-purchaser, the first respondent, is liable for interest on the deficit amount from the date of the sale to the date of the order of the District Munsif directing him to repay. There is nothing in O. XXI, r. 71, Civil Procedure Code, that speaks of interest and we think, therefore, that he is not liable for interest between those dates. Of course, he is liable for interest after the date of the order of payment With this variation, we must allow the appeal of the appellant, set aside the order of the Subordinate Judge, and restore that of the District Munsif.

As regards costs, the 1st respondent will pay the costs of the appellant throughout. As regards the 2nd respondant's costs the claim against him was expressly given up by the appellant in the first Court and, therefore, there was no necessity to make him a party in this appeal before us. As we are giving no relief against him, we think he is entitled to the costs of this appeal from the appellant.

S. D. *Appeal accepted.*

(1) 5 B. 584 ; 8 Ind. Dec. (N. S.) 385.
(2) 65 Ind. Cas. 473.

BRUNTON *v.* BRUNTON

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 82 OF 1921.

March 12, 1923.

Present :—Sir Walter Salis Schawbe, K. C., Chief Justice, and Mr. Justice Coutts-Trotter.

WILLIAM BRUNTON—APPELLANT

versus

JOHN E. C. BRUNTON—RESPONDENT.

Partnership—Contract between parties—Disclosure of material facts necessary—Voidable contract—Election, right of bar exercised—Laches, doctrine of.

A contract which is liable to be avoided by reason of misrepresentation, fraud, non-disclosure of material facts, or undue influence continues valid till the party affected has determined his election by avoiding it. So long as he has made no election, he retains the right to determine it either way, subject to this that if an innocent third party has acquired an interest in the property, or, if in consequence of his delay the position even of the wrong doer is affected, it will preclude him from exercising his right to rescind.

Where one partner enters into a contract with another in relation to the interests of the partnership, it is his duty to make a full disclosure of all the material facts within his knowledge, which would assist the other party in deciding whether to enter into the contract or not.

Clough v. *London North-Western Railway Company*, (1872) 7 Ex. 26 at pp. 34, 35; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189, followed.

The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases lapse of time and delay are most material. But in every case if an argument against relief which otherwise would be justified, is founded upon mere delay, that delay of course not amounting to a bar of any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy. [p. 301, col. 2.]

Lindsay Petroleum Co. v. *Hurd*, (1874) 5 P. C. 221; 22 W. R. 432; followed.

Appeal from the judgment of Mr. Justice Kumaraswamy Sastri, dated the 15th December 1920.

Mr. *Nugent Grant*, for the Appellant.

Mr. *Cornish*, for the Respondent.

JUDGMENT.

The Chief Justice.—I have had the opportunity of reading the judgment of Coutts-Trotter, J., with which I so fully agree that I can say what I have to say shortly. This is an appeal from the judgment of Kumaraswamy Sastri, J., in a suit brought by Mr. Jack Brunton against his step-brother Mr. William Brunton. William Brunton was a partner with his father in an engineering business at Cochin. His mother had died and his father married again. On the father's death, William Brunton entered into a partnership with his step-mother Mrs. Rita Brunton, the mother of the plaintiff, Jack. By the terms of the partnership deed Mrs. Brunton was entitled to 2/3 of the capital and William Brunton to 1/3; but they were each entitled to half of the profits and liable for half of the losses. There were provisions in the deed for the equalization of capital between the two. Time went on and the business prospered under the management of William Brunton. Throughout, he was on most friendly and affectionate terms with the step-mother. From time to time the business required further capital and this was provided by the partners on what was called current account. His contributions were much larger than hers, so that she retained a larger capital account in the business, and he a larger current account. The current account carried interest but the capital account did not. In June 1916 two proposals were made by William Brunton to Mrs. Brunton—one for turning the business into a limited company, and the other for equalization of their capital. The proposals are contained in a letter dated 24th June 1916. I have no doubt that Mrs. Brunton was an intelligent woman and quite capable of appreciating questions of business. The company plan she would have none of, and said so quite plainly. She considered the question of equalization and, though it seems to have been doubted by the learned Judge, I have myself no doubt that she accepted in writing the terms of the equalization of capital. That this is so is clear from the evidence of the defendant and of Mr. D'Cruz, an old and trust[illegible]mployee of the firm, who produced [illegible]er from Mr. Brunton saying that he h[illegible]er from her agreeing, and giving th[illegible]sary instructions. The next balanc[illegible]vas

accordingly prepared on the new basis. There can be no doubt that this was due and there can be no question of mistake, and I am quite satisfied that she, in fact, wrote giving her consent. Why she consented I think is clear from Jack Brunton's evidence, for he says that, in October, 1916, he tried to dissuade her from affirming what had been done by signing the new balance sheet, but she said that it was fair to William, and that she had done it. I think also that she may have been partly influenced to do so by William Brunton's letter pointing out that she would benefit in income because by transferring his money from the current account to the capital account, the firm would no longer have to pay interest on the amount. It was the plaintiff's case that she consented in January 1917 when she was in a bad state of health, and that there was undue influence and concealment of material facts. The learned Judge found, and I am quite clear that he was right, that nothing of the sort happened in January 1919 but that everything was completed by the previous October. On all this part of the case the evidence of the plaintiff and his wife is most unreliable, as they obviously confuse a dispute or discussion about granting to the plaintiff an unlimited power-of-attorney with the question of the signing of the balance sheet, the object being to make out that the signing was done at a time when Mrs. Brunton's health was not good.

This does not conclude the matter, because William and Mrs. Brunton being partners, it was his duty to make to her a full disclosure of all the material facts within his knowledge which would assist her in deciding whether to enter into a contract with him in relation to the interests in the partnership. The learned Judge finds that he did not in fact make the necessary disclosure and on this finding alone bases his judgment. There are some passages in the judgment which suggest that the learned Judge's view was at least one of suspicion as to the honesty, and motives of the defendant, William Brunton, though he does not base his decision on any such ground; and I th right to say that, as far as I can judge on vidence and facts before us, there is no show that William Brunton acted othe an with candour and honesty thi

Whether there was or was not a proper disclosure of facts within his knowledge is a question that I approach with very great caution, because it was not the case of the plaintiff nor was it the case put forward at the trial. Not one question was put to William Brunton suggesting that he kept anything back from her; nor was it suggested what he ought to have told her which he did not or what knowledge he had which she had not. It is obviously a dangerous thing to decide a case on grounds other than those which have been raised at the hearing. Mr. Grant tells us—and it is not contradicted—that until the judgment he had not the least idea that this was the case he had to meet, or was meeting, the case that he was fighting was one of undue influence and fraud or a deliberate concealment made and a final consent obtained not in October, 1916, but in January 1917 when the lady's health was becoming impaired, though not, I would point out, sufficiently impaired to prevent Jack Brunton from obtaining from her a very wide power-of-attorney or to prevent her, on the possible danger of giving to him such wide powers being pointed out, from refusing to allow it to become operative.

The case now made is that the valuation in the balance sheet of land and machinery was inadequate and that the giving up by her of one-sixth interest in the capital was not compensated for by William Brunton giving up his preferential right to Rs. 88,000 in the current account, and his right to interest on that. It is said that on the balance sheet as it stood in 1917 she had given up on balance at least Rs. 50,000 and on a proper valuation a good deal more. The evidence as to this is not very satisfactory to my mind. In 1917, and probably in 1916, there had been a boom in Cochin, owing, it is said, chiefly to the opening of a Harbour; and it is common knowledge that the value of machinery *in situ* rose owing to the difficulty of manufacture and transport during the War. But how far these things would be permanent must obviously have been a question of speculation. I am not satisfied on the evidence that the defendant was any better informed on these matters than Mrs. Brunton.

Further, and to this I attach the greatest weight, it would appear that

before the carrying through of the matter by the signing of the balance sheet, the plaintiff had fully discussed the matter with his mother. He himself had been employed in the firm and was quite compent to advise her and did so by saying that it was impossible for any one without a full and fresh valuation to decide whether the proposal was to her advantage or not ; but she took the view that William wanted it, that it was fair to him and that she thought it right, and did it. In these circumstances, in my judgment, there is no evidence of a failure on the defendant's part to make sufficient disclosure of facts within his knowledge and not within hers. She had the very difficulty pointed out to her son and, if she choose then to accept, with her eyes open to the difficulty, without requiring any further valuation or asking for any further information, she could not, in my judgment, be permitted afterwards to repudiate the bargain, and her son, the plaintiff, is in no better position. If what I have just referred to took place after she had agreed, the position is the same, because, in my judgment, that amounts to an election by her to be bound by the contract.

When a suit is brought to avoid a contract by reason of misrepresentation, fraud, nondisclosure of material facts or undue influence, there are certain recognised principles applicable. In the well known judgment of the Exchequer Chamber in *Clough* v. *London North Western Railway Company* (1) the principles were enunciated thus : " We agree that the contract continued valid till the party defrauded has determined his election by avoiding it. In such cases (*i. e.* of fraud) the question is, Has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract ? Or has he elected to avoid it, or has he made no election ? We think that so long as he has made no election, he retains the right to determine it either way ; subject to this that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or, if in consequence of his delay the position even of the wrong doer is affected, it will preclude him from exercising his right to rescind." The matter was put from another point of view in *Lindsay Petroleum Company* v. *Hurd* (2) thus : " The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine Where it would be *practically unjust* to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be justified, is founded upon mere delay, that delay of course not amounting to a bar of any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy." These passages in these two judgments where approved by the House of Lords in *Erlanger* v. *New Sombrero Phosphate Company* (3). See particularly the opinion of Lord Blackburn at p. 1277. Applying those principles to this case, in my judgment, the setting aside of this contract is out of the question. In this case, for the reasons I have stated, I think that Mrs. Brunton elected to affirm it with quite sufficient knowledge of the facts in October 1916. Secondly, the plaintiff himself having full knowledge of the facts, in my judgment, deliberately elected not to avoid the contract. This, I think, is clear from a letter of his Solicitors, dated 27th November 1917, in which he claimed certain advantages which he contended accrued to him by reason of the equalisation of capital. Further, there has been in this case such *laches* or acquiescence which would render it practically unjust to give any such remedy. The plaintiff has, by his conduct, done what might be fairly regarded as equivalent to a waiver of it or put William Brunt
a situation in which it would not be rea

(1) (1872) 7 Ex. 26 at pp. 34, 35 ; 41 L. J. Ex. 17; 25 L. T. 708 ; 20 W. R. 189.

(2) (1874) 5 P. C. 221 at p. 239 ; 22 W
(3) (1878) 3 A. C. 1218 ; 39 L. T. 268 ;

to place him if a right to such remedy were afterwards to be asserted. He elected to purchase the business on the basis of equalised capital and went on with it for several years and ultimately sold it, and no attempt to repudiate was made, and he thus changed his position so that, in my judgment, it would be quite impossible to grant *restitutio ad integrum* now.

The defendant has appealed from other parts of the judgment but has withdrawn those grounds of appeal. There is a cross-appeal by the plaintiff on two points :—(1) as to the construction of the partnership agreement and whether the defendant had properly elected to purchase thereunder, as to which I agree with the learned Judge and I have nothing to add, and (2) as to the value of the Cochin land, a pure question of fact, and no grounds have been put before us which would justify us in interfering.

The decree will be varied and the accounts taken on the basis of the contract for the equalisation of capital standing good. In the Court below the costs of issues 4 and 7 as to equalisation must be paid by the plaintiff to the defendant. As to the rest each party must bear his own costs. This appeal has succeeded as to a part and failed as to other parts, and the cross-appeal fails and I think that the proper order will be that the costs of both parties of the appeal and cross-appeal will come out of the estate. Certificate for one Counsel.

Coutts Trotter J.:—This is an appeal from thejudgment of Kumaraswami Sastri, J., in C. S. No. 16 of 1920 which was a suit brought by Mr. J. E. C. Brunton as plaintiff against his half-brother Mr. William Brunton, claiming an account from the defendant as executor of the Will of the late Mr. George Brunton and various ancillary reliefs. A bulky record has been piled up, but a very small number of documents have been referred to by the learned Counsel who argued this appeal and, in fact, the matters that we have to determine fall within a comparatively narrow compass. I propose briefly to set out the relevant facts

'hen consider the questions of law which aise and which I conceive to be neces- the determination of this appeal.

lship, after dealing with the evi- came to the conclusion there was no undue influence and fraudulent concealment.

After discussing the evidence the learned Judge came to the conclusion that no undue influence or misrepresentation had been proved, and proceeded as follows:—

What happened at the trial was that, after the case had been fought on a plain issue of fraud, the learned Judge, when he came to give judgment, discovered an entirely new case for the plaintiff—one to which, I am satisfied, Mr. Grant's mind was never directed and with which he had no opportunity of dealing ; that case was not that Mr. William Brunton had committed a deliberate fraud or that he had extracted the assent of Mrs. Brunton to the equalisation of capital in January 1917 when she is alleged not to have known what she was doing because of her physical and mental condition. Accepting the assent to the balance sheet which, of course, involved an assent to the equalisation of capital as having taken place in October 1916, the learned Judge nevertheless held that that assent was given by Mrs. Brunton at a time when Mr. William Brunton was in sole possession of the material facts and that he had failed to acquaint her with those facts, that consequently the doctrine that has its clearest exposition in *Law* v. *Law* (4) applied, and that, accordingly, the transaction must be set aside.

I am almost tempted to say that to raise such a case after the conclusion of the arguments was so great an injustice to the defendant that the judgment ought to be set aside on that ground alone. But, I am of opinion that, even though it was unfairly raised against the defendant and was a case which he had no opportunity of meeting, it nevertheless breaks down on the evidence as we now have it.

His Lordship then found on the evidence that the case set up was fully met by the defendant's evidence.

It is obvious that Mrs. Brunton senior and Mr. William Brunton were on terms of great affection towards one another as is fully evidenced by their letters to one another. She clearly reposed the greatest

(4) (1905) 1 Ch. 140 ; 74 L. J. Ch. 169 ; 92 L. T. 1; 53 W. R. 227; 21 T. L. R. 102.

confidence and trust in him and regarded him as having worthily served her interests by the attention and skill he had devoted to the business which was the source of her livelihood. I see nothing in this record to show that that confidence was in the least misplaced or that Mr. William Brunton at any stage behaved otherwise than as a conscientious and honourable gentleman. I am at a loss to understand why the learned Judge took the view he did take of this case. I am regretfully forced to the conclusion that, in certain matters I have dealt with, Mr. Jack Brunton did not tell the truth and endeavoured to put before the Court a false case. It is my opinion (and if it gives him any satisfaction he is entitled to that opinion) that Mr. William Brunton emerges from this case without the slightest tarnish on his integrity and honour.

I do not see why he should be made to pay the costs of a judicial enquiry which was forced upon him by the plaintiff. Mr. Cornish has not seriously argued the questions raised in his memorandum of cross-appeal. He has quite properly reserved his right not to abandon them but to argue them, if so advised, in the event of this case going to the Privy Council, all the materials for arguing them are contained in the record.

I agree with my Lord's proposed order as to costs.

S. D.

Appeal accepted, decree modified.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 161 OF 1923.

November 15, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

Hakim MUHAMMAD IDRIS—DECREE-HOLDER—APPELLANT

versus

LACHMAN DAS—JUDGMENT-DEBTOR—RESPONDENT.

Bengal Revenue Sales Act (XI of 1859), ss. 33, 34, applicability of—Arrears, absence of—Sale by Collector—Suit to recover possession—Execution—Limitation—Execution of decree—Executing Court, whether can question decree.

Section 34 of the Bengal Revenue Sales Act applies only where a sale held under the Act is annulled by a final decree by a Civil Court. In other words, where a suit is brought under the provisions of section 33 of the Act, and a Civil Court annuls the sale on any of the grounds mentioned in the section, an execution petition must be presented within six months after the date of the decree, but when the suit is not one under the provisions of section 33 of the Act, section 34 of the Act has no operation whatever. [p 204, col. 2.]

There is a clear distinction between a case where a sale is annulled and a case where the Court authoritatively recognises that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to the plaintiff. Where the sale is authorized, but there is a direct violation of the Statutory provision in conducting the sale, the suit must be one for annulment of the sale, and the Court has complete power to set aside the sale, provided the requirements of section 33 are complied with. But where the sale is not authorized, there is in law no sale, and, there being nothing to annul, all that the Civil Court does is to recognise that there is no sale and to pass a decree for possession in favour of the plaintiff. [p. 204, col. 2.]

Where an estate is not in arrears there is no authority in the Collector to put up the estate for sale, and a Civil Court has complete power to recognise authoritatively that there was no power in the Collector to put up the property to sale and to hold that there was in fact no sale at all. To such a case section 34 of the Bengal Revenue Sales Act has no application.

Harkhoo Singh v. *Bunsidhar Singh*, 2 C. W. N. 360; 25 C 876; 13 Ind. Dec. (N. S.) 572; *Balkishen* v *Simpson*, 2 C. W. N. 513; 25 C. 833; 25 I A. 151; 7 Sar. P. C. J. 363; 13 Ind. Dec. (N. S.) 543, relied on.

It is not open to a Court executing a decree to go beyond the decree and to enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint.

Second appeal from the order of the District Judge of Patna, dated the 16th March 1923.

Messrs. *L. N. Singh*, *N. C. Singh* and *B. C. Sinha*, for the Appellant.

Mr. *A. B. Mukherji*, for the Respondent.

JUDGMENT.

Das, J.—I think this appeal must succeed. The appellant instituted a suit as against the respondent to have a Revenue Sale set aside and on the 29th January 1921 he recovered a decree in the Court of the Subordinate Judge of Patna setting aside the Revenue Sale. The appellant thereupon instituted proceedings in execution for recovery of possession of the property sold and it is conceded that the application for execution was not made wit[hin] months after the date of the Civil Court. The question which the Courts below had to try was whether the executic[n] red by limitation in view of the

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section 34 of Act XI of 1859. The Court of first instance came to the conclusion that the Civil Court, having set aside the sale on the ground that the Revenue Court had no jurisdiction to sell the property, section 34 did not apply and the appellant was entitled to maintain execution although the application was not made within six months after the date of the Civil Court decree. The learned Judge in the Court below has taken a different view and he has dismissed the execution petition.

The Subordinate Judge in trying the original suit between the parties and giving a decree to the appellant said as follows: "The plaintiff examines one witness who proves that the notices were not served. He further produces two certified copies of the ledger showing that there was an excess of payment and that, therefore, the sale could not be held. Notices under section 4 were also not served and the plaintiff did not get time to pay arrears. Ordered that the suit be decreed *ex parte* with costs with interest at 6 per cent. per annum. Let the Revenue Sale be set aside and the plaintiff be delivered into possession." The executing Court of the first instance took the view that the decree of the Subordinate Judge in the original case was a decree not strictly annulling the Revenue Sale but vacating the Revenue Sale on the ground that there was no arrear and that consequently there was no authority in the Collector to put up the property to sale. As I read the judgment of the learned Judge in the Court below, he in no way throws any doubt on the construction put upon the judgment by Mr. Ghalib Hasnain. It is urged in this Court on behalf of the respondent that, as a matter of fact, the sale was not set aside on the ground that the estate was not in arrears, but on the ground that notices were not served in accordance with law and that the learned Judge in the Court below did not in fact accept the interpretation put on the judgment in the original case by Mr. Ghalib Hasnain. I am wholly unable to accept this contention. In my opinion the learned District Judge has not thrown any doubt on the construction upon the judgment in the original case learned Subordinate Judge dealing with tion petition Nor do I think that nt pronounced in the original case any other interpretation. It is urged before us that the plaint itself did not raise a case that the estate was not in arrears. That may or may not be so, but undoubtedly evidence was placed before the learned Subordinate Judge that the estate was not in arrears and that there was an excess payment made by the plaintiff; and the learned Subordinate Judge undoubtedly accepted that case and passed a decree in accordance with that finding. In my opinion it is quite impossible for a Court executing the decree to go beyond the decree and to enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint. An executing Court is no doubt entitled to interpret a decree, but is not entitled to pronounce that the decree should not have been passed by the Court. In my opinion the decree that was passed in the original case was a decree which recognised authoritatively that there was no sale at all and that the Collector had no jurisdiction whatever to put up the property to sale.

That being so, the question arises whether section 34 constitutes a bar to the maintainability of the execution petition having regard to the fact that the application was not made within six months after the date of the sale. In my opinion section 34 applies only where a sale held under Act XI of 1859 is annulled by a final decree by a Civil Court: In other words, where a suit is brought under the provisions of section 33 of the Act and a Civil Court annuls the sale on any of the grounds mentioned in section 33 of the Act an execution petition must be presented within six months after the date of the decree; but, where the suit is not one under the provisions of section 33 of Act XI of 1859, section 34 in my opinion has no operation whatever. There is a clear distinction between a case where a sale is annulled and a case where the Court authoritatively recognises that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to the plaintiff. Where the sale is authorized, but there is a direct violation of the statutory provision in conducting the sale, the suit must be one for annulment of the sale, and the Court has complete power to set aside the sale, provided the requirements of section 33 are complied with. But where the sale is not authorized,

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there is in law no sale, and, there being nothing to annul, all that the Civil Court does is to recognise that there is no sale and to pass a decree for possession in favour of the plaintiff. I have no doubt whatever that section 33 applies to a case where the sale is authorised, but is attended with some illegality or irregularity and section 33 affords a complete protection to such sales, although they have been attended with illegality or irregularity, unless the conditions specified in section 33 are fulfilled and the procedure indicated in that section is adopted. But where there is no authority whatever for the sale, section 33 has no operation; and the Court, in dealing with a case where there is an entire absence of jurisdiction in the Collector to put up the property to sale, does not annul the sale but recognises authoritatively that there was no sale at all. In my opinion where the estate is not in arrear there is no authority in the Collector to put up the estate for sale and a Civil Court has complete power to recognise authoritatively that there was no power in the Collector to put up the property to sale and to hold that there was in fact no sale at all. That, in my opinion, was the decree pronounced in the original case brought by the appellant against the respondent. That being so, section 34 in my opinion does not apply.

There are numerous cases on the point; but it will be sufficient to refer to two cases to which, I notice, the learned Subordinate Judge refers. In the case of *Harkhoo Singh* v. *Bunsidhur Singh* (1) it was held that a suit to set aside a sale purporting to be under Act XI of 1859, on the ground that no arrear of revenue was due may be brought in the Civil Court even if such ground has not been specified in an appeal to the Commissioner. Now, it is important to remember that a Civil Court has no power to set aside a sale under section 33 of Act XI of 1859 unless the ground upon which the sale is attacked has been declared and specified in an appeal made to the Commissioner under section 2 of the Act of 1868. It follows, therefore, that if a suit to set aside a sale on the ground that no arrear of revenue was due is to be regarded as a suit under section 33 of Act XI of 1959, the fact that the actual ground was not declared and specified in an appeal to the Commissioner would constitute a complete bar to the maintainability of such a suit. In my opinion the decision in *Harkhoo Singh* v. *Bunsidhur Singh* (1) is an authority for the view that a suit to set aside a sale on the ground that no arrear of revenue was due is not a suit under section 33 of Act XI of 1859. The only other case to which I need refer is the case of *Balkishen Das* v. *Simpson* (2). It was held in that case that there is no jurisdiction in the Collector to put up an estate for sale where that estate is not in arrear. In that particular case it was also held that a Civil Court has jurisdiction to entertain the objection to the sale although the point had not been considered and disposed of by the Commissioner and that section 33 of Act XI of 1859 is no bar to such a suit. In dealing with the question the Judicial Committee pointed out that the enactments of 1859 and of 1868 were intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. They further pointed out that where the estate is not in arrears at all there was no jurisdiction whatever in the Collector to sell the property and they held that the whole proceedings of the Collector were beyond his jurisdiction and were not entitled to the protection given him by the Act in cases where the sale is authorised, although it may be attended with some irregularity or illegality. A distinction is clearly drawn in the judgment of the Judicial Committee between a case where the sale is authorised but is attended with some irregularity or illegality and a case where the sale is not authorised at all. In my opinion all these decisions establish conclusively that where there is no jurisdiction in the Collector to put a property to sale, the sale cannot be regarded as a sale under Act XI of 1859. Section 34 only applies where the sale is held under Act XI of 1859 and is annulled by a final decree of the Civil Court.

In my opinion the view which was t
in this case by the learned Subo
Judge was right. I would allow thi

(1) 2 C. W. N. 360; 25 C. 876; 18 Ind. Dec. (N. S.) 572.

(2) 2 C. W. N. 513; 25 C. 883; 25 I. P. C. J. 368; 18 Ind. Dec. (N. S.) 548.

set aside the order of the learned Judge in the Court below and restore the order of the learned Subordinate Judge. It follows that execution must proceed.

The appellant is entitled to his costs throughout.

Ross, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 120 OF 1923. November 28, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

SHEONANDAN PRASAD AND ANOTHER —APPELLANTS

versus

DAMODAR PRASAD AND OTHERS— RESPONDENTS.

Hindu Law—Daughter, estate held by—Income—Rent decree obtained by daughter, whether vests in reversioners after her death.

Under the Hindu Law the income of a limited estate held by a widow or a daughter is at the disposal of the limited owner, but if the limited owner has made no attempt to dispose of such income during her life-time such income must follow the estate from which it arose.

Isri Dutt v. *Hausbatin Kuarin*, 10 C 324; 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N.S.) 217 (P.C.) followed.

A rent decree obtained by a Hindu daughter and undisposed of by her during her life-time vests on her death in the reversioners of her father.

Appeal from the order of the Subordinate Judge of Saran, dated the 31st January 1923.

Mr. *H. P. Sinha*, for the Appellants.

Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.

Das, J.—I think this appeal must succeed. The learned Judge in the Court below took the view that the rent decree was the property of Phul Koer and descended to the heirs of Phul Koer and not to the heirs of Kali Prasad. It is necessary to remember that Phul Koer succeeded to the estate as the heir of her father Kali Prasad. The estate in her hands was the estate of a Hindu daughter and it is not disputed that the estate as such ·evert on her death to the heirs of Prasad and not to her heirs. The ·t which found favour with the ·dge in the Court below is that having been obtained by Phul Koer it must be regarded as her own personal property. With this conclusion I am unable to agree. It was laid down in the leading case of *Isri Dutt* v. *Hansbatin Kuarin* (1) that if the widow has made no attempt to dispose of the savings from her husband's estate they must follow the estate from which they arose. It is not disputed that the income of a limited estate held either by a widow or a daughter is at the disposal of the limited owner; but the question arises, what happens to such income if the limited owner has made no attempt to dispose of it in her life time. On this question the case to which I have referred is conclusive. It was held by the Judicial Committee that if the limited owner has made no attempt to dispose of the income in her lifetime such income must follow the estate from which it arose; difficulties arise only in cases where the income is held in suspense in the widow's hands, for it is undisputed that it is open to the limited owner to hold the income in suspense with intent to appropriate it for her personal use later on. The test to be applied to cases of this description is, as was pointed out by Mr Justice Mukerji in the case of *Bhakwati Kuer* v. *Sahudra Kuer* (2), to determine from the surrounding circumstances the intention of the widow, namely, whether she intended to treat the income as part and parcel of the estate of her husband or whether she treated it as a temporary saving liable to be applied by her subsequently for her own purposes. But this question does not arise in this case. It is nobody's case that the rent decree was held by Phul Koer in suspense with intent to appropriate the proceeds thereof for her personal use later on. Phul Kuer died not having in any way disposed of that decree. It accordingly vested in the reversioners of her father.

I would allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance. It follows that execution must proceed. The appellant is entitled to his costs throughout. Hearing fee in this Court will be assessed at two gold mohurs.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

(1) 10 C. 324; 10 I A. 150; 13 C. L. R. 419; 7 Ind Jur 557; 4 Sar P. C. J. 459; 5 Ind. Dec. (N. S.) 217 (P. C.).

(2) 18 Ind. Cas. 691; 16 C. W. N. 834.

ZABUR MIAN *v.* PURAN SINGH

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1537 OF 1921.

November 14, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

ZABUR MIAN AND ANOTHER—APPELLANTS

versus

PURAN SINGH AND OTHERS—RESPONDENTS.

Succession Certificate Act (VII of 1889) s. 4—Succession certificate not produced—Objection taken in appeal—Procedure.

Under section 4 of the Succession Certificate Act the production of a succession certificate is not a condition precedent to the institution of a suit, it is sufficient if the certificate is produced at any time before the decree is made.

Where an objection is taken for the first time in appeal that the suit should not have been decreed inasmuch as the plaintiff had not produced a succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate.

Ammasi Kutti Gounden v. *Appalu*, 29 Ind. Cas. 234, relied on.

Second appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 14th May 1921.

Mr. *A. K. Roy*, for the Appellants.

Mr. *P. C. Roy*, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of a suit instituted by the appellants to enforce a simple unregistered bond as against the respondents. The only defence taken in the written statement is that no consideration passed. This issue was decided against the defendants in the Court of first instance and that Court gave the plaintiffs a decree substantially as claimed by them. The learned Judge in the Court below agreed with the finding of fact at which the Court of first instance had arrived, but that Court dismissed the plaintiffs' suit on the ground that the plaintiff did not obtain a succession certificate in respect of the debt due to his deceased brother who, it appears, was the co-partner of the appellant No. 1. Section 4 of the Succession Certificate Act undoubtedly lays down that no Court shall pass a decree against a debtor of a deceased person for payment of his debt except on the production of a succession certificate But it will be noticed that the point was not taken in the Court of first instance. If the point had in fact been taken it would be a matter of no difficulty for the appellants to obtain a succession certificate before the decree was passed. It is well established that the production of a succession certificate is not a condition precedent to the institution of a suit and that it is sufficient if it is produced at any time before the decree is made. That point not having been taken in the written statement the plaintiffs did not apply for and obtain a succession certificate in respect of the debt due by the defendants.

In my opinion the learned District Judge should not have dismissed the plaintiffs' suit on the ground which was for the first time taken in his Court. The procedure which should be adopted when a point is for the first time taken in the Appellate Court is laid down in the case of *Ammasi Kutti Gounden* v. *Appalu* (1). The learned Judges pointed out in that case that, where an objection is taken for the first time in appeal that the suit should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate. This is the procedure which, in my opinion, should have been adopted by the learned Judge in the Court below. Mr. A. K. Roy on behalf of the appellants has now produced the succession certificate before us. We direct that that certificate be marked as an Exhibit in the case. That being done, all that I need say is that this appeal must be allowed and the decree passed by the Court of first instance restored. In the circumstances of the case, there will be no order as to costs.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

(1) 29 Ind. Cas. 234.

MOTILAL GULABSAO *v.* GANPATRAO

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 373 OF 1922.
November 21, 1923.

Present :—Mr. Prideaux, A. J. C

MOTILAL GULABSAO—APPELLANT

versus

GANPATRAO AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, doctrine of, applicability of—Mortgage-suit—Lease granted by defendant during pendency of suit, whether binding on mortgagee—Lambardar, lease granted by, after ceasing to be lambardar effect of—Theka of village, grant of, whether ordinary management.

Only a person having a propiertary interest can be appointed a Lambardar, and though the definition of a proprietor includes a lessee, a person who ceases to retain that capacity ceases to be a Lambardar and cannot perform any of the functions of a Lambardar. The giving of a whole village on lease cannot be said to be an act of ordinary village management. [p. 309, col. 2].

A lease effected for agricultural purposes and a *theka patra* are within the purview of section 52 of the Transfer of Property Act, and it is incumbent upon a person taking such a lease or *theka patra pendente lite* to show that the rights of the true owner of the land leased are not affected thereby. [p. 309, col 2 ; p. 310, col. 1].

Narain Patel v *Abdul Majid Khan*, 15 C. P. L. R. 6; at p. 8 ; *Chandan Singh* v. *Fakirgir*, 27 Ind. Cas. 940 ; 11 N. L. R. 21 ; *Madan Mohan Singh* v. *Raj Kishore Kumari*, 39 Ind. Cas. 182 ; 21 C. W. N. 88, **relied on.**

After the passing of a final foreclosure decree in a mortgage-suit, the judgment debtor is not entitled to grant a *theka* or lease of the property included in the decree. [p. 310, col. 1].

Appeal against the decree of the District Judge, Wardha, dated 22nd April 1922.

Dr. *H. S. Gour* and Messrs. *W. R. Puranik* and *A. J. Mande*, for the Appellant.

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

JUDGMENT.—One Kanhoji Rao Raghoji Rao Mohite owned the village of Mouza Goregaon situated in the Wardha Tahsil. On the 1st of September 1918 he executed a registered *Theka patra* in favour of two persons, Ramchandra and Kunjilal, leasing that village to them for six years, *i.e.*, from 1918-19 to 1923-24. One Tukaram Ramji was the occupancy tenant of field No. 5 in the

He surrendered it by two surrender-
ted 19th December 1919 and 31st
920 to the lessees, and on 31st Jan-
hey executed two *pattas* in favour
'ants, leasing the field to them in

tenant right in perpetuity. Defendants have been in possession since that date. The plaintiff in execution of a mortgage-decree dated 7th November 1918, obtained in Civil Suit No. 17 of 1916 on the file of the Additional District Judge, Nagpur, took possession on 23rd February 1920. The preliminary decree in the case was pased on 5th January 1918. He now sues stating that the two lessees, Ramchandra and Kunjilal, had no right to grant the field to the defendants, as the field was granted to them after the plaintiff had become owner of the village by virtue of the foreclosure decree of 7th November 1918.

The defendants admitted the plaintiff as the present landlord. They denied knowledge of the civil suit in which plaintiff got his foreclosure decree and also that the lease of 1st September 1918 to Ramchandra and Kunjilal was *pendente lite*. They pleaded that on the execution of the *Theka patra* of 1st September 1918 Ramchandra and Kunjilal were the *de facto* proprietors of the village, their names having been recorded as *malguzars* of the village, Ramchandra being the Lambardar ; that the granting of the lease to the defendants was an act of village management ; that they had taken the field for consideration without notice of the plaintiff's alleged title ; that they are entitled to be treated as tenants, and that the plaintiff had only a right to recover rent from them.

The plaintiff succeeded in the trial Court, the trial Judge holding that defendants could not resist the plaintiff's claim for possession. On appeal, however, the District Judge, Wardha, finds that it is not disputed that the leases were granted in the ordinary course of village management, he writes : —

> "There was a surrender and release and the transaction resulted in some profit to the landlord of the village. I do not think it necessary to decide whether the lessees can be considered *de facto* proprietors. The plaintiff became entitled to possession of the village on 7th November 1918. He did not take possession for fifteen months. During this period it was necessary to manage the village. The Lambardar collected rents and granted leases. Heavy loss might have occured to the plaintiff had not rents been collected and

arrangement been made for the cultivation of the lands of the village. The plaintiff stood by and allowed the lessees to manage the village. He did not take early steps for his appointment as Lambardar. The Lambardar is a customary agent of the proprietors of the village and I consider that the plaintiff allowed the lessees to act as his agents. He is, therefore, bound by ordinary acts of village management on the part of the Lambardar. Under the new Land Revenue Act, the Lambardar shall be deemed to be landlord within the meaning of the Central Provinces Tenancy Act (section 188 (2) of Act II of 1917). Here the plaintiff allowed Kanhojirao to remain Lambardar after he had lost his proprietorship; and Kanhojirao's lessees in good faith acted for the landlord, Kanhojirao must be deemed to have been the landlord. The plaintiff may sue the lessees for profits obtained by them but he cannot affect the rights given by them to others in the ordinary course of village management."

The plaintiff's claim was dismissed in the lower Appellate Court.

It is admitted here that on the date of the lease, 31st January 1920, Ramchandra was the Lambardar of the village. For the appellant it is also argued, on the authority of *Dhirajsing* v. *Dinanath* (1), that the lease granted by Kanhoji Rao to Ramchandra and Kunjilal was executed *pendente lite* during the pendency of the mortgage-suit, and was for that reason void, it being a lease for six years, and not an ordinary act of village management. It is said to be void under section 52 of the Transfer of Property Act. The *Theka patra* being void, it is contended, that Ramchandra could not take the surrender of the lease, and that once the final decree was passed on 7th November 1918, or at the most when the decree was amended on 12th March 1919, Kanhoji Rao having ceased to be the proprietor of the village, neither he nor his lessees was the Lambardar. It is stated that Ramchandra's lease gave him no right against the plaintiff, and it is not denied that that lease was granted during the pendency of the mortgage-suit, and that it must be held that though Kanhoji Rao had a right to give the lease, it was a right subject to the result of the suit.

For the respondents it is argued that the principle of section 41 of the Transfer of Property Act should be applied; that the respondent is a stranger; that the village is in the Wardha Tahsil and the respondents are residents of Arvi; that the case was proceeding at Nagpur, and the respondents could not possibly be deemed to have had notice of the litigation; that the execution application was not filed until 2nd February 1920 in Wardha; that Ramchandra was the Lambardar and so they took all reasonable care that no *mala fides* are suggested against them; that there was a delay of eight months in executing the decree after it was amended; that possession was not taken until 23rd February 1920; that mutation was effected on 3rd August 1920 and that plaintiff was then appointed Lambardar on 24th August 1920 *vice* Ramchandra. It is further argued that as the plaintiff accepted the surrender, they must accept the lease, and that they cannot accept a portion of the Lambardar's authority and refuse to accept the rest. It is also stated that the tenancy right did not pass to the plaintiff by the decree, but only the proprietary rights, and that Ramchandra was a *de facto* proprietor working as such with the consent of the plaintiff. *Baidya Nath Roy.* v. *Nanda Lal Guha* (2) is quoted in support of the proposition that, when a tenant has taken land from a *de facto* proprietor, he is entitled to keep his tenancy. It is further contended that the taking of the land was done in good faith and for consideration.

It seems to me that the contentions of the appellant must prevail. There is no doubt that Kanhoji Rao had the right to give the lease subject to the result of the mortgage-suit. The giving of a whole village on lease cannot be said to be an act of ordinary village management. It was held in *Narain Patel* v. *Abdul Majid Khan* (3) that a lease effected for agricultural purposes is within the purview of section 52 of the Transfer of Property and that it is incumbent upon any

(1) 4 N. L. R. 140.

(2) 26 Ind. Cas. 977; 18 C. W. N. 1206 · 595.

(3) 15 C. P. L. R. 6 at p. 8.

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taking such a lease *pendente lite* to show that the rights of the owner of the land leased are not affected thereby; and in *Chandan Singh* v. *Fakirgir* (4) it was held that section 52 of the Transfer of Property Act applies to agricultural and other leases. The lease by Kanhoji Rao may not be an agricultural lease, but it is certainly a lease which comes within the provisions of section 52 of the Transfer of Property Act. *In Madan Mohan Singh* v. *Raj Kishore Kumari* (5) it was held that where, pending a mortgage-suit, the mortgagor settled a number of persons on different portions of the mortgaged land, the plaintiff should recover. It is clear that only persons having a proprietary interest can be appointed a Lambardar, and it seems to me that though that definiton includes a lessee or a proprietor, he who ceased to retain that capacity ceases to be Lambardar and cannot perform any of the functions of a Lambardar. After the amendment of the final decree on the 3rd September 1919, Ramchandra could have no authority to lease out the field. To hold the contrary would mean that, after the passing of a final foreclosure decree, the defendant proprietor of a village would be entitled to get rid of all his *khudkasht* land to the detriment of the successful mortgagee. The record shows that plaintiff was prosecuting his case and the execution of the decree diligently. It seems to me that the case was correctly decided by the trial Court.

I, therefore, set aside the lower Appellate Court's decree and restore that of the trying Court. Costs in all Courts will be paid by the respondents.

.Z K. *Appeal accepted.*

(4) 27 Ind. Cas. 940 ; 11 N. L. R. 21.
(5) 39 Ind. Cas. 182; 21 C.W.N. 88.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 104 OF 1923.
December 4, 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

KAMLANATH JHA AND OTHERS—APPELLANTS

versus

MOBIT NARAIN JHA—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 144, 151—Restitution—Inherent power of Court—Possession delivered under erroneous interpretation of decree whether can be restored

The power of a Court to order restitution is by no means confined to the terms of section 144 of the Civil Procedure Code. It is the inherent power of a Court to do what is right and proper under the circumstances which have happened. [p. 312, col. 1.]

When under a wrong interpretation of a decree the Court executing the decree delivers possession of the disputed property to a party who is not entitled to possession of it, and the interpretation adopted by it is subsequently held to be erroneous, the Court has ample jurisdiction to restore the party who was dispossessed by the erroneous order of the Court to possession of the property. [p. 312, col. 1]

First appeal from the order of the Subordinate Judge of Darbhanga, dated the 9th April 1923.

Messrs. *S. N. Mullick* and *M. Prasad*, for the Appellants.

Messrs. *Jayswal* and *L. K. Jha*, for the Respondent.

JUDGMENT.

Das, J.—This appeal is directed against the order of the learned Subordinate Judge of Darbhanga, dated the 9th of April 1923, by which he allowed the application of the respondent for restitution.

The facts are these. Sometime in 1918 the appellants instituted a suit as against the widows of Sheonath for recovery of certain properties which were held by Sheonath. It appears that Sheonath died sometime in 1917 and thereupon a dispute arose between his widows and the appellants in regard to the succession to the properties of Sheonath. The respondent was in possession of the properties as *thicadars* by virtue of a lease executed by Sheonath in his favour and it appears that the lease

was to run from 1322 to 1328 with option to the respondent to renew it for a further period of seven years. The appellants recovered a decree both as against the widows and the respondent, but the decree expressly preserved the title of the respondent under the lease. In other words, the decree directed that the appellants were entitled to recover rent from the respondent and were only entitled to *khas* possession upon the expiry of the lease. In December 1920 the appellants executed the decree and obtained symbolical possession as against the widows. On the 17th September 1921 they applied for delivery of *khas* possession as against the respondent on the ground that the term of the lease had expired. The Court executing the decree came to the conclusion that the term of the lease expired in 1328 and issued the usual writ for delivery. On the 30th of September 1921 the respondent made an application before the Court executing the decree. It is somewhat difficult to understand the scope of that application, but it appears that the respondent insisted that he was still in possession of the property and was entitled to be maintained in possession. The respondent contended before the Court that, under the lease executed in his favour by Sheonath, he had the right to renew the lease for a further period of seven years from 1328 and that the decree preserved his rights and the Court executing the decree had no right to deliver *khas* possession of the property to the appellants.

The first Court refused the application of the respondent who thereupon appealed to this Court. This Court came to the conclusion that the respondent had an option to renew the lease and that the decree did not give the appellants any right whatever to *khas* possession of the disputed property until the expiry of 1335. The respondent then presented an application which is the subject-matter of this appeal. The application was made under sections 151 and 144 of the Code and it alleged that, "in execution of the said writ of delivery of possession, they (that is to say, the appellants) dispossessed your petitioner (that is to say, the respondent) from the said share and appropriated all the Bhadaie, Aghani and Rabbi produce and other profits of all the *khas* lands, *Batai* and *Bhauli* lands, etc." The respondent contended that the order of the Subordinate Judge having been set aside by the High Court in appeal he was entitled to be restored to possession. The learned Subordinate Judge has acceded to the application made before him and has directed that the respondent should be restored to possession.

It is strongly urged by Mr. Sushil Madhab Mullick on behalf of the appellants that it being the case of the respondent throughout that he was in possession of the disputed properties and has never been dispossessed, it is not open to him to maintain an application for restitution. It is undoubtedly true that, for some reason or other which I have not been able to understand, the respondent did make the case both before the Subordinate Judge and this Court that he was in possession of the disputed properties and was entitled to be maintained in possession. But it is quite impossible to decide this case on a mere technicality. The decision of the learned Subordinate Judge establishes beyond reasonable doubt that the appellants did recover possession of the disputed land from the respondent. It is not disputed that a writ of delivery of possession was issued at the instance of the executing Court, and it is not denied that all that was necessary to be done by the Nazir was in fact done. Mr Sushil Madhab Mullick contends that the possession was a formal one For myself, I do not understand the exact meaning of the words "formal delivery of possession". The appellants did recover possession of the properties from the respondent by virtue of the process of a Civil Court and was entitled by virtue of that order to recover rent from the actual *raiyats* of the land and to cultivate the *khas* land within the village. In my opinion, there is not a shadow of doubt that the appellants did recover *khas* possession of the disputed land. That being so, the question arises whether it was competent to the learned Subordinate Judge to direct that the respondent should be restored to possession. Mr. Sushil Madhab Mullick suggested that the Court, in dealing with an application of this nature, is confined to the terms of section 144 of the Code, and that as the order decree has not been varied or reversed Appellate Court there was no pov Subordinate Judge to direct that the should be restored to possession.

to assent to this argument. Under cover of a decree pronounced by a Civil Court the appellants took possession of the properties to which they were not entitled until the year 1335. It is quite true that the original decree has not been reversed, but it is not suggested by Mr. Jayaswal on behalf of the respondent that that decree was in any way erroneous or that it purported to give the appellants the right which they claimed under it during the execution proceedings. The whole point is this. The appellants did get a decree both as against the widows of Sheonath and as against the respondent. Under cover of that decree they proceeded to turn the respondent out of the land upon which the respondent was entitled to remain until a particular year; and the question is, whether the Court is now entitled to say that the respondent should be restored to possession. The power of a Court to order restitution is by no means confined to the terms of section 144 of the Code. It is the inherent power of a Court to do what is right and proper under the circumstances which had happened. By a wrong interpretation of the decree the Court executing the decree delivered possession of the disputed land to the appellants. This Court decided that the interpretation put on the decree by the executing Court was erroneous. That being so, the Court had complete jurisdiction to restore the respondent to possession of the properties from which he was dispossessed by an erroneous order of the Executing Court.

The decision of the learned Subordinate Judge is right and must be affirmed. This appeal must be dismissed with costs.

On the question of mesne profits, Mr. Mullick contends that, having regard to the attitude which has throughout been adopted by the respondent, his clients should only be called upon to pay what they have actually made out of the disputed land. The learned Subordinate Judge has not dealt with this matter and the question really does not arise for our consideration; but Mr. Jayaswal does not object to the enquiry for mesne profits being confined to the actual profits made by the appellants.

I agree.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 49 OF 1923.
December 4, 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

EAST INDIAN RAILWAY CO. —APPELLANTS

versus

RAM LAKHAN RAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Limitation Act (IX of 1908), s. 22—Suit against wrong defendant—Amendment after limitation, whether permissible.

Where the party intended to be sued and substantially sued has been misdescribed in the cause title, there is complete power in the Court to make the necessary correction without any regard to lapse in time. [p. 313, col. 2.]

Where, however, there are two known persons in existence and plaintiff brings his suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other, and in substance sued the other, and no question of representation arises, the case is not one of misdescription, and the Court will be justified in refusing leave to bring the real defendant on the record at a time when the suit has become barred by time against him. [p. 313, col. 2; p. 315, col. 1.]

Case-law discussed.

A suit against the Agent of a Railway Company in his personal capacity cannot be regarded as, in substance, a suit against the Railway Company.

Second appeal from an order of the Additional Subordinate Judge of Shahabad, dated the 22nd December 1922.

Messrs. *N. C. Sinha* and *N. C. Ghosh*, for the Appellants.

Messrs. *Parameshwar Dayal* and *Tribhuan Nath Sahai*, for the Respondent.

JUDGMENT.

Das, J.—I think that this appeal must succeed. It is not disputed before us that the suit as filed on the 23rd December 1920 was against the Agent, East Indian Railway Co., and that by his application for amendment, the plaintiff sought to substitute the Railway Company for the defendant originally sued. It is admitted that, had the suit been filed at the date when the plaintiff presented his application for amendment, it would have been open to the Railway Company to contend that the suit was barred by limitation; and the learned Munsif giving

effect to the well known rule that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment, declined to accede to the application made on behalf of the plaintiff. The learned Subordinate Judge in the Court below has come to the conclusion that the application for amendment of the plaint ought to have been allowed by the learned Munsif and in that view he has remanded the case to the Court of first instance for disposal on the merits.

In my opinion the question must be decided on the terms of O. I, r. 10 (5) of the Code of Civil Procedure. On the language deliberately employed by the Legislature in the provisions of the Code to which I have referred, there is no room for controversy that the proceedings as against any person added as a defendant shall be deemed to have begun only on the service of the summons. Now, it is admittted before us that the suit as against the Railway Company would be barred by limitation if the proceedings in connection with the suit be deemed to have begun only on the service of the summons. That being so, it seems to me that the learned Munsif was right in declining to accede to the application made before him on behalf of the plaintiff if the Railway Company be regarded as an added party to the suit.

It was strongly contended before us that the Railway Company should not be regarded as " a person added as defendant " within the meaning of the term as used in O. I, r. 10 (5) of the Code. I quite admit that where there is a misdescription of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time; for in a case of misdescription the Court will not have any difficulty in coming to the conclusion that the defendant had been substantially sued, though under a wrong name. The cases relied upon by the learned Vakil for the respondent are all cases of misdescription, and the decisions in all these cases rest on the view that the defendant sought to be added as a party was always on the record as a defendant, though under a wrong name. In the case of *Manni Kasaundhan* v. *Crooke* (1) the plaintiff intended to sue, and did sue, the Municipal Committee of Gorakhpur; but instead of suing the Committee through the President as the plaintiff should have done, he sued it through the Secretary. It was a case of misdescription, pure and simple, and the Allahabad High Court pointed out that no personal relief was sought against the Secretary; the whole object of the plaintiff being to bind the Committee by any decree that might be passed in his favour. In *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*, (2) the plaintiffs claimed a decree expressly against the debuter estate and the defendant was brought on the record not only in his personal capacity, but also as the receiver of the debutter estate. Subsequently, after the expiry of the period of limitation prescribed for the suit, the plaint was amended and the defendant (who was a party on the record both in his personal capacity and as receiver of the debutter estate) was described in the cause title as *shebait* of the debutter estate. The Calcutta High Court, in affirming the view of the lower Appellate Court that amendment should be allowed, pointed out that the plaintiffs expressly asked for a decree against the debutter estate and that the only question was whether the debutter estate was actually before the Court, as in substance it was throughout; and it expressed the view that, " where relief was originally claimed as against a party who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a new defendant to the suit." As I read the decision of the Calcutta High Court, it is based on the view that where the party intended to be sued and substantially sued has been misdescribed in the cause title there is complete power in the Court to give the appropriate relief to the plaintiff without any regard to the terms of section 22 of the Limitation Act. The other cases, (except one to which I shall presently refer) upon which reliance was placed substantially take the same view.

But in my opinion there is all the difference in the world between misdescribing party intended to be sued and suing ong

(1) 2 A 296; 1 Ind. Dec. (N.S.,) 7
(2) 32 C. 582; 9 C.W.N. 421.

party. It was strongly contended before us that the plaintiff intended to sue the Railway Company and in substance sued the Railway Company; but the plaint speaks for itself; and it is quite impossible for us to have recourse to extrinsic evidence. A personal decree was sought against the Agent, East Indian Railway Company, and there is no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the defendant. No question of representation arises in this case and it is quite impossible for us to have recourse to the doctrine enunciated in *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (2). The only case which appears to support the contention of the respondent is the case of *The Saraspur Manufacturing Company, Ltd.* v. *B. B. & C. I. Railway Company* (3), but there is this difference between the Bombay case and the case before us that though the title of the defendant was entered in the plaint as follows:—"The Agent, B. B. and C. I. Railway Company, Ltd.," the prayer was that the defendant Company should pay the amount sued for. In these circumstances, the Bombay High Court took the view that the relief having been claimed against the Railway Company and not against the Agent personally, it was the Railway Company which was substantially the defendant in the suit. But, as I have pointed out, in the present case the plaintiff asks for a personal decree against the Agent of the Railway Company. The point has been expressly decided by my learned brother in the case of *Sinehi Ram Bihari Lall* v. *The Agent, East Indian Railway Company* (4) and I entirely agree with the conclusion at which my learned brother arrived. It may be pointed out that a similar view has been taken at least in two cases in the Calcutta High Court—the case of *Nubeen Chunder Paul* v. *Mr. Cecil Stephenson, Agent of the East Indian Railway Company* (5) and the case of *Indian General S. N.* and *R. Co., Ltd.* v. *Lal Mohan Saha* (6). In the last mentioned case the suit was filed against two companies and the defendant companies were described as "The Indian General Steam Navigation and Railway Company, Limited, and the Rivers Steam Navigation Company, Limited, by their joint Agent, A. E. Rogers." Notice was served on Mr. Rogers and subsequently Mr. Rogers retired from the service of the companies and left the country. At the trial of the suit, the plaint was amended and Mr. Rogers' name was omitted from the title of the suit which was proceeded with against the two companies It was held by Mukherjee and Roe, JJ., that the plaint as originally framed was in contravention of O. XXIX, r. 1 of the Code. It was argued that the suit was in essence brought against the two Companies and that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. With regard to this argument the learned Judges observed as follows:—"There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers, although he was sued in his capacity as joint agent of the two Companies mentioned. The suit, however, should have been framed as one against the two Companies described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs." The question then arose whether, in the circumstances of the case, the Court below should have amended the plaint by striking out the name of Mr. Rogers and allowing the suit to proceed against the Companies. On this point the learned Judges said as follows:—

"In the circumstances of this case, as *no question of limitation arises even if the suit be taken to have been instituted against the two Companies on the date when the plaint was allowed to be amended*, we are of opinion that the amendment may stand." I read the decision of Mr. Justice Mookerjee as containing a strong intimation to the effect that amendment would not have been allowed if any question of limitation arose in the case. In my opinion when there are two known persons in existence and the plaintiff brings the suit against the one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no ques-

(5) Ind. Cas. 1027; 47 B. 785; 25 Bom. L. R 513) A. I. R. B. 452.
Cas. 125; 2 P. L. T. 679.
534.
as. 85; 43 C. 441; 22 C. L. J. 241.

tion of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription.

I would allow the appeal, set aside the decree passed by the Court below and restore the decree passed by the Court of first instance. The appellant is entitled to its costs throughout.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL RIVISION NO. 315 OF 1923.

December 7, 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

BAIDYANATH SARKAR—DECREE-HOLDER —APPLICANT

versus

PRABHABATI DASI AND OTHERS—JUGMENT-DEBTORS —RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXI, r. 90—Execution of decree—Sale—Property sold only portion of property proclaimed for sale—Irregularity.

What is sold at an execution-sale can be nothing but the property attached and proclaimed for sale, but an execution-sale is not invalid merely because the property sold is only a portion of the property proclaimed for sale. [p. 316, col. 1.]

Thakur Brahma v. *Jiban Ram Marwari*, 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 813 ; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161 ; 26 M. L. J. 89; 16 Bom. L. R. 166; (1914) M. W. N. 118; 41 I. A. 88 (P. C.), distinguished.

Application for revision of the order of the District Judge of Dunka, dated 8th April 1923.

Messrs. *K. P. Jayaswal*, *N. C. Ray*, and *N. C. Ghosh*, for the Applicant.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Respondents

JUDGMENT.

Ross, J.—This is an appeal against an order of the District Judge of Dumka reversing an order of the Subordinate Judge of Jamtara and setting aside a sale in execution under O. XXI, r. 90 of the Civil Procedure Code. No second appeal lies against such an order, but there is an application in revision.

It appears that in 1917 the appellant brought a suit for money against the respondents which was decreed on compromise in1918 on the terms that a charge was created over certain properties. There was to be payment of the decretal amount by instalments and an agreement was made that if any instalment was not paid the decree should be executed. In 1922 the appellant proceeded to execute the decree. On the 8th August 1922 there was an application for stay of the proceedings on the ground that one of the judgment-debtors, Satya Prasanna Das, was a minor when the suit was brought and that he had instituted a suit to exempt his 2-annas share of the property from the decree. The Subordinate Judge thereupon ordered that 14-annas only of the property, instead of 16-annas as proclaimed for sale, should be sold. On the 11th September 1922 an application was made under O. XXI, r. 90, Civil Procedure Code to set aside the sale. No evidence was offered, and on the 21st January 1923 the Subordinate Judge refused the application.

On appeal the District Judge has set aside the sale. It was found by the Subordinate Judge that there had been no loss to the judgment-debtors in the sale of the property which had fetched a fair price. With regard to the sale of 14-annas instead of 16-annas, he held that this was an irregularity, but as there was no substantial injury resulting from it, he refused to interfere with the sale. The learned District Judge has agreed with the Subordinate Judge that the property was not sold at less than a fair price, but he has set aside the sale on the ground that the mortgage was split up inasmuch as 14-annas instead of 16-annas was sold and that the Court in splitting up the mortgage had acted illegally. I can see no reason why a mortgagee should not sell a portion only of the mortgaged property ; and the learned Vakil for the respondents has conceded that the order of District Judge cannot be supported on the ground on which it was passed. I think, however, that the property that was

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not the property that was proclaimed for sale and that the sale was, therefore, illegal. He relies on *Thakur Barhma* v. *Jiban Ram Marwari* (1). That, however, was an entirely different case. What was sold in that execution was a 6-annas share of a Mahal subject to a mortgage. After the sale the auction-purchasers applied for a correction of the certificate of sale by adding the word 'not' to the description of the property. It was held that what is sold at a judicial sale can be nothing but the property attached, and that the property attached had been the property subject to the mortgage and it could not be treated as the share in the estate which was not subject to the mortgage. There is no analogy whatsoever between that case and the present. In the present case the property that has been sold is a portion of the property that was proclaimed for sale and I can see no reason why the sale should be invalid.

The result is that the application must be granted and the order of the District Judge set aside and the order of the Subordinate Judge restored. The petitioners will be entitled to their costs, hearing fee two gold mohurs.

As the appeal does not lie it must be dismissed without costs.

Das, J.—I agree.

Z. K. *Application allowed.*

(1) 21 Ind. Cas. 936; 41 C 590; 18 C. W. N. 813; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118; 41 I. A. 88 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1087 OF 1922.

January 22, 1924.

Present :—Mr. Justice Stuart.

NATHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

TULSHI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Licensee erecting permanent structures in pursuance of license—Ejectment.

Persons who have, with the consent of the *zemindar*, been permitted as licensees, to occupy for more than twelve years a plot of land in the village *abadi* which they have used for purposes of agriculture and on which, in pursuance of their license, they have erected constructions of a permanent character, are entitled to be left in undisturbed enjoyment of the plot as licensees, and are not liable to ejectment at this instance either of the *zemindar* or his transferee.

Second appeal against the decree of the District Judge of Farrukhabad, dated the 18th April 1922.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *S. B. Johare*, for the Respondents.

JUDGMENT.—The defendants-appellants are residents of a village called Chiloli in the Farrukhabad District.

It appears, as far as I can ascertain, that the *Zemindars* of this village were a certain Nawab Shams-ul-nissa Begam, Baba Piyare Das, Rangi Lal and some others. In 1914 Nawab Shams-ul-nissa Begam brought a suit against the defendants-appellants in which she asked for their ejectment from a compound in the village on the ground that they had no right there. The suit was dismissed by the Munsif on the ground that the land was part of the *abadi* and that the defendants had been in possession of the compound for a very long time more than 12 years before the suit. The District Judge on appeal decreed the suit, but the High Court in second appeal dismissed it. The judgment of the High Court is in second appeal No. 797 of 1916 and is dated 12th July 1917. Piyare Das and Rangi Lal were *pro forma* defendants in that suit. Now, it appears that on the 22nd August 1913 Piyare Das and Rangi Lal had sold rights in the compound in question to Tulshi Ram and others, the plaintiffs-respondents in the present suit, and by virtue of the sale deed in their favour these plaintiffs-respondents have instituted an exactly similar suit against the defendants-appellants for their ejectment out of the same compound. The present appeal arises out of that suit. The Munsif, adopting the view that the plaintiffs-respondents had no right, dismissed the suit but the learned District Judge has taken a different view. He has allowed the plaintiffs a decree for joint possession and has ordered the enclosure wall to be removed. The defendants come here in appeal.

The decision in the previous suit, of course, does not operate as *res judicata* and it may be said that it has practically no bearing on the present suit. Whether it is desirable that in a case in which a village is owned by a large number of proprietors one proprietor after another should be permitted to bring a suit on exactly the same cause of action against the same people is not for me to decide here. Such is the law in India and it does not follow that after the decision of this suit the point may not be raised again by somebody else in a third suit.

The findings of the lower Appellate Court are these: "The constructions in suit consist only of an outer wall enclosing a space of land in which are a *kacha* well and 3 *hands*. The well appears to have been built in 1913. But it appears to be a fact that the defendants-respondents have been using the land for many years for manure for pressing sugar-cane and other agricultural purposes." I take the learned District Judge to mean by "many years" that the defendants have been using the land for more than twelve years before the date of suit. That was the finding in the previous case and he does not appear to have differed from it. Now, what does this come to? By consent of the *zemindars* for more than twelve yeas the defendants-appellants have been permitted to occupy as licensees a plot of land on which they store manure, press sugar-cane, etc., and in pursuance of their license they have erected constructions of a permanent character, in particular a wall. Complete strangers who have just got into the village wish to turn them out and, not being able to procure their ejectment, have procured what is equally effective a decree for joint possession. This decree, if put into execution, will effectively hamper the defendants-appellants in the use of the land for if the plaintiffs-respondents get joint possession over the compound its value will be diminished if not destroyed. They have also obtained a decree for the demolition of the wall. This is not according to the law as I read it. The defendants-appellants as licensees who have made permanent structures upon the land must be left in undisturbed enjoyment of it. They are not owners but they have the rights of licensees. The suit should be dismissed altogether.

I accordingly allow this appeal and direct that the suit stand dismissed. The plaintiffs will pay their own costs and those of the defendants-appellants in all Courts.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 574 OF 1923.

January 16, 1924.

Present: —Mr. Justice Suhrawardy.

ARJUN KAPALI AND OTHERS—PETITIONERS

versus

ASVINI KUMAR KAPALI AND OTHERS —OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s. 47, O. XXIII, r. 3—Compromise decree—Matters extraneous to suit—Execution as to such matters—Separate suit.

A compromise decree including matters covered by the suit as well as matters extraneous to it can be executed only to the extent it relates to matters in suit and not with regard to matters outside the scope of the suit. [p. 319, col. 2.]

Sabapathy Pillay v. *Vanmahalinga Pillai*, 23 Ind. Cas. 581; 38 M. 959; 15 M. L. T. 208, 26 M. L. J. 381; (1914) M. W. N. 256, and *Jasimuddin Biswas* v. *Bhuban Jelini*, 84; C. 456, relied on.

The power of a Court to pass a consent decree is restricted to matters covered by the suit. But if the agreement refers to matters extraneous to the suit forming consideration for the compromise or settlement of the matter included in the suit, such extraneous terms should also be recorded in the decree. It does not, however, follow that such extraneous terms can be enforced in execution of that decree. In fact, they can be enforced only by a separate suit. [p. 319, col. 2.]

Purna Chandra Sarkar v. *Nil Madhub Nandi*, 5 C. W. N. 485. distinguished.

Rule against the order of the Munsif, First Court, Nabinagar.

Babu *Sasadhar Roy*, (*Sr.*), for the Petitioners.

Babu *Prakash Chandra Prakrasi*, for the Opposite Party.

JUDGMENT.—The point raised in this Rule is whether the plaintiff was entitled

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maintain a suit for the recovery of the amount claimed or his only remedy is to execute the compromise-decree to enforce delivery of the articles or payment of their value. The facts are that the plaintiff had brought a suit for partition and *khas* possession of certain lands against the defendants and others in the Court of the 2nd Subordinate Judge of Comilla. That suit was decreed on compromise. One of the terms of it was that the plaintiff was to get from the defendant four maunds of Jub and ten maunds of paddy. These articles not having been delivered by the defendant to the plaintiff, he has brought the present suit for recovery of the price thereof in the Court of the Munsif of Nabinagar exercising Small Cause Court jurisdiction. The defendant, amongst other defences, raised the plea that no suit would lie in the Small Cause Court by virtue of the provisions of section 47, Civil Procedure Code and that such claim could be made only in execution of the compromise-decree. The Small Cause Court Judge has overruled this plea and gave a decree to the plaintiff for the amount claimed. This Rule has been issued under section 25 of the Provincial Small Cause Courts Act. It is admitted by both the plaintiff and the defendant, as is observed by the learned Munsif, that the subject-matter of this suit was extraneous to the subject-matter of the partition suit. The partition suit related only to lands held in common by the parties, but no partition was claimed of the crops standing on the land. The compromise-decree allowed a partition of the crop to the claimant as one of the considerations for the compromise. In the first place, it is argued, that the subject-matter was included in the previous litigation. But, as I have remarked, both the parties in the Court below proceeded on the assumption that it was not so; and, on the face of the plaint in the partition suit which has been placed before me, I am of the same opinion.

The next question that arises is as to even if the subject-matter of the present suit was not included in the previous suit, the consent decree in the previous suit would bar a separate suit to enforce one of the terms of the compromise though beyond the scope of that suit under section 47, Civil Procedure Code. ance has been placed for this contention on alf of the petitioner on the decisions of the Allahabad and Madras High Courts in the cases of *Mohibulla* v. *Imami* (1), *The Manager of Sri Meenakshi Devastanam* v. *Abdul Kasim* (2), *Joti Kuruvetappa* v. *Izari Sivuseppa* (3), and *Sabapathy Pillay* v. *Vanmahalinga Pillay* (4). There is no doubt that the High Courts of Allahabad and Bombay have adopted the view that, when a suit is decreed by consent and the terms of the compromise are embodied in the decree the only way to get relief under that decree in respect of any matter included in the suit or outside its scope is by way of execution. But this view has not been accepted by this Court. Reference may be made to the case of *Jasimuddin Biswas* v. *Bhuban Jelini* (5). The expressions of opinion there seem to be in favour of the proposition that a consent decree including matters covered by the suit as well as matters extraneous to it can only be executed to the extent it relates to matters in suit. I may here quote the observations of the Court, which are as follows:—" We think that in execution of the decree itself the amount agreed to be paid as damages could alone be recovered from the defendants. The Court executing the decree would not have been empowered under it to compel the defendants to execute a *kabulyat* in favour of the plaintiffs or to accept a lease on the terms agreed to." One of the terms of the compromise in that suit was that the defendants should execute a *kabulyat* in favour of the plaintiff and accept a lease on certain terms. It was held that this covenant could not be enforced by the Court executing the compromise decree. The point did not form an issue in that case but the observations that I have quoted were material for the decision of that suit. In the case of *Purna Chandra Sarkar* v. *Nil Madhab Nandi* (6) the question arose whether the decree having comprised terms outside the scope of the suit was *ultra vires* or not. It was held that a decree passed on compromise cannot be regarded as *ultra vires* simply because it goes beyond the scope of the suit and contains other matters; but if

(1) 9 A. 229; A. W. N. (1887) 19; 5 Ind. Dec. (N. S.) 587.
(2) 30 M. 421; 2 M. L. T. 349; 17 M. L. J. 255.
(3) 30 M. 478; 16 M. L. J. 354;
(4) 23 Ind. Cas. 531; 38 M. 959; 15 M. L. T. 208; 26 M. L. J. 331; (1914) M. W. N. 256.
(5) 34 C. 456;
(6) 5 C. W. N. 485.

those other conditions are independent of the suit they may be regarded as surplusage. In coming to that finding Pratt, J., observed as follows:—"Therefore, whether the whole of the decree is capable of execution or not, it is evident that it is a good decree at least so far as regards the validity of the *kabulyat*." Ghose, J., agreeing in the judgment, says: "It seems to me that these other conditions were either the consideration for the affirmance of the *kabulyat* for which the suit was brought or they were conditions independent thereof. In the first mentioned case, the whole of the conditions must be incorporated in the decree: in the latter case, the decree, according to the view presented by the learned Vakil himself so far as it incorporates only the first condition, namely, as to the *kabulyat* must be upheld and, therefore, the portion of the decree incorporating the other conditions may be regarded as surplusage." The point seems to have been set at rest by the recent decision of the Judicial Committee in the case of *Rani Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (7).

The question that is now before me was not directly in issue in that case, but their Lordships of the Judical Committee have examined the characteristics of a compromise decree containing matters within and outside the scope of the suit. In construing section 375 of the Code of 1882 (corresponding to O. XXIII, r. 3), their Lordships observe as follows:—"The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of the section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This, in fact, is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents." These observations clearly indicate that such a decree is capable of being executed only in reference to the subject-matter of the suit; and it necessarily follows that it cannot be executed with reference to matters outside the scope of the suit. The provisions of the law as contained in O. XXIII, r. 3, throw a great deal of light upon this point. The Court is empowered when a suit has been brought, upon any lawful agreement or compromise, to pass a decree in accordance therewith, "so far as it relates to the suit." Apparently, the power of the Court in passing a decree is restricted to the matters covered by the suit. But it has been held in the cases referred to that where the agreement refers to matters extraneous to the suit forming consideration for the compromise or settlement of the matters included in the suit, such extraneous terms should also be recorded in the decree; but it does not follow that such terms can be enforced in execution of that decree. Reference has been made on behalf of the petitioner to the case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (8). That case may be dismissed by the observation that the plaintiff had instituted a separate suit under the provisions of the Small Cause Courts Act to enforce a mortgage created by the compromise in a previous litigation in respect of properties outside its scope.

In my judgment, the view taken by the Small Cause Court Judge is correct and this Rule is discharged with costs. I assess the hearing-fee at one gold mohur.

S. D. *Rule discharged.*

(7) 53 Ind. Cas 534; 46 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 801; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.).

(8) 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492.

ANANT RAM *v.* ISHRI PRASAD

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 42 OF 1922.

August 7, 1923.

Present :—Mr. Dalal, J. C., and Mr. Cuming, A. J. C.

B. ANANT RAM—PLAINTIFF—APPELLANT

versus

B. ISHRI PRASAD —DEFENDANT—RESPONDENT.

Trusts Act (II of 1882), s. 5—Trust relating to immoveable property, creation of, mode of—Illusory trust—Performance of religious ceremonies, effect of—Trust, essentials of—Dharmsala, *what is—Administration of assets—Executor—Assets converted into building, effect of—Money borrowed by executor—Executor, liability of, nature of—Building constructed partly out of assets, ownership of.*

The term *Dharmsala* means a place where a certain section of the public can claim residence as of right without any payment. A building in the nature of a public boarding-house does not convey the idea of *Dharmsala*.

The performance of the *hawan* ceremony on the occasion of the laying of the foundation stone of a building will not turn an illusory trust in respect of the building into a definite one. [p. 328, col. 1.]

As the execution of a trust is under the control of the Court, the trust must be of such a nature that it can be under the control of the Court, so that its administration can be reviewed by the Court, or, if the trustee dies, the Court itself can execute the trust. [p. 328, col. 1.]

Rauchordas Vandravandas v. *Parvatibai*, 23 B. 725 at p. 785; 1 Bom. L. R. 607; 8 C. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P.C.), relied on.

Under section 5 of the Trusts Act a trust relating to immoveable property must be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the Will of the author of the trust or trustee. [p. 328, col. 2.]

Where an executor invests a portion of the assets of the deceased in constructing a building, an administrator who succeeds the executor can claim the building as part of the assets. [p. 324, col. 1.]

Except in certain special cases, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. [p. 325, col. 1.]

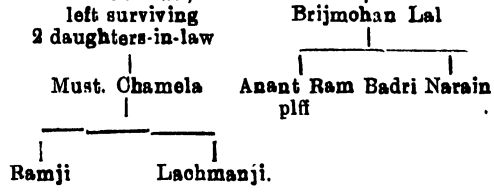
Where a building is constructed by an executor out of the assets of the deceased together with money belonging to or borrowed by himself, the building becomes the property of the deceased and the executor in proportion to the money belonging to each spent thereon. [p. 325, col. 1.]

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 20th of April 1922.

Mr. *Niamatullah*, for the Appellant.

Respondent in person.

JUDGMENT.—The plaintiff B. Anant Ram sued in the Court of the Subordinate Judge of Lucknow as administrator of the estate of one Chhedi Lal for the recovery of possession of a *dharamsala* which is at present in the possession of the defendant Babu Ishuri Prasad. The defendant is surviving brother and successor by right of survivorship of B. Ganga Prasad, who was executor of the Will of B. Chhedi Lal. The following pedigree will indicate the relationship between Chhedi Lal and the plaintiff :—



Chhedi Lal's heirs are his daughter for her life and then her sons, but Letters of Administration have been granted by the District Judge to Anant Ram who applied for them on the ground that he was interested in preserving the estate of the deceased. Reference in this judgment will be necessary to certain documents printed in Books A and R of First Civil Appeal No. 49 of 1919. With the Court's permission they have not been printed over again in the printed book of this appeal. Cheddi Lal made a Will modified by an oral codicil. The oral codicil is quoted by B. Ganga Prasad in his application for Probate (Book A-31). It was possibly uttered in the Vernacular, but an English version thereof has been given. It is: "You are to manage after me so that my daughters-in-law may not be inconvenienced. Give to Chamela Rs. 2,000 in cash and two houses, named *Pathar ke chabutriwala* and *Kharadiwala*. I have troubled these people (points to brother's wife), therefore,

give to Badri Nath Rs. 5,000 in cash and after the death of the daughters-in-law, Kothi, You can apply the *remaining money to any charitable purposes you please.*"

—Chhedi Lal died on 27th February 1907 and Probate was granted to B. Ganga Prasad on 1st July 1907. B. Ganga Prasad built the *dharamsala* in suit partly out of *money in his hands as Chhedi Lal's executor* and partly out of borrowed money. He died on 23rd June 1914 and the defendant has been in possession of the *dharamsala* since. The defendant and Brijmohan Lal, father of the plaintiff, were appointed joint administrators on 13th January 1915, but they had a difference which it was found impossible to compose. The District Judge thereupon dismissed them on 14th June, 1917, and appointed the plaintiff administrator on 5th March 1918. When the plaintiff demanded possession of the *dharamsala* from the defendant as the the administrator of the estate of Chhedi Lal, the defendant refused it on the ground that the *dharamsala* was trust property being endowed as a trust by his brother B. Ganga Prasad, and in accordance with the authority given to him by the oral Will of Cheddi Lal. The plaintiff based his claim for possession on the allegation that the trust was not completed and that, consequently, the *dharamsala* was part of the unadministered assets of Cheddi Lal. The lower Court held in favour of the defence that the building was *wakf* property. It further held that the defendant was entitled to be trustee of the *wakf* and that the plaintiff had no right to the managership of the trust as administrator of Cheddi Lal's estate. Both these findings are attacked in appeal here by the plaintiff.

Ganga Prasad did not pay the legacy to the plaintiff's brother Badri Nath who sued the defendant for its recovery. The first Civil Court expressly excluded the *dharamsala* from the charge of that claim, but on appeal here the legacy was made recoverable from the *dharamsala* property also. It was one of the grounds of appeal that the judgment of this Court of 24th June 1920 (Ext. 9) was *res judicata* between the parties to this suit; but that ground was abandoned by the plaintiff-appellant's learned Counsel. It is obvious that the decision between the plaintiff's brother as legatee and the defendant cannot be binding in a litigation between the plaintiff as administrator of Cheddi Lal's estate and the defendant.

The first question for our consideration is, whether the *dharamsala* is a valid trust. The learned Subordinate Judge has relied upon his own judgment in a previous suit and another judgment of his Court in another suit, though both those judgments were reversed by this Court on appeal. He has failed to discuss the various circumstances narrated in the judgment of this Court (Ext. 9) as indications of the trust not having been completed by B. Ganga Prasad. The learned Judge of the lower Court put this judgment aside as not being binding on the parties and being confined to the legacy being a burden on the *dharamsala.* This showed a want of respect to that (if we may say so) capable judgment.

Let us examine the evidence as to the formation of a trust. To start with, there is no trust-deed. An opening ceremony of the *dharamsala* was performed by a high placed official of the Province, the Hon'ble Mr. Burn, as representative of the Lieutenant-Governor, who had consented to preside but was presented by sudden indisposition. An account of the opening ceremony, was published in a copy of the '*Advocate*' (a local paper printed in English of which B. Ganga Prasad was Editor) The account is reprinted at pages 34 to 38 of Book A. The relevant portions of the speech may be quoted.

"The history of the *dharamsala* may be related in a few words. B. Cheddi Lal in whose memory the building has been constructed was one of my first cousins...He directed me as the executor of his Will to realise moneys due to him and devote the accumulated funds to some charitable purposes.

"In 1911 it was found possible to consider what form the charity should take.....The conclusion arrived at was that the funds in my hands could not be better utilised than by meeting one of the most urgent needs of Lucknow."

Then he dilates upon the great want in Lucknow of a residence where respectable Hindus may put up during their visit. He mentioned that three marriage parties had occupied the building already and that th-

first people who were to occupy it after the opening ceremoney were the Indian members of the All India Sanitary Conference. Then he proceeded : " Hence I thought private charity would be better directed to remove this great source of inconvenience .....The *dharamsala* has been constructed on a plan quite different from the one adopted by oridinary buildings of the kind which one finds in centres of pilgrimage. The building has been purposely designed to be double-storied. On the upper flat there are 19 rooms with large verandahs in the front. One of the rooms has been constructed for use of *parda-nashin* ladies. The rooms have been suitably furnished. The rooms and the cubicles on the ground floor will accommodate over one hundred persons. There is a hall which would be used for accommodating large parties and holding small meetings."

Later on he made reference to the method of management.

He said :—

" The management of the *dharamsala* will be placed in the hands of a committee consisting of representative Hindus : that has already been constituted and will soon be registered as a charitable body. The committee will have entire control and supervision of the building, of funds realised in the shape of rents of ten shops attached to it and contributions that might reasonably be expected from people occupying rooms in the upper flat. The committee will soon frame rules for the proper management of the property and guidance of its temporary occupants. It will be the duty of the committee to see that the *dharamsala* is used for no other purpose than the one for which it has been constructed and that the savings after paying the expense of management are devoted to objects of public charities."

The speech ends with a pious hope " that those who will from now find shelter under the roof of this *dharamsala* will bless the memory of him whose well-directed charity, I doubt not, will meet a real want of this important City."

A perusal of this speech will leave one in doubt whether a hotel was opened for use of well-to-do Hindu visitors of the City or a public building which may be of use to Hindus to accommodate marriage parties and hold meetings. The objects are by no means clear. The surplus was desired to be devoted to objects of public charity, but the building may be one which it was intended to run on a business footing. Rent was to be charged for certain rooms. The committee existed on paper; and it is admitted by B. Ishri Prasad that not a single meeting of the committee has yet been held, and that B. Ganga Prasad alone, during his life time, and after him the defendant looked after the building. Whatever the intention of the founder may be, there was no realization. He himself wanted the building to serve purposes other than those of a charitable institution known among Indians by the term of *dharamsala*. We associate the term with a place where a certain section of the public can claim residence as of right without any payment. To our minds, a boarding-house where the members of a Sanitary Conference may put up will not convey the native idea of a *dharamsala*. B. Ganga Prasad himself must have felt that the building served secular purposes, so he expressed his intention of registering the committee under the Societies Registration Act No. XXI of 1860. The management of the *dharamsala* was never made over to any committee during B. Ganga Prasad's life time, nor since then to this day. We may quote here from the judgment of this Court (Ex. 9) :—

" It may be noted that it was intended that fees should be charged and that the building should yield an income. It was the declared intention of the executor to make over the management (and in all probability to vest the ownership also) in a society registered under Act XXI of 1860, under conditions which would secure that the income should be wholly spent on charitable objects. That intention was never carried out either by him or by his successor B. Ishri Prasad. The building remains under the sole control of the latter and there is no evidence that the charitable objects on which the surplus income was to be spent have ever been formulated. Under these circumstances, the plaintiff is we think entitled to treat it as part of the assets of Chhedi Lal."

These observations are fully justified by the evidence on the record. The evidence of a

witness, Pandit Ram Nath, recorded in a previous suit has been admitted in this suit: At Book A-23 he is reported to have said "Ganga Prasad said that after the committee should be formed he would cut off his personal connection, and might be a member or chairman of the committee." Obviously, certain persons were vaguely asked whether they would be members of the committee, but no committee was definitely formed, and B. Ganga Prasad had not severed his personal connection with the building. There is no word in the speech which would indicate that a trust was created and that the property was made over to trustees. The defendant dwelt on the laying of the foundation stone by a senior member of the family one B. Sunder Lal, on the opening ceremony preformed by the Hon'ble Mr. Burn and on the religious *hawan* which appears to have been recited twice as indications of the trust. These functions, however, do not turn an illusory trust into a definite one. The difficulty is the nebulous character of the objects which the building was to serve. There were the usual faults of procrastination and of a desire of getting things done on the cheap. The formulation of the object of the trust was put off from day to day and, instead of getting a trust-deed prepared by paying a practitioner unconnected with the matter, a busy practitioner who has 20 different jobs on his hands besides attending to his profession to earn his living, was requested to put the matter through free of charge. If a Court were called upon to administer a trust of this nature it would not be possible for it to do so. Their Lordships of the Privy Council quoted from an English ruling how a bequest or device would be void for vagueness and uncertainty *Runchordas Vandravandas* v. *Parvatibai* (1), "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust, therefore, which in case of mal-administration, could be reformed and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familar in other cases, it must be decided that the Court can neither reform mal-administration nor direct a due administration." The trust here as presented before us is void for uncertainty, much is said by the lower Court about a committee. It will be sufficient commentary on it to point out that in his written statement B. Ishri Prasad has made no mention whatsoever of a committee. What is said in para. 14 of the written statement was "B. Ganga Prasad Varma . . . declaring the same as trust according to Hindu belief himself remained the manager thereof, in the capacity of a trustee, so long as he lived."

The lower Court held that the Trusts Act, No. II of 1882, did not apply to the trust of this *dharamsala* because under section 1 of the Act nothing therein contained applies to public or private religious or charitable endowments. We have given reasons for holding that the *dharamsala* was not a religious or a charitable endowment. In his speech B. Ganga Prasad stated that the surplus will be devoted to objects of public charities by the committee. There was no committee except as a nebulous hypothesis, and it is admitted that the surplus was not devoted to any charity. Thus, it cannot be said that the income was turned into a public or private religious or charitable endowment. We are of opinion that for such a trust as one contemplated by Babu Ganga Prasad to be valid, it should be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the Will of the author of the trust or the trustee under section 5 of the Trusts Act. There is neither a registered document nor a Will to support the alleged trust in suit.

The learned Subordinate Judge has spun another web of fiction to cover the true facts of the case He was of opinion that B. Ganga Prasad as executor divested himself of ownership of a certain sum of money and appropriated it to the specific purpose of the trust. He, therefore, severed that amount from the estate of B. Chhedi Lal and became a trustee thereof. In our opinion there was no severance. B. Ganga Prasad went on spending money out of the amount which was in his possession as executor and no attempt was made to separate

(1) 23 B. 725 at p. 735; 1 Bom. L. R. 607; 3 C. W. N 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 22 Ind Dec. (N. S.) 485 (P. C.).

the *dharamsala* from the rest of the assets of B. Chhedi Lal. The defendant himself, who apparently is no believer in fictions, has supplied the proof thereof in the written statement. The first three suits in Schedule D of which the expenses are debited against the *dharamsala* are :—

(1) Application for the grant of Letters of Administration in favour of B. Ishri Prasad and B. Brij Mohan Lal;

(2) Expenses relating to the preparation of a list of property and inventory;

(3) Expenses relating to the preparation of accounts in respect of B. Chhedi Lal's property.

We are glad that the defendant has no use for pretence. Before he took charge the rent for the rooms in the *dharamsala* was called "*Imdad*" (help), but this foolery was more than the defendant could put up with and he called the payment rent as it really was.

It was argued on behalf of the defence that the administrator of B. Chhedi Lal's estate can recover only the money spent on the *dharamsala* and not any portion of the building itself. Our attention is drawn to section 146 of the Probate and Administration Act where it is laid down that, when an executor or administrator misapplies the estate of the deceased, he is liable to make good the loss or damage so occasioned. Reference was also made by way of analogy to section 66 of the Trusts Act which entitles the beneficiary to a charge on the whole fund where the trustee wrongly mingles the trust property with his own. Here, however, the plaintiff makes no allegation of misapplication. His case is that the executor utilized the money profitably to the estate in investing it in the *dharamsala*. If an executor invests a portion of the assets in constructing a building there is no reason why an administrator who succeeds the executor should not claim the building as part of the assets. The defendant desired that the present suit may be dismissed and the plaintiff referred to a suit for money realizable by sale of the *dharamsala*. Even if this had been a more equitable view to take under the circumstances of the case and if we had held the plaintiff entitled only to the capital sum expended on the *dharamsala* with interest we should have given him a decree in the present suit. In the plaint there is a prayer that any other relief warranted by justice on the merits of the case be granted to the plaintiff, and Court-fee has been paid on a sum of nearly Rs. 50,000.

Another argument of the defendant was that, as soon as an executor converted ready cash into something else, it ceased to be the asset of the deceased, because the property into which the cash was converted did not exist in the life time of the deceased. Such a contention will not bear examination. After defining assets it is stated in Williams' Law of Executors (Vol. II, 1905, p. 1279): "There are many instances in which property in the hands of an executor is regarded as asset, although it was never in the testator." It will be remembered that when the plaintiff's brother Badri Narain sued for his legacy this Court held that the money could be recovered by sale of the *dharamsala* (Ex. 9). This decision implies that when cash was converted into a building the building became the asset of the deceased which could be charged for the payment of a legacy.

There remains one plea of the appellant to examine. It was argued by his learned Counsel that B. Ganga Prasad as executor was justified in borrowing money to invest in the *dharamsala*, and that the entire *dharamsala* should be decreed to the plaintiff, who would be willing on rendition of accounts to pay the debt contracted by B. Ganga Prasad. This argument, however, is in conflict with the position taken up by the plaintiff in his pleadings. In para 15 of his replication he said : "The plaintiff is not prepared to admit that under the Will of B. Chhedi Lal B. Ganga Prasad had any right or power to obtain any debt from the National Bank, or that he having obtained any loan from the National Bank spent the same on the erection of the *dharamsala* buildings. Besides, B. Ganga Prasad had no need to borrow any money from the National Bank for building *dharamsala*." Thus, the plaintiff repudiates the executor's action in borrowing money. In para. 35 he pleads that if the defendant spent any money out of his own pocket the estate of B. Chhedi Lal will not be liable for the payment of that sum, either with or without interest. Reference is necessary to a suit brought by the National Bank of India against the plaint-

iff as administrator and the defendant as heir of B. Ganga Prasad. In that suit the plaintiff succeeded in this Court in his plea that the estate of B. Chhedi Lal was not liable for money borrowed by B. Ganga Prasad. In a judgment delivered on 11th January 1922 a learned Judge of this Court held that, in so far as the money was borrowed by B. Ganga Prasad to supplement the assets left by B. Chhedi Lal, his liability was clearly a personal one. He was of opinion that, except under certain special cases, of which the present was not one, it was settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the asset of the testator. Unfortunately, the parties are on such unfriendly terms, that there is no prospect of any compromise between them, and we prefer to be guided by the pleadings and actions of the plaintiff than by the words of his Counsel.

We hold that the *dharamsala* was built with two separate funds (1) the assets of B. Chhedi Lal and (2) the money of B. Ganga Prasad either paid out of his own pocket or borrowed. The *dharamsala*, therefore, is the property of both in the proportion of the money of each spent thereon.

We have not noticed above the defendants argument that the *dharamsala* building is administered estate, even if it is not *wakf*, because this argument has been effectively answered by the lower Court in its decision on the 25th issue that the question will depend on whether the property is *wakf* or not. The argument does not require any separate consideration.

We discharge the decree of the lower Court and pass a preliminary decree in favour of the plaintiff for joint possession of the *dharamsala* to the extent of money of Chhedi Lal spent in the construction, that is, if the amount spent out of Chhedi Lal's assets be designated by A and the rest of the sum expended on the building by B, the plaintiff is decreed joint possession of the extent of $\frac{A}{A \& B}$.

We remit the suit to the lower Court for the preparation of a final decree to determine the exact amount spent out of B. Chhedi Lal's assets and the balance of the amount spent on the building. The exact proportion shall be indicated in the final decree. Account shall be indicated in the final decree. Account shall also be taken from the defendant of the management of the *dharamsala* and the same proportion of the surplus income realised by the defendant, if any, shall be decreed to the plaintiff. In the word *dharamsala* is included the effects contained therein of which a list shall be prepared by the lower Court. In the final decree costs of both Courts shall be made payable according to the success and failure of each party.

We desire to express our belief in the perfect good faith of the defendant who has attempted to carry out to the best of his ability what he considered to be a trust founded by his brother. It is unfortunate that he should be on such unfriendly terms with the plaintiff, as to make the prospect of a compromise between them a very rare possibility. At the same time, we express a hope that the parties will not waste more money in litigation and attempt to arrive at some kind of settlement.

It was represented to us during argument that the heirs of B. Cheddi Lal desire to carry on the *dharamsala* as a trust. If so, the present litigation will be unreal and it is to be regretted that B. Ishri Prasad did not have B. Cheddi Lal's daughter and grandsons examined as witnesses in the trial Court. If such is really the case, the Court of the District Judge which granted Letters of Administration to the plaintiff may be able to explore possibilities of a private settlement.

Z. K. *Case remitted for preparation of final decree.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1127 OF 1922.

January 22, 1924.

Present :—Mr. Justice Stuart.

GIRWAR SINGH—PLAINTIFF—APPELLANT

versus

Mst. RAM PIARI KUER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. II, rr. 2, 4—Suit for possession—Mesne profits from date of decree to date of possession, whether can be claimed—Separate suit, maintainability of.

The law permits a plaintiff in a suit for possession to claim mesne profits not only up to the date of suit or decree but up to the date of delivery of possession, and the failure of a plaintiff to make the claim in the suit for posession debars him from putting it forward in a separate suit.

Ram Din v. *Bhup Singh*, 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96; and *Kashi Pershad* v. *Bajrang Pershad*, 30 A. 86; 4 A. L. J. 768; A. W. N. (1907), 281 followed.

Second appeal against the decree of the District Judge of Cawnpore, dated the 22nd March 1922.

Mr. *Mushtaq Ahmad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondants.

JUDGMENT.—The learned District Judge has applied the principles which are laid down by a Bench of this Court in *Ram Din* v. *Bhup Singh* (1), which affirm the view taken by a Single Judge in *Kashi Pershad* v. *Bajrang Pershad* in (2). The learned Counsel for the appellant admits that the law has been applied correctly but he takes exception on one point. The decree for redemption was passed on 23rd April 1919 and possession was not obtained until the 16th July 1919. His case is that, although a separate suit is barred for the profits prior to 23rd April 1919, he was entitled in the suit out of which this appeal arises to the profits which accrued between the 23rd April 1919 and the 16th July 1919. I cannot, however, accept this argument. The law as laid down in the two above rulings is based upon the provisions of the Code of Civil Procedure which, in order to prevent

(1) 30 A. 225 ; 5 A. L. J. 192 ; A. W. N (1908) 96.
(2) 30 A. 86 ; 4 A. L. J. 768 ; A. W. N. (1907), 281

mulitiplicity of suits, direct that all questions arising out of one cause of action should be heard and determined in the same suit, and that if a plaintiff omits to take his remedy at the time of the original suit he shall be debarred from taking it at a later stage. But the law also provides for the awarding of mesne profits up to the date of obtaining possession and so it was open to the plaintiff-appellant not only to have asked for the mesne profits up to the date that the decree was passed but up to the date that he obtained possession and his omission to have done so tells against him not only up to the date that the decree was passed but up to the date that he obtained possession. Apart from that fact, it is difficult to understand how any profits could have accrued between the 23rd April 1919 and the 16th July 1919 for in that period there are not, ordinarily, any crops standing on the ground. The question of rent demand would probably not enter into the case.

For the above reasons, I accept the view taken by the learned District Judge and dismiss this appeal with costs on the higher scale.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 222 OF 1921.

December 13, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

ALAGIRISAMI AIYAR (*Died*) *His Legal Representative* N. A. RAMIER, AND ANOTHER—APPELLANTS

versus

RUNA CHEENA MANA NAVANNA ONA & BROS. BY UTHANU CHETTIAR —RESPONDENTS.

Sale of goods—Construction of document - Condition precedent—Seller bound to give arrival notice after taking delivery of goods—Failure to give notice effect of—Breach of contract.

Plaintiffs agreed to purchase certain goods from

the defendants and paid a certain sum as advance. The agreement contained the following clause :—

"On the said bales being received by R and then from him by L and then from him by us, we shall then and there send to you notice of arrivals. On the very date of receipt of such advice, you shall pay the balance left after deducting . . . advance and obtain delivery of the goods. In default you are liable to pay the damages and costs incurred. If on receipt by us of advice of the arrivals of the goods we fail to give information thereof to you or make delivery of goods for which money is paid we are bound to pay to you the damages, etc., thereby incurred by you."

Some time after, the defendants gave notice to the plaintiffs that I had given them intimation that part of the goods had arrived and asked plaintiffs to pay the money and take delivery of the goods. It was found that the defendants had not taken delivery of the goods from L. Plaintiffs refused to pay for the goods and take delivery. In an action by the plaintiffs to recover the sum paid by them as advance :

Held (1) that under the agreement the giving of arrival notices by the defendants to plaintiffs, was a condition precedent and no obligation on the part of plaintiffs could arise till such notices were given ; [p. 328, col. 2.]

(2) that no arrival notices could be given by the defendants till they had actually received the goods from L. ;

(3) that the defendants not having taken delivery of the goods from L. were not in a position to give arrival notices to the plaintiffs and were consequently guilty of breach ;

(4) that the plaintiffs' suit was, therefore, entitled to succeed.

Appeal against the decree of the Court of the Second Additional Subordinate Judge of Madura, in O. S. No. 25 of 1921 (O. S. No. 48 of 1920, on the file of the Sub. Court, Madura.)

Mr. *C. V. Ananta Krishnair*, for the Appellant.

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

JUDGMENT.

Phillips, J:—While I feel convinced that the parties did not at the time of entering upon the contract intend that actual physical delivery should be taken by each of the firms in turn, for such an arrangement would cause unnecessary delay and trouble, yet I am not prepared to differ from my learned brother's opinion that they have not given effect to this intention in the contract, and consequently I agree in the order proposed.

Venkatasubba Rao, J.—The plaintiffs have instituted this suit for recovery of Rs. 6,250 with interest thereon on the ground that the said sum was paid by them as advance in respect of a contract entered into with the defendants, and that the plaintiffs are entitled to a refund of the amount, the defendants having broken the contract. There was an oral agreement on the 8th of August 1918 and the terms of it were subsequently reduced to writing in what is known as *varthamanam* letter bearing the date 28th of October 1918 which the defendants sent to the plaintiffs The contract was for the sale of 50 bales of yarn containing 80 bundles each and the price was settled at Rs. 14-8 per bundle. The goods are stated to be those which the defendants had agreed to buy from Mr. Lakshmana Aiyar who himself had contracted to purchase them from Messrs Ramachari & Sons who in their turn had placed an order for them with the Madura Mills. The *varthamanam* refers to the writing evidencing his contract between the defendants and Mr. Lakshmana Iyer and it then recites the fact that the defendants received from the plaintiff earnest-money amounting to Rs. 6,250 at the rate of Rs. 125 per bale.

The most important terms of the contract, on a construction of which the decision of this case turns, are given below:—

"On the said 50 bales being received by K. V. Ramachari & Sons and then from them by R. G. Lakshmana Iyer & Sons and then from them by us, we shall then and there send to you advice of their arrivals. On the very date of receipt of such advice, you shall pay the balance left after deducting from the amount of value of the bale or bales calculated at the above rate of Rs. 14-8, the advance of Rs. 125 per bale free from interest and obtain delivery of the bale or bales. In default, you are liable to pay the damages, costs, etc., incurred thereby, If on receipt by us of advice of the arrivals of bale or bales we fail to give information thereof to you or to make delivery of the bales for which money is paid, we are bound to pay to you the damages, etc., thereby incurred by you."

The material facts are these. The defendants gave the plaintiffs three notices of arrival, the first relating to 4 bales, the second to 2

bales, and the third to 3 bales, and they were dated the 1st of November, the 4th December and the 5th of November 1918 respectively Of course, the notices are not strictly notices of arrival, but I use the expression as it had been throughout used at the trial, in the judgment of the lower Court and in the course of the arguments before us. I shall reproduce below one of the three notices as the terms of it have an important bearing upon the issue to be decided and I may add that the other notices are more or less in the same terms : —

" As M. R. Ry. R. C. Lakshmana Iyer & Sons have given us intimation through letter that out of the bales mentioned in the *varthamanam* letter written and given to you by us on the 12th instant, 4 bales arrived, 2 bales on the 8th instant and 2 bales on the 13th ; you should without delay bring and pay money for the said 4 bales and take delivery of the said bales."

It is admitted that the defendants did not send the plaintiffs arrival notices in respect of the remaining 41 bales. It is further admitted that the defendants did not take delivery of any of the bales from their vendor Lakshman Iyer. It transpires in evidence that the Madura Mills kept in stock 9 bales on account of Ramachari & Sons from the 21st of October 1918 to 31st October 1918; that the said bales were not taken delivery of; that eventually the Mills cancelled the contract and sent their purchasers letter of cancellation, dated 3rd June 1919, and that the Mills did not obtain any sum for damages from their purchasers, the said Ramachari & Sons. The defendants admit that they made no attempt to take delivery of the 9 bales in question after the receipt by them of arrival notices from their own vendor. Nor did the defendants make any attempt to get the balance of 41 bales.

It must be stated that the plaintiffs allege in the plaint that they tendered the price and asked for the delivery of the 9 bales. This issue of fact was decided against plaintiffs by the Subordinate Judge and it was argued before us that this finding is wrong. Again, the defendants alleged that the plaintiffs on the receipt by them of the arrival notices represented that they did not want the bale and requested that the contract might be cancelled agreeing to pay damages and that the defendants accordingly cancelled the contract. The lower Court found that the case set up by the defendants was false, and their Vakil did not make any serious attempt to agrue that this finding was wrong.

On these facts, the question to be determined is : Did either party break the contract, and, if so, who broke it ? By the contract, the defendants agreed to give notices of arrival. But the contract expressly provides that notices of arrival shall be given by the defendants only after the goods are received by them or, literally translating the Tamil words, "after the goods come to them." The contract contemplates the receipt of goods by Ramachari & Sons and their being passed on to Lakshmana Iyer and then the defendants getting the goods. The defendants are to give notices of arrival only after they receive the goods. It is not sufficient under the contract that the defendants were in a position to say, "our vendors have given us notices of arrival and you the plaintiffs are therefore bound to pay the price and take delivery of the goods." Under the contract, the giving of arrival notices is a condition precedent and no obligation on the part of the plaintiffs arises till such notices are given and it is equally clear that no valid arrival notices can be given till the defendants receive the goods ; or, in other words, till the goods " come to the defendants." It is true that in several contracts of a similar kind which have come before the Courts there is not to be found such a provision as this. But this fact cannot affect our judgment. We must construe the particular contract before us and I do not think we can ignore a very clearly expressed term on the ground that it is not unusual for yarn dealers to enter into contracts containing different stipulations. The *varthamanam* says

> "On the said 50 bales coming to K.V. Ramachari & Sons and then coming from them to Lakshmana Iyer & Sons and then coming from them to us we shall then and there send you advice of their arrivals."

This clause is put in the forefront of the contract and we cannot lightly impute to business men an intention to treat words in a business document like this as conveying no

particular meaning. In other words, the statement relating to the receipt of the goods is not merely an integral part of the contract but is a condition precedent. The intention of the parties, as appears from the writing, was certainly not that the defendants could, without taking delivery of the goods, insist upon performance of the contract on the part of the plaintiffs. The defendants suggested that if the plaintiffs went up with the money to the Madura Mills and paid the price of the 9 bales, delivery could have been obtained; that is to say, that the plaintiffs could have paid the price on behalf of Ramachari & Co., and got the goods. This is not what the parties intended. If that was the intention, the parties would have said so and as a fact many contracts entered into at this period contained such a stipulation. I am, therefore, of the opinion that the defendants committed a breach of the contract by giving arrival notices which are not in accordance with the terms of the agreement.

This may be looked at, again, from a slightly different point of view. The defendants agreed to supply the bales which they themselves were to receive from their vendors. The term relating to the receipt of the goods is a part of the description of the goods and that term is a condition. In *Bowes* v. *Shand* (1) a contract for goods to be shipped during the months of March and April was construed according to the literal meaning and goods partly shipped in February for which bills of lading were then signed were held not to satisfy the contract. Lord Blackburn observed :

" If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. The parties have chosen, for reasons best known to themselves, to say; we bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and . . . . it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

In *Behn* v. *Burness*, (2) action was brought upon a Charter Party dated the 19th day of October 1860, in which it was agreed that Behri's ship ' now in the port of Amsterdam' should proceed to New Port and there load a cargo of coals which she should carry to Hong-kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached New Port, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought and the question for the Court was whether the words ' now in the port of Amsterdam' amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. The Exchequer Chamber held it to be a condition. This principle has been recognised in numerous other English decisions and it is scarcely necessary to refer to them ; it is sufficient to say that this rule was adopted by this Court in *Sivarama Aiyar* v. *Subbiah & Sons* (3) where it was held that a tender of goods was bad on the ground that the vendors had purchased them at prices different from those named in the contract although the goods answered the description in respect of quality, mark and quantity.

On the defendants' admission that they did not give any arrival notices in regard to the 41 bales the plaintiffs are entitled to the return of the advance in respect of them. In regard to the 9 bales, as I have said, the plaintiffs are also entitled to the advance paid in respect of them, the defendants' notices being bad and the defendants being guilty of the breach. The learned Vakil for the defendants contended, on the strength of the last clause in the contract, that they did not commit a breach. I am unable to accept this argument. The last clause does not certainly supersede the earlier clauses but it is only supplementary. It presupposes and does not dispense with, the obligation on the part of the defendant to send proper arrival notices but it further provides that bales shall be delivered on payment of cash, thus delivery and payment being regarded at that stage as concurrent acts.

(1) (1877) 2 A. C. 455 ; 46 L. J. Q. B. 561 ; 36 L.T. 857 ; 25 W R. 780.

(2) (1863) 3 Best & Smith 751; 32 L. J. Q. B. 204 ; 9 Jur. (N. S.) 620 ; 8 L. T. (N. S.) 207; 11 W.R. 496 ; 124 R. R. 794 ; 122 E. R. 281.

(3) 70 Ind. Cas. 346 ; 15 L. W. 9 ; (1922) A. I. R. (M.) 28.

I am of opinion that the Subordinate Judge's decision is correct and I would, therefore, dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 340-B OF 1922.

November 5, 1923.

Present :—Mr. Kinkhede, A. J. C.

BALIRAM AND ANOTHER—APPELLANTS

versus

KAMALJA AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872) ss. 59, 71—Attesting execution whether includes attestation and admission of execution—Question of fact—Second Appellate Court—Burden of proof, when loses significance—Mortgage-suit—Execution—Recitals, on whom binding—Mortgage executed by widow—Adoption after mortgage, whether binding on adopted son—Burden of proof, discharge of by cross-examination of opponent's witnesses.

Section 69 of the Evidence Act applies only where no attesting witness can be found, but where an attesting witness is called and examined and denies execution of the document, the provisions of section 71 come into operation.

The " execution " of a deed designates the whole operation including both the signature by the executant and the attestation thereof by the subscribing witnesses.

A Court of second appeal is precluded from considering the admission of execution made before the Registration Officer, as such question is a question of fact to be decided by a Court of fact and not to be disposed of in the second appeal as a matter of law.

Although the burden of proof remains constantly shifting in the course of the trial, according as one fact or the other is brought out in evidence by one party or the other, the question of burden becomes immaterial when evidence has been adduced by both the parties and the relevant facts are before the Court.

In an action to enforce a mortgage security where there is no contest by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recital as to payment of consideration for the deed which he executed is untrue. Where, however, a stranger to the transaction is a party, and the claim is contested by him and he denies execution and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case.

In case the attesting witnesses are either hostile or not available and the writer of the bond is dead the mortgagee should give independent evidence to identify the handwriting of the person who purported to put the mark or to write the name of the executant and also that of the witness who purported to attest the deed but whose direct evidence is not procurable.

A recital in a deed binds only the maker, *i.e.*, the party to the instrument, and not persons who are not parties thereto, although they may have derived their title from such maker. A person who is not a party to a transaction is in the category of a stranger, and as such can set up an inconsistent claim or defence whether he be a plaintiff or defendant.

It is not always necessary that the party who has the burden must himself lead evidence. It is open to him to sustain the onus cast upon him by the facts which he may elicit by cross-examination of the other party's witnesses.

Although a person adopted by a Hindu widow gets the title to her husband's estate by virtue of his adoption by her, yet he does not derive his title through her, and, therefore, cannot be looked upon as a party to a deed of mortgage executed by her before his adoption.

Appeal against the decree of the District Judge, East Berar, Amraoti, in Civil Appeal No 174 of 1921, dated the 28th March 1922.

Dr. *H. S. Gour*, for the Appellants.

Messrs. *D. T. Mangalmoorti*, *M. B. Marathi* and *R. R. Jaywant*, for the Respondents.

JUDGMENT.—Only two points are involved in the case, one of attestation and the other of consideration. So far as the question of consideration is concerned, both the lower Courts have concurrently found that the plaintiffs have not been able to prove the fact of the existence of the debt recited in the mortgage-deed in suit. Plaintiffs, however, contend that the decision regarding consideration cannot be supported as a finding of fact as its correctness or otherwise depends upon the question as to who had the burden to prove it. Reliance is placed on *Burkur Ram Kishan Singh* v. *Lalji Ram*(1) and it is contended that defendant No. 1 on 25th April 1908, the date of the mortgage, represented the estate and, therefore, recitals by her as to the existence of the debt from the time of defendant No. 1's husband bind not only her but also all persons who derive their title from her by

(1) 18 C. P. L. R. 1.

virtue of subsequent transactions, *i. e.*, defendant No. 2 whose adoption took place in April 1919, *i.e.*, long subsequent to the mortgage in suit, as also defendants Nos. 3 and 4 who are subsequent mortgagees from her. It is further contended that, inasmuch as the defendants have not led any reliable evidence to disprove the recitals which *prima facie* bind defendant No. 1, the plaintiffs' claim should be decreed provided the mortgage is held validly attested as against all the defendants. As regards attestation it is contended that execution having been admitted by or proved against defendant No. 1 the plaintiffs had not to prove attestation as against any of the other defendants. On the side of the respondents it is contended that, however important this question of burden of proof may be in the earlier stages of a case, it has no significance after all the evidence is out on both sides. The evidence must be looked at as a whole and the truth determined or inferred from it. and that, if there be evidence on record to disprove attestation and consideration that is sufficient, no matter by what party it is laid before the Court. Reliance is placed on the decision of the Privy Council in *East India Railway Company* v. *Kirkwood* (2) in support of the first contention, and on *Makund* v. *Beharilal* (3), quoted with approval in *Lal Singh* v. *Chaitram* (4), in support of the second contention. I think there is much force in the respective contentions of the parties and I must decide both these questions. I will consider the question of attestation first and then the question of consideration. By a reference to the pleadings of defendant No. 1 it is sought to be made out that she had admitted the execution of the mortgage-deed in suit. I have carefully gone through the pleadings and I find that there was no clear and unambiguous admission on the part of defendant No. 1 about the execution, receipt of consideration and attestation of the deed in suit. In this view, the provisions of section 70 of the Indian Evidence Act could not help the appellants : see *Budha* v. *Sarwan* (5) compare *Mt. Sarja* v. *Murlidhar* (6) and *Raj Mangal Misir* v. *Mathura Dubain* (7). It was, therefore, necessary for the plaintiffs to establish by independent evidence the fact of execution and attestation even as against defendant No. 1

As regards the other defendants, they not having admitted execution and attestation the burden of proof was clearly on the plaintiff. So the plaintiffs were bound to prove every fact which would entitle them to a decree on the mortgage as against all the defendants. Suffice it to say at the out set, that section 69 of the Evidence Act has no application to the present case. It applies only to a case where no attesting witness "can be found." Here an attesting witness was called and examined and consequently the provisions of section 71 of the Indian Evidence Act came into operation as soon as he denied the execution of the document. It will be noticed that in this case the writer is dead, and out of the four attesting witnesses two, namely, Gundaram and Harsing, are proved to be dead and Moraji is untraceable, as P. W. 1 says. The only surviving attesting witness Tukaram was called and examined as witness No. 3. The Courts could have believed or disbelieved him when he said that the executant did not sign the deed in his presence and in the presence of the other attesting witness Harsing. But they chose to believe him and hold that direct proof of attestation was wanting in the case. The Courts further refused to infer due attestation from that part of the deposition of that witness wherein he said the executant Kamalja and the witnesses Gundaram and Moruji had already signed before he arrived ; that statement of the witness not being a statement of a fact which the witness actually saw with his own eyes had no evidentiary value in order to raise any presumption of due attestation also. It proved the negative because when he took up the deed for signature, it already bore the signature or mark of the executant and the signatures of the said two witnesses. He was not, therefore, competent to speak about them from personal knowledge. Instead of, then, proving the execution of the mortgage, the witness gave out a circumstance which negatived the inference of due attestation. The District Judge, therefore, was right in refusing

(2) 67 Ind. Cas. 921 ; 48 C. 757 at P. 761; 15 L. W. 248.
(3) 3 A. 824 ; A W. N. (1881) 86 ; 6 Ind. Jur. 321; 2 Ind. Dec. (N. S.) 537.
(4) 15 C. P. L. R. 24.
(5) 11 Ind. Cas. 689 ; 7 N. L. R. 85.
(6) 42 Ind. Cas. 715 ; 18 N. L. R. 197.
(7) 30 Ind. Cas. 576; 38 A. 1 ; 13 A. L. J. 881.

to infer due attestation or to apply the maxim *omnia praesumuntur rite esse acta* to the facts of the case.

It is, however, contended that there was other evidence on the record, namely, that of P. W. 1 and P. W. 3, and in view of the provisions of section 71 of the Evidence Act, the other evidence ought to have been believed. The lower Courts have, however, not accepted it as proving execution and attestation. With a view to satisfy myself as to whether that evidence was correctly appreciated by the Courts below I have myself read through the evidence of P. W. 1 and P. W. 3 with the help of Counsel and I have unhesitatingly come to the conclusion that it is not only vague and lacking in precision but leaves many things unsaid on several material points. The plaintiff, as P. W. 1, speaks to the execution of the deed by Kamalaja in the presence of the attesting witnesses, apparently all the four witnesses, but he stands contradicted by P. W. 3 who says all were not present Moreover, he has stated that Rs. 100 were paid before the Sub-Registrar but he stands self-condemned by the Sub Registrar's endorsement which shows that consideration was simply admitted by the executant before him. The plaintiff's testimony was, therefore, not acceptable and I cannot blame the Judges of the Courts below for not believing him. Under circumstances such as these, every plaintiff would be well advised to give independent evidence to identify the handwriting of the writer who purported to put the mark or to write the name of the executant and also that of the witnesses who purported to attest the deed but whose direct evidence is not procurable. If this independent evidence had been given in this case and still the Courts below had thrown it out, then there was some room for interference. The defendant No. 1's own testimony, as D. W. 1, does not in any way help the plaintiffs on this point. Her statement as a witness also does not contain any clear admission of execution of the mortgage-deed in suit. In the present state of the record I am not inclined to hold that the plaintiff made any serious attempt at proving the execution of the mortgage which, as laid down in *Jhama* v. *Deobux* (8), designates the whole operation, including both the signature by the executant and the attestation thereof by the subscribing witnesses. Attesting witnesses who actually saw Kamalaja put her mark or touch the pen of the writer who wrote her name under her instructions and thereafter subscribed thereto their own names as a memorandum of that fact, as held in *Ajab* v. *Mangal* (9), had to be examined in this case. Such evidence of direct attestation being wanting and plaintiffs' other evidence being found deficient and unreliable the lower Courts were right in holding the execution of the deed as not proved as against defendant No. 1 or any of the remaining defendants.

It could have been argued on the plaintiffs-appellants' behalf before the lower Courts that the admission of execution made by defendant No. 1 before the Registering Officer was sufficient to prove execution and receipt of consideration. But that does not appear to have been done I, as a Court of second appeal, am precluded from considering it as such a question is one to be decided by a Court of fact and not to be disposed of in second appeal as a matter of law : see *Mt. Sarja* v. *Murlidhar* (5).

It is next contended that both the Judges have stated that the document in suit was "executed" by the mortgagor but they have held against the plaintiffs only on the point of due and valid attestation. Accepting this view of the findings as correct, all I have to say is that, as pointed out above, "execution" designates the whole operation including signing by the executant and attestation by the witnesses.

I will now proceed to consider the second question, namely, about the burden of proving or disproving consideration for the mortgage. Although the burden of proof remains constantly shifting in the course of the trial according as one fact or the other is brought out in evidence by one party or the other, still the question of onus loses its significance after a certain stage of the trial. Their Lordships of the Privy Council have repeated this more than once in several cases. In *Seturatnam Aiyar* v. *Venkatachela Goundan* (10) the Madras High Court when the case

(8) 2 N. L. R. 10.

(9) 8 Ind. Cas. 1119; 6 N. L. R. 152

(10) 56 Ind. Cas. 117 ; 43 M. 567 ; (1920) M. W. N. 61 ; 27 M. L. T. 102 ; 11 L. W. 899 ; 88 M. L. J. 476 ; 22 Bom. L. R. 578 ; 18 A. L. J. 707 ; 47 I. A. 76 ; 25 C. W. N. 485.

again came before it gave a finding upon a point which, even after remand from the High Court, the District Judge had decided in an incomplete manner. That finding was attacked by the plaintiff-appellant before their Lordships of the Privy Council, firstly, on the ground that the burden of proof was wrongly thrown on him and, secondly, on the ground that in any case the facts did not justify the inference. His Lordship of the Privy Council, Sir Lawrence Jenkins, observed at page 576 :—

> "To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what proposition of fact or of law the parties were at variance and how the matter stood when the case reached the High Court."

Their Lordships' judgment also quotes with approval the following passage from the judgment of the High Court as showing a true perception of the position : —

> "We also hold that even if that fact could be of any use to him the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The following passage at page 577 is very illuminating :—

> "In the end, the learned Judge drew the inference, they speak of it as a presumption in favour of the defendants' occupancy rights, and as finally expressed their determination was unvitiated by any error as to burden of proof. The controversy had passed the stage at which discussion as to the burden of proof was pertinent ; the relevant facts were before the Court and all that remained for decision was what inference should be drawn from them."

In an action to enforce a mortgage-security where there is no contest by the mortgagor, and execution is admitted by or proved against him, the onus lies upon defendant to prove that the recital as to payment of consideration for the deed which he executed is untrue. This view is supported by the decision of the Judicial Committee in *Kaleepershad Tewarree* v. *Rajah Sahib Perhlad Sein* (11), *Ali Khan Bahadur* v. *Indar Pershad* (12) and the decision of the Full Bench in *Fulli* v. *Bassiruddi* (13) quoted with approval by Justice Mukerjee in *Krishna* v. *Nagendra Bala* (14), where, however, a stranger to the transaction is a party and the claim is contested by him and he denies execution and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case : see in this connection *Rahimjan Bibi* v. *Imanjan* (15) which followed a previous decision of the same Court in *Bisheswar Dayal* v. *Harbans Sahay* (16) in which the dictum in *Baranashi Pershad* v. *Brij Lal* (17) which formed the very foundation of the view taken by Sir Stanley Ismay, J.C., in *Burkur Ram Kishen Singh's* case (1), was expressly dissented from as not well founded on principle. There have since been a number of cases in which the principle that a recital binds only the maker, *i. e.*, the party to the instrument, and not persons who are not parties thereto, although they may have derived their title from such maker, has been accepted. The correctness of the view taken by Sir Stanley Ismay, J. C., in the said case is, therefore, open to doubt in view of the trend of the later decisions. That a person who is not a party to a transaction is in the category of a stranger and as such can set up inconsistent claims or defence whether he be a plaintiff or defendant is clear from the observations of Sir Bose, A. J. C., in *Joharmal* v. *Nainsukh* (18). Sir Henry Drake-Brockman, J. C., gave the benefit of the plaintiff mortgagee's failure to establish the mortgage as against a person put into possession of the mortgaged property by the mortgagor to the mortgagor's personal representative who did not even appear to contest the suit in *Kasham Khan* v. *Mt. Sawitre* (19) In *Bisheswar Dayal's* case (16) the

(11) 12 M. I. A. 282; 12 W. R. (P. C. 6;) 2 B. L. R. P. C. 111; 2 Suth P. C. J. 225; 2 Sar. P. C. J. 419; 20 E. R. 345; 1 Ind. Dec. (N. S.) 554.
(12) 28 C 950; 23 I. A. 92; 7 Sar P. C. J. 63; 12 Ind. Dec. (N. S.) 631 (P. C.).
(13) 12 W. R. 25 ; 4 B. L R. 54 (F.B).
(14) 66 Ind. Cas. 694; 34 C. L. J. 333 at pp. 336, 337; 25 C. W. N. 942.
(15) 15 Ind. Cas. 698; 17 C. L. J. 173.
(16) 6 C. L. J. 659; 3 M. L. T. 88.
(17) 3 C. W. N. CCC XXIV (321.).
(18) 5 Ind. Cas. 745; 6 N. L. R. 33 at. p. 35.
(19) 19 Ind. Cas. 547; 9 N. L. R. 38.

learned and eminent Judge, Sir Ashutosh Mukerjee, refused to hold that execution purchaser who according to him "may be a representative in interest of the judgment-debtor for certain purposes," was bound by the mortgagor's recitals in the mortgage. He limited their binding character as against the maker only. He observed that the position of the purchaser was different : "he knows nothing about the deed; he is not a party to it, and he is entitled to call upon the plaintiff not only to prove the execution of the deed but also to establish that there was consideration for it," and quoted with approval the decision in *Shib Narain* v. *Shankar Panigrahi* (20) which was given by the same learned Judges who had taken precisely the opposite view in *Baranashi Pershad* v. *Brij Lal* (17). This view, which is consistently maintained by the said Judge in the recent case of *Krishna* v. *Nagendra Bala* (14) above-quoted, has very rightly observed at page 337 :—

> "The reality of the mortgage transaction is impugned by the purchaser of the equity of redemption and the burden of proof lies consequently in the first instance on the plaintiff to establish that the deed was duly executed and the consideration paid. We may add, however, that the question of onus of proof arises only where there is no evidence one way or the other which will entitle the Judge to come to a conclusion on a question of fact to be determined : but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof, as pointed out by Viscount Haldane in *Kundal Lal* v. *Mt. Begum un-nissa* (21) and by Sir Lawrence Jenkins in *Seturatnam Aiyer* v. *Venkatachela Goundan* (10), becomes immaterial and importance should not be attached to the question on whom the initial onus lay ; in such circumstances the question of the burden of proof is really not pertinent."

There observations have my entire concurrence. Looking at the facts of the case before me in the light of those observations I am clearly of opinion that the defendant No. 2 although he gets his title to the property by virtue of an adoption made by defendant No. 1 still he cannot be considered to be a person deriving his title thereto from her so as to be looked upon as a party to the instrument of mortgage, nor can the defendants Nos. 3 and 4 be looked upon as parties to the instrument as such. They were strangers to the transaction and, therefore, the initial onus of proving consideration lay on the plaintiffs and they have failed to prove it by satisfactory evidence against not only defendant No. 1 but also against Nos. 2, 3 and 4, and the question of onus ceased to be pertinent after all the evidence was once before the trial Court.

Even if it be considered that defendants Nos. 2, 3 and 4 are representatives-in-interest of defendant No. 1 and were bound by what she stated in the deed and that they as well as defendant No. 1 were bound to disprove the existence of the debt, still, the evidence has been fully discussed and disbelieved and finding adverse to plaintiffs has been given by the Courts below. It is argued that, in the absence of any rebutting evidence worth the name tendered by the defendants Nos. 1, 2, 3 and 4 to disprove the recital about the existence of the debt, the fact must be deemed to have been sufficiently established as against them in the circumstances of the case. I am not prepared to hold that this is a case in which the defendants have not adduced any evidence. They have examined some witnesses to prove the solvency of Kamalaja's deceased husband Shivram and to show that he himself used to lend money to others and thereby to establish the absence of any need on his part to borrow the alleged debts from plaintiff and his deceased brother Jairam. The Court of first instance who heard the witnesses has, however, characterised this evidence as very "poor." Though the Judge of the lower Appellate Court has not said anything regarding it in his judgment, I am not prepared to say that the lower Appellate Court did not consider it at all ; *Loole* v. *Pyare* (22). Even if that evidence be excluded from consideration, I am not prepared to hold that there is no evidence on record to prove non-payment of consideration. It is not always necessary that the party who has the burden must himself lead evidence. It is

(20) 5 C. W. N. 403.
(21) 47 Ind. Cas. 337 ; 22 C. W. N. 987 ; 8 L. W. 228 (P. C.).
(22) 38 Ind. Cas. 497 ; 12 N. L. R. 57 at p. 58.

open to him to sustain the onus cast upon him by the facts which he may elicit by cross-examination of the other party's witnesses. *Moti Kahanji* v. *Dipchand Virchand*, (23) quoted with approval in *Bhagwant* v. *Kedari* (24). The defendants impugned the existence of the debt of Sheoram's time very vehemently and all their efforts were directed to elicit facts from plaintiff as P. W. 1 and from his other witnesses on the point of consideration which would go to show that such a debt did not as a matter of fact exist or could not have existed at the date of the mortgage I think they have been more than successful in this endeavour of theirs. I have myself gone through the evidence with the help of the Counsel and pleaders who appeared in the case and I am decidedly of opinion that the defendants have established by their cross-examination all that was necessary to disprove the recitals. When they had thus succeeded in establishing that nothing was due from the deceased husband of defendant No. 1 to plaintiff and his brother, the duty of introducing opposing evidence was shifted on to the plaintiffs and as he failed to adduce such evidence his claim was naturally dismissed.

The result is that the suit was rightly dismissed and I accordingly dismiss this appeal with costs. The costs of the Courts below will be paid as already ordered. The pleader's fee in this Court will be paid separately for each set of respondent or respondents.

G. R. D. S. D. *Appeal dismissed.*

(23) 5 B. H. C. R. 81.
(24) 25 B. 202 ; 2 Bom. L. R. 986.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 297 OF 1923.
January 9, 1924.
Present :—Mr. Justice Suhrawardy and Mr. Justice Page.

Shaikh DEBIR-UD-DIN—DEFENDANT—PETITIONER
versus
SM. AMINA BIBI AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXII, r. 7, Sch. II—Arbitration—Award not submitted within time—Fresh date fixed—Award whether valid—Agreement to refer to arbitration, whether agreement within the meaning of O. XXXII, r. 7—Revision.

Where under a reference to arbitration made by a Court, the arbitrators do not submit their award within the time fixed by the Court and the Court fixes a date for hearing and, at the same time, issues *Takid* to the arbitrators, the Court's order will be taken as an order for extending the time for filing the award, and the award filed before the date thus fixed shall be taken to be filed in time.

Digambari Bewa v. *Joy Narayan Das*, 16 Ind. Cas. 223 ; 16 C. L. J., 573, explained.

Per Page, J.: In a suit one of the parties to which is a minor represented by a guardian, if the party to the suit apply to the Court for an order of reference to arbitration the Court in hearing the application for such an order has jurisdiction to consider a petition under O.XXXII, r. 7,Civil Procedure Code But whether it does or does not consider such application and passes the order of refusal, its order will stand and no question can arise thereafter, as to the regularity of the proceedings preliminary to the order of reference and the arbitrators get jurisdiction to proceed with and to complete the arbitration notwithstanding the fact that a petition has not been preferred under O. XXXII, r. 7, Civil Procedure Code.

Per Suhrawardy, J.: An agreement to refer to arbitration is not such an agreement as is contemplated by O. XXXII, r. 7, Civil Procedure Code. But even if it is, where it is entered into without the leave of the Court and the Court overrules an objection against its invalidity, it does not commit such an irregular exercise of jurisdiction as would justify interference in revision.

Lutawan v. *Lachiya*, 21 Ind. Cas. 939 ; 36 A. 69 ; 12 A. L. J. 57, relied upon. *Annada Krishna Dey* v. *Jogendra Nath Dey*, 8 C. L. J. 294, distinguished.

It cannot be laid down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith, interference cannot be made under section 115, Civil Procedure Code as there may be cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings. [p. 336, col.]

DEBIR-UD-DIN v. AMINA BIBI

Rule against the order of the Munsif, Second Court, Uluberia.

Babu *Gour Mohan Dutt*, for the Petitioner.

Babu *Mritunjoy Chatterjee*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule is directed against the judgment and decree passed by the Munsif of Uluberia on the 30th November 1922 according to the award filed in the suit. Two substantial objections are taken to the decree passed by the lower Court. First, that the Munsif had no jurisdiction to pass a decree in accordance with an award filed after the time fixed by the Court for the filing of it, and, secondly, that the agreement to refer the matter to arbitration was entered into on behalf of a minor plaintiff by his mother without the sanction of the Court. The award, therefore, is not valid in law and should not be enforced.

A preliminary objection has been taken to the effect that no petition in revision lies against a judgment and decree passed in accordance with an award filed in the suit following the arbitration proceedings under Schedule II to the Civil Procedure Code ; and in support of this submission reference has been made to the case of *Gholam Khan* v. *Mahamad Hassan* (1). There is a great deal of force in the objection ; but, at the same time, I am not prepared to lay down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith can this Court interfere under section 115, Civil Procedure Code. It is conceivable that there may be cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings. But I am of opinion that the present case is covered by the observations of their Lordships of the Judicial Committee in the case referred to.

With regard to the first ground of the objection, it appears that the matter was referred to the arbitration of certain persons and the 10th November 1922 was fixed for the filing of the award. On that date, the award not having been filed, the Court passed the following order : " The arbitrators have not submitted their award. Issue *Takid* at once fixing the 10th November for hearing." The officer who had passed that order was the same officer who passed the decree ; and he says that his intention in passing that order was to extend the time to the 11th November for the filing of the award, though he had not said so in so many words. Stress is laid upon the case of *Digambari Bewa* v. *Joy Narain Das* (2), and it is contended on the authority of that case that, unless the Court expressly extends the time to file an award, the mere adjournment of the case to a future date cannot be taken to have extended the time. On a close examination of the case it, however, appears that it is an authority for the proposition that an order like the present may be taken as an order for extending the time for filing the award. In that case the final order was for the disposal of the case on the evidence to be produced by the parties before the Court on the adjourned date. The learned Judges held that would not be an extension of time for filing the award. In my opinion, by the order passed by the learned Munsif on the 23rd October, the Court intended to extend the period for the filing of the award to the 10th November. The award was filed on the 4th November 1922. It thus appears that the award was filed in time and is not invalid on the ground that it was filed out of time.

The second objection is bassed on O. XXXII, r. 7, and it is said that the agreement to refert the matter to arbitration is an agreement which requires the sanction of the Court; and reliance is placed upon the decision of the Madras High Court in *Davuluru Vijaya Rammayya* v. *Davuluru Venkat Subba Rao* (3). The Allahabad High Court has taken a different view and it has laid down authoritatively that an agreement to refer to arbitration is not such an agreement as is comtemplated by O. XXXII, r. 7. See the case of *Lutawan* v. *Lachiya* (4) There is no direct authority on the point in this Court but the Allahabad view was approved by Maclean, C. J., in the case of *Annada Krishna Dey* v. *Jogendra*

(1) 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.)

(2) 16 Ind. Cas. 228 ; 16 C. L. J. 578.
(3) 32 Ind. Cas. 881 ; 39 M. 853 ; 30 M. L. J. 465.
(4) 21 Ind. Cas. 989 ; 36 A. 69 ; 12 A. L. J. 57.

'ath Dey (5) Personally speaking, I think iat the decision of the Allahabad High Court correct. But it is not necessary to pursue ie matter further because, in the view I take f the powers of this Court to interfere under ection 115, Civil Procedure Code, this applica-on is incompetent A similar objection on the round of the agreement not having been en-ered on behalf of a minor with the sanction f the Court was taken in the case before the udicial Committee, namely, the case of *Ghu-im Khan* v. *Mohammed Hassan* (1). Their ordships, without dealing specifically with iis objection, remarked that no appeal lies rom a decree passed in accordance with the ward and that a petition in revision under ection 622 of the old Code will be more bjectionable as it will destroy finality of arbi-ration proceedings. Assuming that the lower Court has committed an error of law in over-uling the objection that the agreement was ot validly entered into by the minor plaint-f, I do not think that it has committed any uch irregular exercise of jurisdiction as would ustify us in interfering with the decree assed. I may observe in passing that the ase on which great reliance was placed y the petitioner, namely, the Full Bench ecision of the Madras High Court above lluded to, was a case in which a sepa-ate suit was filed by the minor on the round that he was not bound by the award r the decree based thereon as he was not a arty to the agreement, and the decree was ot challenged in revision.

One other ground is taken, namely, that the uestion referred to the arbitrator for deter-nination was whether the *kobala* which was ought to be set aside was genuine or not; but he arbitrators have gone further than that nd found that the *kobala* was executed by he deceased Khoda Bux but that there was partial failure of consideration and was ex-ecuted by the deceased under circumstances as would render it liable to be set aside. The Court below has overruled that objection and as not acted without jurisdiction or illegally r with material irregularity in determining hat question. I do not think that a strong ase has been made out for our interference nder section 115, Civil Procedure Code. The Rule is, therefore, discharged with costs. We assess the hearing fee at two gold mohurs.

Page J:—I am of the same opinion. This is an application for a Rule under section 115, Civil Procedure Code, calling upon the opposite party to show cause why a certain award should not be set aside. Two contentions have been urged by the applicant in support of the Rule. The first is, that the arbitrators had no jurisdiction in the mattter because the award was made after the time had passed within which the arbitrators were bound to make their award. But the Court has found "that the time was duly extended by the Court and within such extension of time the award was made." There is no substance in the first contention.

The second contention is this. It is urged that the award was made on a reference ordered by the Court, but that one of the parties thereto was a minor represented by a guardian and that the provisions of O. XXXII, r. 7 had not been complied with and, therefore, that the whole basis of the arbitrator's jurisdiction was destroyed and that the award was not validly made and is null and void. The question, therefore, is whether or not the arbitrators possessed jurisdiction to make the award. Now, in considering that question it is necessary to bear in mind that this reference to arbitration was not created merely by agreement between the parties. It was ordered by the Court, and that fact, in my opinion, materially affects the jurisdiction of the arbitrators. This question was for consideration by the Judicial Committee of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (1). Lord Macnaghten in giving the judgment of the Board referred to the different forms of arbitration under three heads. The first head related to occasions where the parties to a litigation desire to refer their differences to arbitration, and an order of reference is made by the Court. The second head relates to occasions where the parties, without having recourse to litigation, enter into an agreement to refer their differences to arbitrators to obtain the sanction of the Court to the award that is made; and the third head relates to occasions where the agreement to arbitrate is made by the parties without any reference whatever to the Court In dealing with arbitrations under head I,

(5) 8 C. L J. 294.

that is to say, arbitrations whichare ordered by the Court, Lord Macnaghton makes the following observation : " In cases falling under Heads II & III, the provisions relating to Cases under Head I are to be observed so far as applicable. But there is this difference which does not seem to have been always kept in view in the Courts in India. In cases falling under Head I the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point.' Now (*supra* p. 183) what happened in this case was, that the parties to the suit agreed that the matter in dispute between them should be referred to arbitration by order of the Court and one of the parties was an infant appearing by a guardian. On the application for an order of reference being made it was open to the Court in its discretion either to grant or to refuse the application. Having regard to the circumstances, the Court in this case in its discretion made an order of reference. The Court had jurisdiction when hearing the application for an order of reference to consider a petition under O. XXXII, r. 7; but whether it did so or not, the order of reference will stand, and no question could arise thereafter as to the regularity of the proceedings which were preliminary to the order of reference. Now, in my opinion, the effect of the order of reference was that the arbitrators possessed jurisdiction to proceed with and to complete the arbitration notwithstanding the fact that a petition has not been preferred under O. XXXII, r. 7. See the case of *Lutawan* v. *Lachiya*(4). With great respect, I am not prepared to accept the view to the contrary which was expressed by the Madras High Court in the case of *Davalure Ramayya* v. *Davalure Venkata Subba Rao* (3). It is to be observed, however, that in that case the form proceeding adopted was not application to the Court to exercise its jurisdiction under section 115, but a suit by the minor to set aside the compromise. Whether the minor is entitled to dispute the validity of the award in a suit, I express no opinion ; but having regard to the provisions of section 115, Civil Procedure Code, I find my self unable to come to the conclusion that in this case there was any error of law or in respect of jurisdiction committed which calls for the exercise of the jurisdiction which the High Court possesses under the provisions of this section. In these circumstances, I agree that this proceeding is misconceived and that the Rule should be discharged.

S. D. *Rule discharged.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 322 OF 1922.

July 31, 1923.

Present :—Mr. Baker, J. C.

HARBHAGAT—DEFENDANT—APPELLANT

versus

Pandit NARAYANANRAO AND OTHERS —PLAINTIFFS—RESPONDENTS.

Construction of document—"Months", meaning of—Mortgage—Foreclosure and redemption, rights of, whether co-extensive—Evidence Act (I of 1872), s. 21—Admission by judgment-debtor whether binding on auction-purchaser—Admission of prior mortgage by mortgagor in suit on subsequent mortgage, effect of.

The principle of the English Common Law that the term "months" used in a contract means lunar months, is not applicable to contracts in the vernacular. On the contrary, even when lunar months are mentioned in a vernacular contract, the time is to be calculated by reference to calendar months.

The ordinary presumption that the rights of redemption and foreclosure are co-extensive may be negatived by a special provision in the mortgage-deed in the interests of the mortgagor. For instance, when the deed provides that the mortgagor may redeem within a certain period, it implies that the mortgagee has no right to foreclose before the expiry of that period. In such a case limitation will not begin to run against the mortgagee till after the expiry of the period fixed in the deed.

A purchaser at an execution-sale is in privity with, and the representative in interest of, the judgment-debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions. Where, therefore, in a mortgage-suit the mortgagor admits a prior mortgage, the purchaser of the property in execution of the mortgage-decree is bound by the prior mortgage.

Ramcoomar Koondoo v. *Mc'Queen* 18 W.R. 166; 11 B. L. R. 46; I. A Sup. Vol. 40 ; 3 Sar. P. C. J. 160, and *Mohamed Mozaffer Hossein* v. *Kishori Mohan Roy*, 22

HARBHAGAT *v.* NARAYANANRAO

C. 909; 22 I. A. 129; 5 M L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N.S.) 602 (P. C.), relied on.

Appeal from the decision of the District Judge, Nimar, dated the 7th April 1922, in Civil Appeal No. 10 of 1922.

Mr. *S. B. Gokhale*, for the Appellant.

Mr. *V. R. Pandit*, R. B. for the Respondents.

JUDGMENT.—The plaintiff sued on a mortgage, dated 9th March 1908, payable in 12 months. The suit was brought on 9th March 1921. Defendant No. 1 is an auction-purchaser at a Court sale on a decree obtained by a prior mortgagee. The sale was subject to the plaintiff's mortgage. The suit is admittedly brought on the last day of limitation and it is contended that it is barred by limitation, as the term 'months' used in a contract means lunar months, as has been held by the Calcutta High Court in *South British Fire* and *Marine Insurance Co.* v. *Brojo Nath Shaha* (1).

That case, however, and other similar cases refer to contracts in the English language. It would be wrong to apply a principle of the English Common Law to Vernacular mortgages and a reference to the notes under section 25 of the Indian Limitation Act by Rustomji will show that even when lunar months are mentioned in a Vernacular contract the time is to be decided by reference to calender months: cf. *Rungo Bujaji* v. *Babaji* (2) and *Latifunnessa* v. *Dhan Kunwar* (3).

The mortgage-money was, therefore, payable on or before 8th March 1909 and the day of execution being excluded under section 12 of the Limitation Act, the suit on 9th March 1921 is in time.

It has been further argued that as the mortgagor had the right to redeem within 12 months and the rights of redemption and foreclosure are co-extensive, the mortgagee could foreclose at any time after the execution of the mortgage and the money became payable on the execution of the document. The learned pleader for appellant relies on *Purna Chandra Sarma* v. *Peary Mohan Pal Das* (4) but that case itself shows that the ordinary presumption that the rights of redemption and foreclosure are co-extensive may be negatived by a special provision in the interests of the mortgagor. That is the case here. The mortgagor was entitled to redeem at any period within 12 months, but it is obvious that the mortgagee could not sue for foreclosure unless and until that period had expired, since, under the terms of the mortgage, the mortgagor was entitled to delay payment until the last day of the 12 months. The effect of the appellant's argument is to ignore this stipulation altogether.

I hold, therefore, that the suit is not barred by limitation.

The mortgagor was one Bhagirathibai. She had executed a prior mortgage to another person, who sued upon it and obtained a decree. In that suit Bhagirathibai admitted the amount due on the plaintiff's mortgage. The Subordinate Judge did not adjudicate on the mortgage of plaintiff, but the property was sold subject to the plaintiff's mortgage and was purchased by the present defendant.

The lower Courts have held that he cannot contest the plaintiff's mortgage, relying on *Kalidas Chaudhuri* v. *Prasanna Kumar Das* (5), where it was held that a person who purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum*, or undertakes to discharge it, cannot be heard to deny the validity of the mortgage subject to which he made his purchase.

There is a contrary ruling in *Lalchand* v. *Hasto Bai* (6) in which it was held that a purchaser at auction-sale of the right, title and interest of the judgment-debtors in property which is subject to a mortgage and which mortgage was upheld at the time of sale, is not precluded from resisting a suit on the mortgage on the ground that nothing is due on it. In order to succeed, the mortgagee is bound to prove that the amount claimed is really due and an order passed under section 282, Civil Procedure Code, in execution proceedings cannot absolve him from this necessity. In that case it is not clear

(1) 2 Ind. Cas. 578; 36 C. 516; 13 C. W. N. 425
(2) 6 B. 93; 8 Ind. Dec. (N. S.) 513.
(3) 24 C. 882; 12 Ind. Dec. (N. S.) 922.
(4) 15 Ind. Cas. 287; 39 C. 828; 17 C. W. N. 149.
(5) 55 Ind. Cas. 189; 47 C. 446 at p. 456; 30 C. L. J. 496; 24 C. W. N. 269.
(6) 7 C. P. L. R. 73.

whether a formal order had been passed under section 282 (now O. XXI, r. 66) in execution proceedings could absolve the plaintiff from the necessity of proving that the amount which he claimed as being due on the mortgage is really due. This case was followed in *Mt. Dhoka* v. *R. B. Behari Lal* (7) which was a case of an auction-purchaser disputing a charge maintained by an order under section 282 of the old Civil Procedure Code (O. XXI, r. 62). In a similar unreported case, *Rai Seth Chandmal* v. *Kanhayalal* (First Appeal No. 42 of 1913), decided by a Bench of this Court on 22nd December 1916, the case of *Lalchand* v. *Hasto Bai* (6) (above cited) was followed and it was held that no order passed under section 282 precluded the purchaser at an auction-sale from resisting a suit on a mortgage upheld at the time of sale on the ground that nothing is due under it.

The whole subject is discussed at p. 456 of the above quoted Calcutta case and it is pointed out that the distinction between the two classes of cases depends on the question whether the property has been sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale, the former contingency being provided for by O. XXI, r. 62, and the latter by O. XXI, r. 66, and a number of rulings are quoted to illustrate the distinction.

In the present case, although it is not clear that any order under O. XXI, r. 62, was passed, the sale was subject to the plaintiff's mortgage and, therefore, in the view of the Calcutta High Court the case would be governed by O. XXI, r. 62. In this conflict of authority I should be bound to follow the previous decisions of this Court, were it not that the facts of the present case are distinguishable. In the suit brought by the prior mortgagee against the mortgagor Bhagirathibai, to which the present plaintiffs are parties, Bhagirathibai admitted the plaintiff's mortgage. The result of the principles laid down by the Privy Council In the cases of *Ramcoomar Koondoo* v. *Mc Queen* (8) and *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (9) would appear to be that a purchaser at an ordinary execution-sale is in privity with, and the representative-in-interest of the judgment-debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions.

It would appear, therefore, that the appellant is bound by the admissions of Bhagirathibai of the plaintiff's mortgage.

It, moreover, appears that the price paid (Rs. 560) was less on account of the plaintiff's mortgage, and, as the District Judge has pointed out, he gained a substantial advantage by accepting the validity of the mortgage. I am, therefore, of opinion that he cannot now contest its validity. It has been pointed out by the lower Appellate Court that Bhagirathibai did not object to the rate of interest and that appellant cannot be allowed to do so. The lower Appellate Court has pointed out that the price paid at the auction makes allowance for the amount then due under the mortgage at the stipulated rate of interest. It may be noted that the appellant was under no obligation to purchase the mortgaged property. He entered into the transaction with his eyes open and I do not think he can contend now that the terms of the bargain were unconscionable.

The appeal is consequently dismissed with costs.

G. R. D. *Appeal dismissed*

(7) 1 N. L R 150.

(8) 18 W. R. 166; 11 B. L. R. 46; I. A. Sup Vol 40; 8 Sar. P. C. J. 160.

(9) 22 C 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar P C. J. 583; 11 Ind. Dec. (N.S.), 602 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 19 OF 1923.

December 19, 1923.

Present: —Mr. Daniells, J. C.

RAMESHAR DUT SINGH—DEFENDANT—APPELLANT

versus

H. H. MAHARAJA JAGJIT SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 8, distinction between—Procedure under r. 8—Remedy of aggrieved party—Appeal—Appellate Court, power of.

RAMESHAR DUT SINGH *v.* MAHARAJA JAGJIT SINGH

No valid distinction can be drawn between action taken under O. XVII, r 2, of the Civil Procedure Code and action taken under the provisions of O. IX of the Code. O. XVII, r. 2, refers back to O. IX and gives the Court permission to decide the case in one of the ways prescribed by the latter Order

O. XVII, r. 3 of the Civil Procedure Code is, however, different; it does not refer back to O. IX in any way, and a decision given under it is given on the merits. In such a case the remedy of the aggrieved party is by way of an appeal from the decree, and if the Appellate Court finds that the trial Court was wrongin proceeding under the rule it has jurisdiction to set aside the decree and remand the case to the trial Court for disposal according to law.

Jadu Nath v. *Ram Narain*, 1 Ind. Cas. 329; 12 O. C. 25, and *Hummi* v *Aziz-ud-din*, 36 Ind. Cas. 277; 14 A. L. J. 1226; 39 A. 148 distinguished.

Rule 3 of O. XVII of the Civil Procedure Code applies where two elements combine, *viz.*, (1) the adjournment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. It is immaterial, however, whether the defendant is present or absent.

Enatulla v. *Jiban Mohan Roy*, 23 Ind. Cas. 769; 41 C. 956; 18 C. W. N. 775 19 C. L. J. 535, relied on.

Kichamma v. *Sreeramulu*, 43 Ind. Cas. 566, 41 M. 286; 34 M. L. J. 24; 23 M. L. T. 1; (1918) M. W. N. 92 (F. B.), dissented from.

Appeal against the decree of the Assistant Collector, Firt Class, Bahraich, dated the 20th February 1923.

Messrs. *Niamatullah* and *Mahmud Beg*, for the Appellant.

Mr. *B. Bisheshar Nath Srivastava*, for the Respondent.

JUDGMENT.—These are two connected appeals arising out of two suits filed in the Court of an Assistant Collector of the first class for arrears of rent under section 108 (2) of the Oudh Rent Act. The appeals lie direct to this Court as in each case the amount in dispute is over Rs. 5,000. The defendant appellant is a *Thekedar* of two villages Shukul Purwa and Kundar Ramghat in the Bahraich District from the proprietor, H. H. the Maharaja of Kapurthala, who is the plaintiff-respondent. The main ground of appeal is that the suits were decided without hearing the defendant's evidence.

The following dates are material: —

Issues were framed on 13th November 1922.

11th December 1922 was fixed for the hearing. On that date one witness was examined on behalf of the plaintiff and one on behalf of the defendant. The other witnesses of the defendant were absent and the case was adjourned on the oral application of his pleader to 20th January 1923. On that date the Assistant Collector was occupied with other work and it was further adjourned to 20th February 1923. On that day the Assistant Collector passed a decree decreeing the suits. It is against these decrees that the present appeals are filed.

The defendant had employed a Gonda pleader to take his case. At 8-30 A. M. the pleader handed in a telegram at Gonda Railway Station stating that he had missed his train and asking for postponement of the case. It appears that the train for Bahraich leaves at an early hour of the morning and that there is no other train which would have enabled the pleader to reach the Court during Court-hours on that day. The telegram was received at Bahraich at 8-50 A.M. It must presumably have been delivered to the Assistant Collector within two hours of that time. Before it was received, however, the case had been decided and the Court has made a note to this effect on the telegram.

The Assistant Collector's decree purports, on the face of it, to be a decree on the merits. It refers to the defendant's absence but it decides the case on the ground that the plaintiff has proved that the rent is in arrears, that the defendant's evidence on the record is insufficient to rebut this case and that the defendant has admitted execution of the *kabuliat* and, therefore, was bound by its terms. It would seem, therefore, that the Assistant Collector intended his decree to be one under O. XVII, r. 3. Civil Procedure Code.

On the very next day, February 21st, 1923, defendants' general agent who was representing him in the proceedings, treating the decree as an *ex-parte* decree, presented an application to have it set aside.

This application was accompanied by an affidavit which set forth that he had gone to Gonda on the previous day to call his pleader and that on the morning of the 20th, he and the pleader had both gone to the Station together to take the train for Bahraich but the train had started just as they were arriving at the station. The Assistant Collector

appears to have overlooked the fact that the affidavit related to the agent as well as to the pleader, for in the order which he passed on the application he says that he accepted the statement of the pleader that he had missed the train but that there was no reason why the general agent should not have been present. He, therefore, refused to re-open the case.

There can be no doubt that a grave injustice has been done to the defendant by the proceedings of the Assistant Collector. The Assistant Collector appears to have shown undue haste in disposing of the case without waiting a little to see if there was any reason for the defendants' non-appearance when the Court opened on February 20th. The suits were suits of high value. The defendant had already filed a written statement and summoned witnesses and it was not likely that he would be willing to allow them to go by default. Further, when the Assistant Collector learnt from the defendant's affidavit, which he accepted as true and which has not been questioned before me, the real explanation of the defendant's absence, it was his clear duty to set aside his order and restore the case on any terms as to costs which he might think just. It is admitted that the Assistant Collector made a mistake in his decree in not allowing the amount covered by ground of appeal No. 6 in Appeal No. 20 of 1923.

The main argument addressed to me on behalf of the respondent in this Court is that the appellant has adopted the wrong remedy, that he ought to have appealed under O. XLIII, r. 1 (*d*), Civil Procedure Code against the order refusing to restore the case, and that in these appeals he cannot question the propriety of the Assistant Collector's action in disposing of the case *ex parte* and in refusing to restore it. The respondent relies strongly on the decision in *Jadunath* v. *Ramnarain* (1). This was a case under section 108 of the Code of 1882, corresponding to O. IX, r. 13 of the present Code. This decision is authority for the view that in a case coming under that rule the Court cannot look outside the record in dealing with the appeal. If there is anything appearing on the face of the record to show that the Court acted improperly in decreeing the suit *ex parte*, this will be a good ground for a reversal of the decree but until the appellant has made out a case for admitting fresh evidence the Court cannot refer to any affidavit subsequently filed or to anything which took place after the decree was passed. There is authority of the Allahabad High Court to the same effect in *Hummi* v. *Aziz-ud-din* (2). In reply to this objection the appellant urges,—

(1) that a different view was expressed by a Judge of this Court in a recent case in which, however, the earlier decisions were not brought to his notice ;

(2) that this is a case under O. XVII and not under O. IX ;

(3) that if the decision be treated as one under O. XVII, r. 3, the ruling relied on does not apply. In such a case the defendant's only remedies are by way of appeal or review and he cannot be debarred from showing by affidavit or otherwise that he was wrongly shut out from producing evidence.

I do not think that any valid distinction can be drawn between O. XVII, r. 2, and O. IX. O. XVII, r. 2, refers back to O. IX and gives the Court permission to decide the case in one of the ways prescribed by the order. The case in *Hummi* v. *Aziz-ud-din* (2) was a case under O. XVII, r. 2, and so were the two cases referred to below. O. XVII, r. 3, is different. That rule does not refer back to O. IX in any way. The decision was given on the merits and the remedy of the aggrieved party is by way of an appeal from the decree.

The distinction between rr. 2 and 3 of O. XVII has been considered by the Calcutta High Court in *Enatulla Basunia* v. *Jiban Mohan Roy* (3) and by the Madras High (Court) in *Puchamma* v. *Sreeramulu* (4). In the former case it was held that r. 3 applies where two elements combine namely:—

(1) The adjournment must have been at the instance of a party.

(2) There must be materials on the record for the Court to proceed to decide the suit.

(1) 1 Ind. Cas. 899, 12 O. C. 25.

(2) 36 Ind. Cas. 277; 39 A. 148; 14 A. L. J. 1226.

(3) 23 Ind. Cas. 769 ; 41 C. 956 ; 18 C. W. N. 775 ; 19 C. L. J. 535.

(4) 43 Ind. Cas. 566 ; 41 M. 286 ; 34 M. L. J. 24; 23 M. L. T. 1 ; (1918) M. W. N. 52 (F.B)

If this is the case, it does not matter whether the defendant is present or absent. A majority of the Madras High Court held in the latter case, Wallis, C. J., dissenting, that O. XVII, r. 3 can only apply where the defendant is present. It appears to me that the view of the Calcutta High Court is to be preferred. O. XVII, r. 1 permits the Court to do either of two things. Firstly, it may for cause shown grant time to any party ; secondly, it may from time to time adjourn the hearing of the suit. The power to adjourn may be exercised independently of any application made by any of the parties. These two branches of r. 1 are dealt with in the reverse order in r. 2 and r. 3 respectively. Rule 2 refers to the failure of the parties to appear on the adjourned date. Rule 3 refers to the case in which time has been granted to a party and he fails to produce his evidence or to perform some other act necessary to the further progress of the suit for which time has been allowed. In this case the order sheet of December the 11th shows that on that date only one of the defendant's witnesses was present and the case was adjourned to 20th January on the oral application of the defendant's pleader. The further adjournment to 20th February was merely a continuation of the former adjournment. On 20th February the defendant failed to appear with his witnesses when the case was called on. It now appears that there was sufficient reason for his failure and that the Court was not justified in deciding the case so hastily. Under these circumstances, it appears to me that there is nothing in the law which debars me from giving the appellant the redress to which on the merits he is certainly entitled. Some question may arise as to the form in which relief should be granted, but it appears to me that as the Court below has decided the case without having the relevant evidence before it and without giving a detailed finding on any of the issues it has in substance been decided on a preliminary point without going into the merits.

I, therefore, set aside the decree of the Court below and direct it to rehear the case on the merits. As the plaintiff is entitled to some compensation for the expense to which he may have been put on account of the defendant's failure to appear on 20th February, I allow no costs of these appeals.

Z. K. *Case remanded for re-hearing.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 283 OF 1922.

September 19, 1923.

Present :—Mr. Prideaux, A. J. C.

NARAYAN—DEFENDANT—APPELLANT

versus

MOTISA—PLAINTIFF—RESPONDENT.

Equity—Contract—Contract Act (IX of 1872), s. 65—Sale in contravention of law—Refund—Parties in pari delicto—Civil Procedure Code (Act V of 1908), Sch. III, para. 11—Sale whether void.

The obligation to do justice rests upon all persons natural and artificial ; if one obtains the money or property of others, without authority, the law will compel restitution or compensation.

Before an illegal purpose is carried out, wholly or in part, and the parties are *in pari delicto*, the general rule is, that no suit will lie to recover money paid under the unlawful agreement.

A sale in contravention of the provisions of para. 11, Sch. III, Civil Procedure Code, is void. But if both the vendor and the vendee had arranged it in ignorance of the law, the latter is entitled to demand a refund of the price paid by him.

Appeal from the decree of the District Judge, Wardha, dated the 17th February 1922.

D. N. Khare, R. B. for the Appellant.

Mr. *N. B. Niyogi*, for the Respondent.

JUDGMENT.—This appeal involves an interesting point of law. The facts are that proceedings regarding the sale of an absolute occupancy holding were pending in the Court of the Collector, Wardha. The defendant entered into an agreement for the sale of that field and executed a conveyance, Exhibit D-2, dated the 11th January 1919, in favour of the plaintiff. The defendant was incompetent to alienate the field under the provisions of paragraph 11

of the third Schedule to the Code of Civil Procedure and it is no longer in dispute that the sale is void. In this present suit the plaintiff asked for specific performance to sell, or in default for the refund of the consideration money and damages. The claim for specific performance is no longer urged but both Courts have found the plaintiff is entitled for the refund of the consideration and decreed accordingly.

It is contended here that section 11 of the Contract Act, which runs : " Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject," prevents the plaintiff from recovering the consideration paid and prevents section 65 of the Contract Act from applying to the case. It is stated that the transaction comes under the same category as a contract made by a minor or lunatic. It has been found in the present case that neither party was aware that the sale would be void under the provisions of the Civil Procedure Code.

It is certain the plaintiff would not have paid the large sums of money he has if he thought he was to get nothing by the transaction. No case exactly in point has been shown me. Sir Henry Drake-Brockman, J. C., in *Mt. Salu Bai* v. *Bajat Khan* (1), states :— " I concur then with Stanyon, A. J. C., in affirming *Murray* v. *Muratsingh* (2), and in holding that we have in section 325-A, Civil Procedure Code, a legal disqualification to alienate at all which *mutatis mutandis* puts the judgment-debtor affected on a par with a minor." In that case it was held that a transfer made in contravention of the provisions of section 325-A, Civil Procedure Code, 1882, is void and of no legal effect whatsoever. Section 43 of the Transfer of Property Act, 1882, does not apply.

I am referred to *Mohori Bibi* v. *Dharmodas Ghose* (3), wherein it has been held that a person who by reason of infancy is incapable to contract cannot make a contract within the meaning of the Contract Act. A mortgage, therefore, made by a minor is void and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid ; sections 64 and 65 of the Contract Act being based on there being a contract between competent parties, and being inapplicable to a case where there is not, and could not have been any contract at all. It is argued that in the present case the Statutory prohibition prevented there being a contract and, therefore, section 65 of the Contract Act does not apply and the plaintiff cannot demand a refund. The other cases quoted are *Gurushiddswami* v. *Parwa* (4), *Bani Muncharam* v. *Regina Stanger* (5) and *Bhikam Singh* v. *Har Prasad* (6).

For the plaintiff in this Court is quoted *Mathura Mohan Saha* v. *Ram Kumar Saha* (7), which lays down that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others, without authority the law independently of express contract, will compel restitution or compensation. *Haribhai Hansji* v. *Nathubhai Ratanji* (8), *Avuala Charamudi* v. *Marriboyina Raghavulu* (9) and *Motilal Mansukhram* v. *Maneklal Dayabhai* (10) are also relied on.

It seems that the contract to sell and the sale itself are void. Under the law the plaintiff could not buy and the defendant could not sell. But I do not think that section 65 of the Contract Act is not applicable. It is settled law that before an illegal purpose is carried out, wholly or in part, and the parties are *in pari delicto* the general rule is that no suit will lie to recover money paid under

(1) 42 Ind. Cas. 200; 18 N. L. R. 180 (F. B.).
(2) 8 N. L. R. 171.
(3) 30 C. 539 at pp. 548, 549 ; 30 I. A. 114 ; 7 C. W. N. 441 ; 5 Bom. L. R. 421 ; 8 Sar. P. C. J. 874 (P. C.).
(4) 55 Ind. Cas. 271 ; 44 B. 175 ; 22 Bom. L R. 49.
(5) 32 B. 581 ; 10 Bom. L. R. 318.
(6) 19 A. 35 ; A. W. N. (1896) 167; 9 Ind. Dec. (N. S) 23
(7) 35 Ind. Cas. 805 ; 48 C. 790 ; 28 C. L. J. 26 ; (C. W. N. 370.
(8) 23 Ind. Cas. 602 ; 38 B. 249 ; 16 Bom. L. R. 62.
(9) 28 Ind. Cas. 871 ; 39 M. 462 ; 28 M. L. J. 471; 18 M. L. T. 76 ; (1915) M. W. N. 596.
(10) 59 Ind. Cas. 245 ; 45 B. 225 ; 22 Bom. L R. 1195.

the unlawful agreement. But in the present case both parties seem to have been mistaken. They did nothing illegal with their eyes open, but have been caught by the fiction that they should have known the law. It is obviously wrong that the plaintiff should be made to lose both his money and the field and that defendant should be enabled to retain both. Equity, it seems to me, demands that in such a case as the present restitution must be made and that the defendant has been rightly made to disgorge the money received. With these remarks, I dismiss this appeal with costs. The appellant will pay the respondent's costs.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISIONS NO. 137 AND 138 OF 1923.

January 24, 1924.

Present :—Mr. Justice Kanhaiya Lal.

Pandit AUSERI LAL—PLAINTIFF —APPLICANT

versus

MULLHAN AND ANOTHER—DEFENDANTS —OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX *of* 1887) *Sch.* II, *Art.* 8—*Suit to recover rent of grazing land, nature of—Suit whether cognsiable by Small Cause Court.*

Plaintiff obtained a lease of some grass land situate in a Cantonment from the Cantonment Committee and sub-let the land for grazing purposes to the defendant at a fixed rate per cattle. In a suit by the plaintiff for recovery of the rent from the defendant :

***Held*, that the suit was not one for the recovery of the price of grass sold to be cut, but was one for the recovery of rent and being covered by Article 8 of Schedule II to the Provincial Small Cause Courts Act, was excluded from the cognisance of a Small Cause Court.**

***B. and N. W. Railway* v. *Bandhu Singh*, 2 Ind. Cas. 223 ; 31 A. 342 ; 6 A. L. J. 400, and *Manohar Lal* v. *Gauri*, 22 Ind. Cas. 16 ; 12 A. L. J. 86, distinguished.**

Civil Revision from the order of the Judge of the Court of Small Causes at Cawnpore, dated 1st August 1923.

Mr. *Asthana*, for the Applicant.

Mr. *Mukhtar Ahmed*, for the Opposite Parties.

JUDGMENT.—The plaintiff obtained a lease of some grass land situated in the Cawnpore Cantonment from the Cantonment Committee. He sub-let that land for grazing purposes to another person at a fixed rate per cattle The present suit was filed by him for the recovery of the rent payable by the latter. The suit was clearly one for the rent of the grazing area let to the defendant ; and it was excluded from the cognizance of the Small Cause Court by clause 8 of Schedule II of the Provincial Small Cause Courts Act (No. IX of 1887). It was not a suit for the recovery of the price of grass sold to be cut and the decision in *B. and N. W. Railway* v. *Bandhu Singh* (1) does not, therefore, apply ; nor was it a suit for the recovery of the rent of land situated in a mahal and let for grazing purposes ; and the decision in *Manohar Lal* v. *Gauri* (2) is equally inapplicable. The defendant was entitled to use the land and the grass growing on it for grazing purposes during the period for which the lease was granted ; and the order of the Court below returning the plaint cannot, therefore, be sustained. The present application in revision is not directed solely against the erroneous order of the Appellate Court, upholding the order of the Munsif. It is also directed against the order of the Munsif returning the plaint for presentation to the proper Court; and, as pointed out in *Chandu Mal* v. *Koka Mal* (3), a refusal of a Court to exercise the jurisdiction vested in it by law can legitimately form the subject of revision. The application is, therefore, allowed and the orders passed by the Courts below are set aside with a direction to the Court of first instance to restore the suit to its original number and to proceed with its hearing in the manner provided by the law. The costs here and hitherto will abide the result.

Z. K. *Suit remanded for re-trial.*

(1) 2 Ind. Cas. 223 ; 31 A. 342 ; 6 A. L. J. 400.
(2) 22 Ind. Cas. 16 ; 12 A. L. J. 86.
(3) 61 Ind. Cas. 86 ; 19 A. L. J. 110 ; 43 A 334.

MALINDAR SINGH *v* ALLAH DITTA

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2021 OF 1921.

November 19, 1923.

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

MALINDAR SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ALLAH DITTA—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887) ss. 50, 77 (3) (g) —Landlord and tenant—Suit by tenant to recover possession of holding from landlord, whether cognisable by Civil or Revenue Court.

A suit by an occupancy tenant to recover possession of his holding from the landlord by whom he has been wrongfully dispossessed is cognisable only by a Revenue Court and not by a Civil Court even though brought more than one year after the date of the plaintiffs' dispossession.

Imam Din v. *Feroz Khan*, 64 P. R. 1898, **dissented from.**

Parman v. *Lhassu*, 51 Ind. Cas. 443; 49 P. R. 1919, **distinguished.**

Akbar Hussain v. *Karam Dad*, 48 Ind. Cas. 8 ; 90 P. R. 1918 (F. B.), **followed.**

Second appeal from the order of the District Judge, Hoshiarpur, dated the 4th July 1921.

Mr. *Shamair Chand*, for *L. Fakir Chand*, for the Appellants.

Mr. *B. D. Kureshi*, for the Respondents.

JUDGMENT.—The plaintiff claimed possession over certain land on the allegation that he was its occupancy tenant and had wrongfully been dispossessed by the defendants-landlords about six years ago The trial Court, applying the provisions of section 50 of the Punjab Tenancy Act, held the claim to be barred by time and dismissed the suit. The lower Appellate Court has set aside the decree and has made an order of remand under O. XLI, r. 23 of the Civil Procedure Code. Against this order the present appeal has been preferred.

The lower Appellate Court has relied upon the decision reported as *Parman* v. *Lhassu* (1) and also upon the ruling in *Imam Din* v. *Feroz Khan* (2) and has held that, as the suit was brought after the period of one year provided by section 50 (*b*) of the Punjab Tenancy Act, it was cognizable by a Civil Court and the limitation of 12 years was applicable to it. This view is clearly opposed to the Full Bench decision reported as *Akbar Hussain* v. *Karam Dad* (3). It was held in that case that a suit of this nature was cognizable only by a Revenue Court and not by a Civil Court even though not brought within one year from date of plaintiff's dispossession, *vide* sections 50 and 77 (3) (*g*) of the Punjab Tenancy Act. The case reported as *Imam Din* v. *Feroz Khan* (2) was expressly overruled in this case. The case dealt with in *Parman* v. *Lhassu* (1), was distinguished from the case decided in the Full Bench ruling on the ground that the plaintiff in that case had been dispossessed in due course of law and that the plaintiff in the Full Bench case had been wrongly dispossessed. Obviously, there is this distinction to be found between the two cases.

The learned Judge of the Court below, therefore, was wrong in relying upon *Parman* v. *Lhassu* (1) for the decision of the present case. We are clearly of opinion that the present case is fully governed by the decision in the Full Bench case *Akbar Hussain* v. *Karam Dad* (3).

We accordingly accept the appeal and, setting aside the order of remand, dismiss the suit of the plaintiff on the ground that the Civil Court has no jurisdiction to try it. The result is that the decree of the trial Court is restored with costs in all Courts.

Z. K. *Appeal allowed.*

(1) 51 Ind. 443 ; 49 P. R. 1919.
(2) 64 P. R. 1898.
(3) 48 Ind Cas. 8 ; 90 P. R. 1918 (F. B.).

SHUKOOR *v.* JAGAIYYA

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 209-B OF 1922.

September 12, 1923.

Present:—Mr. Kotval, A. J. C.

SHUKOOR—DEFENDANT—APPELLANT

versus

JAGAIYYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Trusts Act (II of 1882), s. 48, scope of—Co-trustees—Suit for ejectment—Refusal of one trustee to join—Suit by other trustee alone, whether, maintainable.

If one of the two trustees refuses to join as plaintiff and is joined as a defendant, the other trustee alone can maintain a suit for eviction of a person from the trust property. [p. 348, col. 2.]

Kumhan v. *Moorthi*, 7 Ind. Cas. 422; 34 M. 406; (1910) M. W. N. 859; 8 M. L. T. 208; 20 M. L. J. 951, followed.

Appeal from the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 187 of 1921, dated the 28th February 1922.

V. R. Pandit, R. B., and Mr. *R. R. Jaywant*, for the Appellants.

Messrs. *S. B. Gokhale* and *B. R. Pendharkar*, for the Respondents.

JUDGMENT.—This judgment governs also second appeals Nos. 213-B and 211-B of 1922. The cases out of which they arise were tried together in the first Court and the appeals from the decision of that Court were also dealt with in the same judgment. In this Court, too, the appeals have been argued ogether.

The plaintiff Jagaiyya alleged that one Rajayya, deceased, by a Will dated the 4th September 1922 appointed his two sons Gopalswami (defendant No. 2) and Anna Ramchandra Appa, deceased, and the plaintiff as trustees to manage his property consisting of the shops in dispute, to recover the rents and to apply the proceeds towards the maintenance and education of certain members of his family; that the plaintiff was to be the chief trustee and the other two trustees were to act under his guidance; that these latter were ill-behaved and did not act as trustees; that the shops were let to the defendants; that as they paid no rent during the last few years they were given notices to quit but they had not complied with them, and that the defendant Gopalswami was colluding with the lessees and was unwilling to be a plaintiff. The plaintiff alone, therefore, sued to recover possession. The defendants pleaded that they were tenants of the shops in dispute for several years; that they had paid rent to and obtained receipts from Gopalswami who owned and managed the shop, and that the notices were insufficient and illegal. It was denied that the plaintiff was the chief trustee, that defendant 2 was ill-behaved, and that plaintiff alone could maintain the suit.

The trial Court found that the plaintiff was the chief trustee under Rajayya's Will, that defendant No. 2 was ill-behaved and acting to the prejudice of the trust, and that plaintiff alone could put an end to the tenancy and maintain the suit for ejectment. The plaintiff's claim for possession was decreed in all three cases.

On appeal the following issues were framed by the Additional District Judge and the suits remanded for retrial and findings by the first Court:—

1. Did defendant No. 2 decline to join the plaintiff in this suit?
2. Was defendant No. 2 managing the house property on behalf of trustees?
3. Did defendant No. 2 lease the house to the defendant No. 1 for current year?
4. Is the said lease a prudent act for the advantage of the trust?
5. Whether the notice to quit served on defendant No. 1 was sufficient with regard to the period it granted to vacate the premises?
6. Was the notice to quit signed by one trustee valid in law and in fact?

The findings on these issues were that defendant No. 2 declined to join as plaintiff, that the deceased Ramchandra was managing the property till 1919 when he died, that defendant No 2 was not managing the house property on behalf of the trustees, that Gopalswami did not lease the house to the defendants for the current year and that the alleged lease

was not to the advantage of the trust, and that the notices were valid and sufficient with regard to its period as well as the person by whom they were given. The lower Appellate Court has found that Gopalswami declined to join as plaintiff in the suit ; that the notices were sufficient and valid ; that Gopalswami managed the property since 1914 ; that he had not leased the shop for the current year and had not received the rent, and that the leases by Gopalswami, if any, were not prudent. The decrees of the trial Court allowing the plaintiff's claim for possession were confirmed.

In second appeal it is argued on behalf of the lessees that, in view of the finding of the lower Appellate Court that Gopalswami was managing the property since 1914 and of Gopalswami's admission that he had let the shops to the defendants, the plaintiff could not sue to eject the lessees. It is urged that the plaintiff let the defendants' lessees know that Gopalswami was the exclusive manager. It is further urged that, even if the plaintiff and Gopalswami together were entitled to let the property yet if Gopalswami alone has let it, the plaintiff could not sue to eject the lessees and that the notices by the plaintiff were insufficient in point of time under section 106, Transfer of Property Act. Grounds 3 to 17 of the memorandum of appeal were not argued in any case.

On behalf of the plaintiff it is contended that the finding of the lower Appellate Court that Gopalswami has been managing since 1914 is not a necessary finding that Gopalswami was put forward as the exclusive manager having the sole right to let the shops. Looking to the evidence of Jagaiyya which has been believed by the lower Court and the statement of Gopalswami in Exhibit P-5, it appears that the plaintiff's contention is correct. The lower Appellate Court's finding need not be taken to be that Gopalswami was put forward as the exclusive manager of the property since 1914. If it were meant to be to that effect it would be incorrect. It is in evidence that up to 1912-13 at least the plaintiff, Gopalswami, and the deceased Ramchandra Appa used to let the property and the lessees must have known that these three were the proper persons to let the property. If Gopalswami thereafter let the property the defendants must be taken to have understood that he was doing so on behalf of the trustees. The plaintiff at least had the right to sue the lessees jointly with Gopalswami. There is no basis for a finding that the plaintiff let the lessees know that Gopalswami was the manager.

The question to be decided is, whether the plaintiff can maintain the present suit for eviction. It has been found that Gopalswami refused to joint as a plaintiff. He has been made a defendant, and I am of opinion that the suit under such circumstances by the plaintiff alone is maintainable ; *Kumhan* v. *Moorthi* (1). As regards the argument that even if the plaintiff and Gopalswami together were entitled to let the property yet if Gopalswami alone has let it the plaintiff could not sue to eject the lessees, the answer is that it has been found by the lower Appellate Court that the alleged lease has not been proved.

As regards the question of the sufficiency of the notice it does not arise in second appeal No. 211-B of 1922 which arises from Civil Suit No. 317 of 1920, nor in second appeal No. 210-B of 1922 which arises from Civil Suit No. 319 of 1920 for the notice is not on the record of either of these suits. The notice filed in Civil Suit No. 321 of 1920 out of which second appeal No. 209-B of 1922 arises is dated the 26th April 1919 which corresponds to Chait Badi 11. It is clear that the lease was from Diwali to Diwali. The notice asked the lessee to vacate the premises on the 23rd October 1919, corresponding to Ashwin Badi 15, the Diwali day. This is a little more than six months according to the Marathi calendar. No pleas were, however, raised in the trial Court that the notices were required to be of six months under the provisions of the Transfer of Property Act. As would appear from issue 5 on remand, what appears to have been pleaded was that it was not a reasonably sufficient notice. This is also clear from what the lower Appellate Court says in paragraph 6 of its judgment. Even in this Court the point was not raised clearly in ground No. 3. Even if the Transfer of Property Act applies, the tenancy would in this case appear to be from month to month ; *Debendra Nath Bhowmik* v. *Syama Prosanna Bhowmik* (2) and *Govinda*

(1) 7 Ind. 422 ; 34 M. 406 ; (1910) M W. N. 359 ; 8 M. L. T. 208 ; 20 M. L. J. 951.

(2) 11 C. W. N. 1124.

MUSADDI LAL *v.* CHHOTU

Chandra Saha v. *Dwarka Nath Patita* (3). All the grounds urged fail. The three appeals are dismissed with costs.

G. R. D. *Appeals dismissed.*

(3) 26 Ind. Cas. 962 ; 19 C. W. N. 489 ; 20 C. L. J. 455.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1157 of 1922.

January 24, 1924.

Present : Mr. Justice Mukerji.

MUSADDI LAL—PLAINTIFF—APPELLANT

versus

CHHOTU AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901) *s.* 86—*Ex-proprietary tenant—Order fixing rent based on agreement, whether binding on heirs of tenant*

An order fixing the rent of an ex-proprietary holding is binding on the heirs of the ex-proprietary tenant even if it merely adopted an agreement between the landlord and the ex-proprietary tenant. [p. 350, col. 1.]

Har Prasad v. *Khasan*, 5 Ind. Cas. 441 ; 18 A. L. J. 684 ; 2 U. P. L. R. (A.) 281, followed.

Second appeal against the decree of the Additional District Judge of Meerut, dated the 22nd April 1922.

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

JUDGMENT.—The facts of the case are briefly these. One Attar Singh was the proprietor of certain lands, *sir* and non *sir*. He made a mortgage in favour of the appellant, who was the plaintiff in the suit out of which this appeal has arisen. The appellant asked for rent being assessed over the *sir* lands which became, by the fact of mortgage, the ex-proprietary tenancy of Attar Singh. It appears that Attar Singh and the appellant agreed as to the amount of rent to be paid by the former. An order was passed by the Court under section 36 of the Land Revenue Act. It examined the patwari heard the *sulahnama* and ordered that for 10 *bighas* 6 *biswas* land, for which the rent is now claimed, a sum of Rs. 101-7 be fixed as the rent. It fixed another sum with respect to certain other lands in which Attar Singh had no interest as an ex-proprietary tenant. Attar Singh is dead. The appellant instituted the suit against his two brothers who are the recorded tenants, on the death of Attar Singh and also made Attar Singh's daughter *Musammat* Gaindi a party. In the Courts below it was recognised that *Musammat* Gaindi had no interest and she never contested the suit. In this Court no notice was served on *Musamma* Gaindi and so far, therefore, as she is concerned, this appeal must fail.

The Court of first instance found that the defendants applied for abatement of rent and the rent was reduced to the sum of Rs. 37 and odd. This order, however, was to take effect from 1329 F. and did not affect the present suit which was for the years 1325-1327 F. The learned Assistant Collector held that the compromise on which the order of the Assistant Collector fixing the rent was passed was an unfair compromise and had been obtained by exercise of undue influence. He decreed the suit with respect to a very small sum. Indeed, he accepted a certain amount as the rent for the land which had been recorded before the rent was fixed.

On appeal the learned District Judge was practically of the same opinion as the learned Assistant Collector. He held that it was necessary to protect the ex-proprietary tenants against their own folly.

In appeal, which is unfortunately not opposed in this Court, it has been argued that the order fixing the rent, so long as it stands, is binding on the parties and their successors and it did not lie within the province of the Court below to question the validity of it.

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It has not been alleged that the order fixing the rent was obtained by means of fraud or that the Court which fixed the amount was of incompetent jurisdiction. That being so, the order which was passed between the parties is binding, even if it be the case that it merely adopted an agreement between the landlord and the ex-proprietary tenant. We have, however, the fact that the patwari was also examined in the case, though it is not clear on what point. This view was taken by this Court in the case of *Har Prasad* v. *Khazan* (1).

I accordingly hold that the defendants respondents Nos. 1 and 2 are bound to pay according to the rent fixed by the Assistant Collector on 8th December 1917.

The result is that the appeal is allowed, decrees of the Courts below are set aside and the suit stands decreed against the respondents Nos. 1 and 2 alone with costs throughout which, however, will not include the costs in this Court because the appeal was uncontested. The suit will stand dismissed against respondent *Musamamt* Gaindi.

Z. K. *Appeal allowed.*

(1) 57 Ind. Cas. 441 ; 18 A. L. J. 684 ; 2 U. P. L R. (A). 231.

LAHORE HIGH COURT.

CIVIL REVISION No. 367 OF 1923.

January 22, 1924.

Present :—Mr. Justice Moti Sagar.

NAND KISHORE AND OTHERS—PLAINTIFFS—PETITIONERS

versus

SARDAR NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 115—Bengal Regulation (XVII of 1806)—District Judge, whether acts judicially—Revision—Remedy, other, open—Interference by High Court.

The functions to be exercised under Bengal Regulation XVII of 1806 are ministerial and not judicial, but a District Judge assumes judicial functions when he proceeds to determine whether he has or has not the jurisdiction to issue a notice under the Regulation and his order is, therefore, open to revision. But where the aggrieved party has a right of suit, the High Court will not interfere with the order in revision. [p. 352, col. 1.]

Where an order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and it is not shown how the aggrieved party will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. [p. 352, col. 2.]

Ponnurangan Pillai v. *Lal Khan Sahib*, 37 Ind. Cas. 848 followed

Petition under section 44, Act VI of 1918, the Punjab Courts Act, against the decision of the District Judge, Delhi, dated the 23rd February 1923.

Mr. *Shamair Chand*, for the Petitioners.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT. —This is an application for revision of an order passed by the District Judge of Delhi in a proceeding under Regulation XVII of 1806. The facts are briefly these,—

The petitioners, who are residents of Shahdara, own some landed property in the village Mandauli which was formerly a part of the United Provinces of Agra and Oudh. In 1920 they mortgaged this property to the respondent Sardar Narain Singh by way of conditional sale for a sum of Rs. 1,50,000. The mortgage not having been redeemed within the stipulated period, Sardar Narain Singh applied to the District Judge for the issue of a notice for foreclosure under Regulation XVII of 1806. The notice having been served upon the petitioners they appeared before the District Judge and filed certain objections. Their main objection was that Regulation XVII of 1806 was not in force in the village Mandauli and that the issue of the foreclosure notice under the Regulation was, therefore, clearly illegal Now, Delhi was constituted as a separate Province under Government Notification No.911, dated the 17th of September 1912. In 1912 an Act, called the Delhi Laws Act,

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(XIII of 1912), was passed by which all Laws and Regulations in force in the Punjab were made applicable to that Province. In 1915 certain villages, in which the village of Mandauli was also included, were taken out of the Meerut District and added to the Delhi Province. By Act VII of 1915 the Delhi Laws Act of 1912 was extended in its entirety to this added area with this reservation, however, that certain enactments, which are specified in Schedule III to that Act, were ordered to remain in force as before in this new territory. One of the enactments specified in Schedule III was the Transfer of Property Act (1882). Now, section 2 of the Transfer of Property Act provides that " in the territories to which this Act extends Regulation XVII of 1806 will not apply but shall be considered to have been wholly repealed." The petitioners' contention before the learned District Judge was that, as the Transfer of Property Act still continued to be in force in the village Mandauli, the Regulation aforesaid was not applicable, and that consequently he had no jurisdiction to issue a notice of foreclosure. The learned District Judge disallowed the objections, holding that the Regulation of 1806 and the Transfer of Property Act were both in force in Mandauli and that the procedure followed by the mortgagee was, therefore, not illegal.

Against this decision the mortgagors have come up in the revision to this Court, and it has been contended on their behalf that the order passed by the learned District Judge is wholly without jurisdiction and that his opinion that both the Reguiation and the Transfer of Property Act are in force in the added territory is erroneous. A preliminary objection has been taken by Bakhshi Tek Chand that the revision is not competent inasmuch as the order which is sought to be revised, has not been passed by the learned District Judge in his judicial capacity. It is further contended that it is not the practice of this Court to interfere in revision when another remedy is open to an aggrieved party. It is pointed out that the petitioners may challenge the validity of the notice either in a suit for redemption or in a foreclosure suit which the mortgagee may bring against them after the year of grace has expired.

The first contention, in my opinion, has no force. It is true that the functions to be exercised under the Regulation are ministerial and not judicial ; but there can also be no doubt that a District Judge assumes judicial functions when he proceeds to determine whether he has or has not the jurisdiction to issue a notice. In *Gulab Singh* v. *Karam* (1) the District Judge refused to issue a noitce under Regulation XVII of 1806, holding that the mortgage-deed propounded was not a mortgage by conditional sale and, therefore, not within the scope of the Regulation. An application for the revision of this order was made in the Chief Court, and it was held, on the authority of *Hazari Lal* v. *Kheru Rai* (2), that the order was open to revision. The learned Judges observed as follows while disposing of this question : —

" It would be anomalous if a mortgagee had no remedy where the District Judge had refused to act in accordance with law, as in the present case, without any apparent justification. The functions to be exercised under the Regulation are no doubt ministerial rather than judicial—but we consider that a District Judge assumes judicial functions when he proceeds to construe and interpret the document presented as a mortgage by conditional sale, and that at least in such case his proceedings are open to revision if he declines jurisdiction on clearly erroneous grounds."

The facts of the present case, in my opinion, are in no way distinguishable from those of the case cited above. In the present case the learned District Judge, instead of construing a document, has construed a certain Act of the Legislature and the contention is that his proceedings are open to revision inasmuch as he has assumed jurisdiction on clearly erroneous grounds.

In *Sanmant* v. *Dya Ram* (3), the mortgagors tendered a certain sum of money to the District Judge as being all that was due on a mortgage made by their predecessor-in-title. Notice was issued by the District Judge to the

(1) 119 P. R. 1892.
(2) 3 A. 576; A. W. N. (1881) 41; 2 Ind. Dec. (N.S.) 367.
(3) 107 P. R. 1890.

representatives of the original mortgagee who appeared and contended that a much larger sum was due to them than that admitted by the mortgagors. The District Judge summarily tried the question and ordered redemption on payment of the sum admitted by the mortgagors to be due to the mortgagees. An application for revision was filed against this order in the Chief Court on two grounds:—(1) that under section 2 of Regulation I of 1798 the District Judge was competent to take action in the manner prescribed by that Act only when the mortgage was by way of conditional sale, and (2) that he had no authority to enter upon questions of right that may be in dispute between the parties. The mortgage was admittedly not a mortgage by way of conditional sale but an ordinary mortgage with possession. The Chief Court entirely set aside the proceedings and held that the proper remedy for the mortgagor was by Civil suit in the ordinary form for redemption of mortgage. It will be observed that in this case the District Judge had assumed jurisdiction on clearly erroneous grounds, and, though it was held that the functions of a District Judge acting under the Regulation were ministerial and not judicial yet the proceedings were set aside obviously on the ground that he had assumed jurisdiction which was not vested in him under the law. I do not, therefore, think that there is any force in the first ground and I overrule it.

The next ground, however, appears to be fatal and must be upheld. It is admitted by Mr. Shamair Chand that a suit for redemption certainly lies, but it is urged that such a suit would cost a great deal of money which his clients are not in a position to afford. He further argues that if his clients were to wait till a suit is instituted against them by the mortgagee, the year of grace would expire and if in that suit the question of the validity of notice is decided against them their right of redemption would be gone and the property mortgaged which is of considerable value will be lost to them for ever. In my opinion none of these reasons are sufficient to induce me to depart from the ordinary rule that, where an applicant has other remedies by way of suit or otherwise, the intervention of the High Court under section 115 of the Civil Procedure Code is not called for. It has been held in *Ponurangam Pillai* v. *Lalkram Sahib* (4) that where a Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. This case, in my opinion, is exactly in point, and I decline to interfere on the revision side.

The result is that the petition fails and is dismissed. I make no order as to costs.

Z. K. *Petition dismissed.*

(4) 87 Ind. Cas. 848.

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CHITPORE GOLABARI CO., LTD. *v.* GIRDHARI LAL SEROGI

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES

NOS. 1642 AND 1700 OF 1920.

January 23, 1924.

Present:—Mr. Justice Rankin, and Mr. Justice M. N. Mukerjee.

CHITPORE GOLABARI CO., LTD.—APPELLANT

versus

GIRDHARI LAL SEROGI AND OTHERS—RESPONDENTS.

Landlord and tenant—Rent, suit for, questions of title whether relevant—Res judicata—Appeal—Decision in Appellate Court confined to one ground—Other grounds whether matters of estoppel.

There is no rule of law that in a rent suit questions of title which require to be determined should not be determined, although generally questions of title between the plaintiff and third persons are not strictly relevant in a rent suit. [p. 354, col. 2.]

In a rent suit the question of the relationship of landlord and tenant subsisting between the parties and the question of the plaintiff's or anybody else's title are distinct questions. [p. 354, col. 2.]

When a case is taken from one Court to another on appeal and is finally disposed of on a particular ground, that ground alone and no other, is matter of estoppel by record between the parties, although other grounds may have been relied upon by the trial Court. [p. 355, col. 2.]

Appeals against decrees of the Subordinate Judge of Howrah, dated the 28th February 1920.

Babu *Brojolal Chuckerbutty*, for Dr. *Dwarkanath Mitter*, and Babu *Gour Mohan Dutt*, for the Appellant.—The plaintiff brought this suit for declaration, that the plaintiffs were entitled to a 12-annas share of the lands of the *Kha* schedule and included in the *Ka* schedule of the plaints in the two suits. In the plaint the plaintiffs traced their title from a *kabuliyat* dated 1872. The plaint lands subsequently were occupied by one Haridhan Dutta, as a *ticca* tenant under the plaintiff's predecessors-in-interest. In one of the paragraphs of the plaint it was stated that although the plaint lands were not included with the title-deeds of the defendants, they included those lands within their Factory walls and possessed the same in order to deprive the plaintiffs of their just rights.

There were altogether sixteen issues, mostly on the question of title, but subsequently, by a petition the plaintiffs amended the plaints by omitting their prayer for declaration of their title. A fresh issue (the 17th) was then raised, namely, "does the relationship of landlord and tenant subsist between the parties in respect of the lands in suit."

My first point is that all the issues as made originally were really issues of title. It was only at the last stage, the issue about landlord and tenant was raised. Although the suit is ostensibly one for rent, it was framed to be really a title-suit, in which case, the valuation being over Rs. 1,000, the Munsif would have no jurisdiction over it. Upon the plaint itself this could not be a suit for arrears of rent but one for damages as against a trespasser. As a result, I was deprived of my right of first appeal before your Lordships. Although the relief claimed is small, yet if the suit is really a suit for establishment of title and ejectment the jurisdiction should be ousted. Such indirect methods are not allowable. Reads *Deokali Koer* v. *Kedar Nath* (1). Here also he has sued for rent and he is really seeking a declaration of a much important nature. He wants my ejectment by these tactical methods. Some of the findings are not necessary for disposal of the rent-suits at all. He enumerated them.

As to the question whether questions of title could be gone into in a rent-suit *Lodai Mollah* v. *Kally Das Roy* (2) is a comprehensive case. The mischief which is done in allowing important matters to be agitated ostensibly in suits for rent, is also discussed there. A great mischief that has been done to my client is great because in any subsequent litigation he may be greatly prejudiced and embarrassed by this decision of these issues.

On reading the plaint it becomes apparent that scope and frame of the plaintiffs' suit has been completely misunderstood. The Courts have made out a case for the plaintiff which plaintiff did not make himself.

(1) 15 Ind. Cas. 427; 39 C. 704, at p. 707.
(2) 8 C. 288; 10 C. L. R. 581; 4 Shome L. R. 275; 4 Ind. Dec. (N. S.) 152.

As regards the *Thekas*, they have not been properly proved. The only presumption under s. 90 Indian Evidence Act is that a document which is 30 years old is signed by the person by whom it is purported to be signed. The collection papers may come as substantative evidence under section 32 (2) but only on proof that these are kept in the ordinary course of business. This cannot be presumed but must be proved. Reads *Umed Ali* v. *Habibullah* (3). These collection papers are the principal support of the plaintiffs' case. The presumption of their being written in due course does not arise at all. My submissions, therefore, are that the suit in the present form is not maintainable, that it was without jurisdiction and should be confined to issue of relationship of landlord and tenant.

Babu Mohendra Nath Roy, with Babu Bhupendra Kumar Ghose, for the respondents:—The Court of Appeal below held that the collection papers were genuine and they proved payment of rent. Their custody has been proved. The death of persons who wrote those papers has also been proved. There may be one loose sentence in the judgment of the learned Judge. My learned friend might take exception to the sentence " written in due course". But the Judge was entitled to accept them as true and act upon them. They are undoubtedly admissible as evidence. The question is whether they come as substantive evidence under section 32 (2), *i.e.*, if the *Theka* is kept in the ordinary course of business. It should depend on the document adduced in evidence. I am not aware of any case which has gone to the extreme length to which my learned friends want you to go.

The question of relationship of landlord and tenant involves two questions, (1) that of plaintiffs' title and (2) that of defendants' title. These will have to be gone into unless admitted on either side. The rule in 8 Cal. is *obiter*. Both chains of title will have to be enquired into and, of couse, will become *res juaicata*. There is nothing in law to prevent a landlord to seek for such a declaration, as in this case, as preliminary to the substantial relief. The appellant has not at all been prejudiced. He has no grievance at all.

A. C. R. C.

(3) 56 Ind. Cas. 88 ; 31 C. L J. 68 ; 47 C. 266.

JUDGMENT.

Rankin, J. :—This appeal has been very ably and closely argued. The plaintiffs sued the Chitpore Golabari Company, Limited, by a suit which, as originally framed, prayed for a declaration of the plaintiff's title in addition to a decree for Rs. 33 being the arrears of rent due to the plaintiffs in their 12-annas share in certain property. The property actually in dispute is the property in Schedule *Kha* of the plaint ; but the property in that Schedule is also included in Schedule *Ka* of the plaint. The plaint is an elaborate document and a very favourable specimen of the pleadings in the lower Courts. It sets out very elaborately the history of the plaintiff's title to the land and also of the alleged tenant right of the defendants. Objection was taken to a suit constituted in that way for declaratory reliefs, amongst other things, on the question of title being brought before the learned Munsif whose jurisdiction was limited to Rs. 1,000. The learned Munsif, by an order which has been criticised for ambiguity, appears to have directed that the plaint should be treated as amended by omitting the prayer for declaration of title and he in the end added a 17th issue to those already framed which really covers in itself the whole ground between the parties on the footing that the suit was a mere rent-suit. That is, " does the relationship of landlord and tenant subsist between the parties in respect of the lands in suit ? " It is quite clear that this suit must now be treated as being, from first to last, a mere rent-suit and any declaration that can possibly be given in the suit must be one wholly ancillary to the question of the defendant's liability for the rent claimed.

In a rent-suit, there is no rule of law that questions of title which require to be determined are not to be determined ; but there are two reasons why, in general, questions of title as between the plaintiff and third persons do not require to be determined. The first reason is that for a claim to rent as distinct from damages mere proof of the plaintiff's title, is not sufficient. The second reason is that the plaintiff who as against the third person has no title may have a perfectly good claim against the tenant whom he has inducted for rent. Accordingly, between the landlord

and the tenant the question of relationship subsisting between them and the question of the plaintiff's or any body else's title are distinct questions though they may, for accidental reasons, become entangled.

Now, in this case, the learned Judges of both the Courts below have utilised the circumstance that the parties had stated in detail their differences in the form of numerous issues to enable them to deal with the matters in dispute under the headings of different issues. But, in strictness, in such a case as the present, the treatment of these questions of title arising incidentally as independent and substantive issues is wrong. They are matters bearing upon the sole issue, the question of relationship between landlord and tenant. Not all of them were necessary for the decision of the case but most of them were necessary and lay absolutely in the way, having to be disposed of before the case could be properly decided. In the end, the learned Judge of the lower Appellate Court has done this : He has traced back the plaintiffs' title to certain people of the name of Santras. He has traced back the defendants' title in respect of the lands in dispute to a certain Haridhan Dutt. He has found that Haridhan Dutt in his day did pay rent to the Santras for the lands in suit. He has, therefore, affirmed the relationship of landlord and tenant and has given to the plaintiffs a decree for the amount of rent that is the plaintiffs' correct proportion of the rent which Haridhan Dutt used to pay. In these circumstances, Babu Brojolal Chuckerbutty who appears for the defendants-appellants has taken objections which may be put under three headings. He first says that all these different issues framed as such and incidentally decided by the lower Conrts constitute a grievance to his client because they affect his title beyond what was necessary and proper in a rent-suit; and that, as the record stands, in any subsequent contest, his client will be very much more embarrassed by the record in this case than he would have been, if the 7th issue had been treated as the only issue Now, so far as that is concerned, it is enough to say that, speaking for myself, I am satisfied that there may be, in these circumstances, some danger of an injustice. But it has to be remembared that when a case is taken from one Court to another on appeal and is finally disposed of on a particular ground and that alone, no other of the grounds, though relied upon by the lower Courts, are matters of estoppel by record. In this case, my learned brother and I both desire to be plain and emphatic to the effect that the issues other than the 17th are not proceeded upon by this Court as being issues or matters substantially in controversy on their own account. We think that the only issue was the question of the relationship of landlord and tenant and, if that matter is made absolutely clear, we can safely proceed to dispose of this appeal by considering whether the question of the relationship of landlord and tenant has been satisfactorily determined according to law.

It was suggested that, in the lower Appellate Court, some observations were made against the present appellants by reason that they had not shown that they paid rent to the alleged third party the Dighapatia Raj. It is quite plain that the correct way to decide this suit is to leave out of account altogether any question of *jus tertii* in the Dighapatia Raj and it does not appear that the lower Appellate Court has proceeded in that respect upon any false notion of the true frame of the case.

Now, the first question to deal with is this. It is said that the decision of the Courts below really makes a new case for the plaintiffs: that, according to the plaintiffs, it would appear that the defendants had not purchased, or derived title to, the *Kha* land—the land actually in contest, that the plaintiffs' case was, so it is alleged, that the defendants were mere trespassers without title, and that they prayed for a declaration of their own title on that basis and for a decree for rent by an inconsistency in the legal reasoning. Now, I do not so read this plaint. As I read the plaint, it is intended to mean that the defendants have succeeded to the interest of Haridhan Dutt, that they have succeeded to his interest not only in the other lands but in this land too but that in the defendants' conveyance, there is consciously or else by mistake a recital to the effect that the land now in contest is not part of the land conveyed. However that may be, when the Courts came to examine into the defendant's documents, they found that, although

the earlier documents did not help the plaintiffs in this matter, Ex. 8 coming into force in 1914 showed that the defendants did purport to take an assignment of the land in suit deriving title from Haridhan Dutt. In these circumstances, it does not seem to me that there was anything to preclude the lower Appellate Court from dealing with the rights of the parties according to the facts proved on the evidence.

The last point that requires consideration is, I think, more difficult than any of the others. It is a question of series of a documents called *Thekas* which were relied upon by the plaintiffs to show that Haridhan Dutt paid rent to the plaintiffs' predecessors—the Santras. Now, as regards those documents, they were contested altogether, that is to say, their genuineness was disputed from the beginning. It was said that they were manufactured for the purposes of this case or some other case. It was said that this explained the reason why any previous attempt to sue for rent had not been made. It was denied that they were in the handwriting of the Santras' Gomasta. The documents were objected to when they were tendered in evidence and accordingly the matter was dealt with by the trial Court which found in favour of the documents. In the grounds of appeal to the lower Appellate Court, which we have scrutinized, we find that observations about other particular pieces of evidence were made grounds of appeal but the question of these *Thekas* was not mentioned specifically there at all in those grounds. When the learned Judge of the Court of appeal below came to deal with the matter, an issue (No. 6) was framed by him which gives reliable evidence, so far as it goes, of the line of argument that the appellants took; " Are the documents used in evidence by the plaintiffs fraudulent and collusive and have they been wrongly admitted in evidence ?" Assuming that the documents referred to are these *Thekas*, the appellants there were raising the whole thing over again denying the learned Judge's right to make any presumption in their favour under section 90 of the Evidence Act and denying the proof of their genuineness, in fact, raising the original objection in its entirety. The learned Judge has been perhaps, a little unhappy in the use of the single phrase. He says that the *Thekas* and the counterfoils of rent receipts prove beyond doubt that the appellants' predecessor paid rent to the Santras. He then says : " It is urged by the learned Vakil for the appellants that no reliance should be placed on these papers and that they have been manufactured for these suits It is also contended that they have not been duly proved ; but I cannot accede to his contentions." He then mentions that they were used and filed in some other suits long ago, that they have respectable appearance, that they are more than thirty years old, and that their custody has been proved. Then he says: " So it may be presumed under the law that they were written in due course." After that he goes on to say that it is proved that their writers are dead and to deal with the question that the writers were the Gomastas of the Santras. He also says that some of the counterfoils of the *dakhilas* signed by the Santras corroborate particular entries in the *Thekas* and he finally says, " considering all this", I hold that these " Collection papers are admissible in evidence." Now, Babu Brojalal Chuckerbutty says that, if one scrutinizes this finding, one cannot get the precise finding of *fact* that these documents came into existence in the ordinary course of business within the meaning of section 32 of the Evidence Act. If that question had been specifically raised in the grounds of appeal and if one could collect from the learned Judge's judgment that he was really called upon to mention specially the question whether they were made in the ordinary course of business or not, it might be a matter for consideration whether his statement that it may be presumed under the law that they were written in due course was sufficiently precise. But the facts were these: He was dealing with documents whose genuineness was utterly in dispute. He found that they were fairly numerous, that there were lists of tenants, lists of rents realized and all sorts of particulars and that they were documents which any Gomasta could reasonably be presumed to have prepared in the ordinary course of his duty. If that particular point had been put to him, the learned Judge, who was satisfied of their genuineness and content to act upon it, must have found that they were prepared in the course of the business of that proprietor's estate. I

cannot myself be satisfied that this criticism has any reasonable basis. It seems to me that it is very hard on litigants at the end of a long litigation to be forced to begin all over again merely because the language of the learned Judge is not absolutely in terms on several points with the relevant sections of the Evidence Act. Under section 114, he was quite entitled from the circumstances to hold that he could presume and would presume that the numerous and lengthy documents such as these proved in this case to have been written by the Gomasta of the landlord were written in the ordinary course of his duty. In these circumstances, it seems to me that it would be wrong to commence this litigation over again, practically from the beginning for that would be the consequence, merely because the only phrase used by the learned Judge is that it may be presumed under the law that they were written in due course. I think, therefore, that this appeal fails and must be dismissed. On the question of declaration, I think there is sufficient reason why there should be no order made as to costs.

Mukherji, J.:—I agree.

For the reasons given in our judgment delivered just now in Second Appeal 1642 of 1920, this appeal fails and is dismissed without costs.

Z. K. *Appeals dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 546 OF 1921.

September 29, 1923.

Present :—Mr. Prideaux, A. J. C.

PARASHRAM AND OTHERS—APPELLANTS

versus

SITARAM—RESPONDENT.

Civil Procedure Code (Act V of 1908)—O. XXIII, r. 3 —Compromise decree—Unlawful terms—Execution.

The inclusion of an invalid or illegal provision in a decree does not validate it and so far as a decree embodies unlawful terms of a compromise it is inoperative and cannot be enforced. Therefore, a consent decree directing the sale of trees which stand on agricultural land and cannot be sold apart from the land cannot be executed. [p. 358, col. 1.]

Appeal from the order of the District Judge, Wardha, in Civil Appeal No. 47 of 1921, dated 27th July 1921.

Mr. *V. V. Chitale*, for the Appellants.

Mr. *M. K. Padhye*, for the Respondent.

JUDGMENT.—In a Civil suit between the parties a consent decree was passed on 6th March 1919 ordering the defendants to pay Rs. 200 to the plaintiff stating that Rs. 500 shall be paid on the corresponding day next year with interest at 1 per cent. per mensem and in default of payment one pie *malguzuri* share of Mouza Surgaon and an 8-annas share in 25 mango trees in *sir* field No. 218 of the same village were to be sold by auction. The defendants applied to the Court, stating (1) that interest had been charged on Rs. 200 though it was not ordered to be paid in the decree and that this interest should be disallowed; (2) that field No. 218 is *sir* and the mango trees therein are held in the same right; they are not, therefore, liable to be auctioned and should, therefore, be released from the sale; (3) the crops were bad and the Rs. 823-4-0 claimed in execution could not be paid at once. Instalments were asked for; (4) interest at 1 per cent. has been charged, it should be 0-8-0 per cent., which is the Court rate.

The executing Court found that no interest on Rs. 200 was allowable. As regards the second point the Judge writes :—

> " On point (2), under the ruling in the case of *Sukhnandan* v. *Manak Chand* (1), the trees which stand on agricultural land cannot be sold apart from the land. The trees can be sold along with the land on which they stand if the land is saleable. *Sir* land is not saleable and the trees cannot be sold. I hold that the charge itself, though specified by an agreement of the parties is illegal and the property cannot be sold apart from the land. I have cut the trees. The *malguzari* share only will be sold."

(1) 10 Ind. Cas. 478 ; 7 N. L. R. 68.

PITAMBAR LAL *v.* DODEE SINGH

The matter was taken in appeal to the Court of the District Judge, Wardha, who holds that section 97 of the present Tenancy Act is no bar to the sale of the trees. The decree was based on a private compromise between the parties and was registered and had to be executed. The judgment concludes :—

> " Under any circumstances, therefore, the lower Court could not refuse to execute the decree by sale of proprietary rights in half the share in the mango trees standing on the said *sir* land."

The case was remanded.

It is here contended that, though the proprietary rights of the *malguzar* in the *sir* land and the trees standing thereon can be sold, yet *khas* possession of the same cannot be given to the decree-holder ; that under section 45 of the Tenancy Act XI of 1898 he who loses his *sir* land as proprietor becomes automatically an occupancy tenant of the land ; and it is argued that trees standing in *sir* land are held in the same right as the land itself, and section 97 of the present Tenancy Act which was in force when the defendants' application was filed states :— " Trees standing in any land shall not be attached in execution of a decree or order of a Civil Court unless the land itself is attached," is a bar to the execution of the decree.

It seems to me settled law that the inclusion of an invalid or illegal provision in a decree does not validate it. In *Lakshmanaswami Naidu* v. *Rangamma* (2), it was held that a Court has no jurisdiction to pass a decree on a compromise unless it was a lawful compromise and that any terms of a contract which are opposed to public policy are invalid and will, therefore, not be enforced by the Courts, and, so far as a decree embodies unlawful terms of a compromise, it is inoperative and will not be enforced. In *Ramasami Naik* v. *Ramasami Chetty* (3), it was enunciated that the transfer of a bare expectancy was a nullity under section 6 (*a*) of the Transfer of Property Act and the prohibition in that section was based on principles of public policy and the Court cannot allow such transactions to be effected by a consent decree.

(2) 26 M. 31.
(3) 30 M. 255 ; 17 M. L. J. 201 ; 2 M. L. T. 167.

The decree in the present case seems to me invalid. It deals with trees standing on *sir* land, trees which could not be attached and sold in execution of the decree. The condition in the decree that the decretal amount should be recovered by sale of the mortgaged property was, therefore, inoperative. The argument that the decree makes the money a charge on the property does not, in my opinion, affect the case. The parties have inserted in their decree a condition which cannot be carried out and the executing Court was right, in my opinion, in refusing to enforce that portion of the decree. The proprietary rights in the trees can of course be sold but possession of those trees cannot be transferred to the auction-purchaser for they form part of the land of which the ex-proprietor is an occupancy tenant.

I set aside the order of the lower Appellate Court and restore that of the executing Court with the exception as to sale of the proprietary rights in the trees. This appeal succeeds, but, looking to the circumstances of the case, I think it just that parties should bear their own costs.

G. R. D. *Appeal allowed.*
S. D.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION NO. 7 OF 1923.

January 29, 1924.

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

PANDIT PITAMBAR LAL—OPPOSITE PARTY

versus

DODEE SINGH—PETITIONER.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9 13—Ex parte decree, application to set aside, dismissal of, in default—Fresh application, whether maintainable—Application for restoration, whether lies.

Where an application to set aside an *ex parte* decree is dismissed in default, a fresh application for the same purpose is maintainable.

Bipin Behari Saha v. *Abdul Barik*, 85 Ind. Cas. 618 ; 44 C. 95 ; 24 C. L. J. 446 ; 21 C. W. N. 80, **relied on.**

RAUNAQ ALI *v.* NAZIR HUSAIN

Order IX, r. 9 of the Civil Procedure Code has no applicability to an application to set aside an *ex parte* decree which is dismissed in default.

Civil Revision from an order of the Munsif of Fatehpur, dated the 2nd December 1922.

Mr. Damodar Das, for the Applicant.

The opposite party was not represented.

JUDGMENT.—This revision has been referred to a Bench of two Judges by Mr. Justice Mukerji. The reasons for his referring it are contained in the revision order of the 9th of January 1924, and are as follows: —

"The question raised in this revision is whether an application for restoration, which was dismissed for default, that application itself being one for the restoration of a suit which was decided *ex parte*, can lie.

"On this point there seems to be no authority of this Court. The Calcutta High Court, in the case of *Bepin Bihari Saha* v. *Abdul Barik*, (1) and the Patna High Court, in the case of *Ramghulam* v. *Sheo Deonarain Singh* (2) have taken contrary views.

"In view of the importance of the question, I refer it to a larger Bench. The second question involved in this application is much easier to decide. But as the more important question is to be decided by a larger Bench both the questions may be put up before that Bench."

We prefer the Calcutta view on this simple ground. Although the application is called an application to restore the application to set aside the *ex parte* decree, which application had itself been dismissed for default, it really is an application to set aside the *ex parte* decree, and it may be treated as such. To quote the judgment in *Bipin Bihari Shaha* v. *Abdul Barik* (1), "the application may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case." If it is treated as an application to restore a previous application, we agree with the Patna view that O. IX, r. 9 cannot be construed so as to apply to such an application. The practical objection raised to the view which we take, namely, that in this event a litigant may go on for ever and apply to restore in an uninterrupted stream of unsuccessful applications, is met by the fact, as Mr. Damodar Das points out, that such an application must be made within 30 days of the decree on the date when the decree becomes known, and that, if it is not so made, it is barred by Statute. It may be that if that point had been taken, this application would have been so barred. But that is not the point on which it was referred to us. On the second question, it is obvious from the arguments of the plaintiff's Vakil, that the application, of which complaint is now made, was notified to the plaintiff. The defendant has been put on terms. It is a small matter of Rs. 55, and we are satisfied that no injustice has been done by the order which would require the case to be reheard. The application is dismissed.

Z. K. *Application dismissed.*

(1) 35 Ind. Cas. 613; 44 C. 950; 24 C. L. J. 446; 21 C. W. N. 80.

(2) 51 Ind. Cas. 152; 4 P. L. J. 287.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 8 OF 1922.

July 19, 1923.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Cuming, A. J. C.

SH. RAUNAQ ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

S. NAZIR HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Benami *transaction—Fraudulent purpose—Property, whether can be recovered—Adverse possession—Constructive trust.*

A party guilty of entering into a fraudulent contract is entitled to recover the property conveyed to the other party under such a contract provided the fraudulent purpose of the contract has not been executed. [p. 361, col. 2]

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected; then, and

then alone, does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. [p. 362, col. 2.]

Case-law discussed.

Plaintiffs' father conveyed certain property to the defendant in order to defraud his creditors. Subsequently, the property was attached be a creditor of the transferor in execution of a decree obtained by him against the latter, but it was released on the objection of the defendant. Several years later, plaintiffs sued to recover the property from the defendant on the ground that the transfer by their father in favour of the defendant was fictitious:

Held, that the property having been transferred to the defendant to effect a fraudulent purpose, and the contemplated fraud having been carried out plaintiffs could not recover the property from the defendant. Where property is ostensibly transferred by one person in favour of another under an arrangement that the latter shall hold possession of the property for the benefit of the former, the arrangement gives rise to a constructive trust and the transferee is bound to hold the property in trust for the transferor and not for any benefit of his own. [p. 364, col. 1.]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 385; 23 C. W. N. 521; 1 U. P. L. R. 1 (P.C.); 12 Bur. L. T. 122; 46 I. A. 1. (P. C.), relied on.

In such a case no question of adverse possession by the transferee can arise until he does some overt act to the knowledge of the transferor indicating an unequivocal intention to hold the property for his own benefit.

First appeal against the decree of the Subordinate Judge, Bara Banki, dated the 18th October 1921.

Mr. *Wasim*, for the Appellants.

Messrs. *Mahashir Husain*, *A. P. Sen*, and *M. A. Khan*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit in ejectment in respect of the entire village Saraiyan, Pargana Dewa, Tahsil Nawabganj, District Bara Banki, which was dismissed by the Court of the Subordinate Judge, of Bara Banki on the 18th October 1921.

The grounds of the claim are that the village in suit belonged to Mansab Ali, who was heavily indebted; and that with a view to save it from his creditors he executed a fictitious sale-deed on the 27th March 1879 in respect of that village in favour of defendant No. 1, Syed Nazir Husain, who was Mansab Ali's sister's son and a minor on the date of the sale but that "Mansab Ali" himself remained in proprietary possession and enjoyment thereof during his lifetime and he alone used to be benefited by the income arising from the village." (Paragraph 4 of the plaint). Mansab Ali died on the 14th March 1908. The plaintiffs Nos. 1 to 3 are his sons and the plaintiff No. 4 is the purchaser of a 12-annas, share from the aforesaid plaintiffs. For some time after the death of Mansab Ali the defendant No. 1 "continued to pay the profits of the village to plaintiffs Nos. 1 to 3, but thereafter he did not pay a single farthing." The defendants have wrongfully deprived the plaintiffs of their rights: hence the suit. (Paragraphs 6, 7 and 10 of the plaint). Mutation of names was effected in favour of Nazir Husain in pursuance of the deed of the 27th March 1879. In the year 1895 and at the instance of Nazir Husain a 12-annas' share of the village was entered in the names of Altaf Husain, Dildar Husain and Ashfaq Husain, brothers of Nazir Husain, in equal shares in the revenue papers. The remaining four-annas' share was retained in the name of Nazir Husain. Altaf Husain, Dildar Husain have since died. Ashfaq Husain is defendant No. 2 and Afzal Husain is the minor son of Altaf Husain, deceased, and is defendant No. 3 in the suit. Defendant No 4 is a mortgagee in possession of the 4-annas' share of Nazir Husain. Defendant no 5 is a mortgagee of defendant No. 2. The other defendants were merely *pro forma* parties to the suit.

So much of the defence as is relevant to this appeal is that the sale-deed of the 29th March 1879 was not a fictitious transaction; that the suit is barred by limitation; that the defendants Nos. 1 to 3 have been in adverse possession for more than 12 years, and that on the plaintiffs' own case the deed in question was executed by Mansab Ali with the object of defrauding his creditors of their just dues, and, the said object having been attained, the plaintiffs as the heirs of Mansab are not entitled to recover the property in suit. There were other defences to the suit with the result that no less than 14 issues were settled for decision. The learned Subordinate Judge decided the following issues only:—

(1) (a) Was the *sale*-deed dated 27th March 1879 a fictitious transaction as alleged

in para 4 of the plaint and did Mansab Ali remain the real owner ?

(*b*) Was it intended to operate as a deed of gift in favour of Nazir Husain ?

" 2. Have plaintiffs and Mansab Ali been in possession of the village in suit within limitation ?

" 4 Have any, and, if so what, creditors been defrauded by the execution of the deed of 27th March 1879 ? If so, what is its effect ?

" 5. Are the plaintiffs the legitimate sons of Mansab Ali ?

" 14. Are the claims time-barred and are they not maintainable as alleged ?"

The learned Subordinate Judge has decided these issues against the plaintiffs, except issue No. 5, on which his finding is that the plaintiffs are the legitimate sons of Mansab Ali, and issue 1 (*a*) with respect to which his conclusion is that the sale-deed of the 27th March 1879 is a fictitious transaction and " was made in fraud of the creditors, " and also issue 1 (*b*) on which he has held that the deed of the 27th March 1879 was not intended to and could not operate as a deed of gift. As a result of his findings on issues 2, 4 and 14 which he decided against the plaintiffs, he dismissed the suit. His findings on issues 1 (*a*) and (*b*) were not challenged before us in appeal. We must, therefore, accept them as correct.

We have only two points to decide in this appeal. The first is the effect in law of the finding that the sale-deed of the 27th March 1879 was fictitious and was executed by Mansab Ali in fraud of his creditors; the second is the question of limitation which involves the question of adverse possession set up by the defendants. On both these points our conclusions are the same as those arrived at by the learned Subordinate Judge.

As regards the first question, we start with the accepted finding that the sale-deed of the 27th March 1879 was executed fictitiously for the purpose of defrauding the creditors. The allegations made by the plaintiffs in paragraph four of the plaint clearly constitute the sale in question a *turpis causa*. The fraud which Mansab Ali contemplated to effect is a part of the plaintiffs' case. The first step which the plaintiffs must take towards the success of their claim is to prove the alleged fraud and if the rule of law were merely that a party who is *allegans turpitudinem* must fail in a Court of Equity we must hold that the plaintiff's suit could be dismissed on that ground alone, but this is obviously not the law. After a good deal of conflict in its earlier stages both in England and in this country it seems to be now well settled law that a party guilty of entering into a fraudulent contract would be entitled to recover the property conveyed to the other party under such a contract provided the fraudulent purpose of the contract has not been executed. On the one hand, we have the decision of Lindley, L. J., in the case of *Scott* v. *Brown Deering, McNab & Co.*, (1) in which the following proposition was laid down :—

" *Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson* (2). In this case Lopes, L. J., quoted a passage from the case of *Begbie* v. *Phosphate Sewage Co.* (3) and the last part of the quotation is as follows:—"The plaintiff cannot present his case to a Jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid." On the other hand, there is the decision of the Court of Appeal in the case of *Taylor* v. *Bowers* (4) in which it was held that the

(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. 218.

(2) Cowp. 341.

(3) (1875) 10 Q. B. 491; 44 L. J. Q. B. 238; 33 L. T. 470; 24 W. R. 115.

(4) (1876) Q. B. D. 291; 46 L. J. Q. B. 89; 34 L. T. 988 ; 24 W. R. 499.

fraudulent purpose of the transaction not having been carried out, the plaintiff was entitled to recover the goods with which he had parted under that transaction. The case of *Symes* v. *Hughes* (5) was referred to and the following passage from the judgment of Lord Romilly, M. R., was quoted by Cockburn, C. J. :—

" Two objections have been raised on behalf of the defendant. The first is, that the assignment was made for an illegal purpose and it is said that such being the case, the Court will not interfere. I think the correct answer to this was given by Mr. Southgate, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee, who has given no consideration for it. It is clear in the present case that no harm has been done to any creditor, and, in fact, the suit is now being prosecuted for the purpose of enabling the creditors to recover something."

It may be that the inconsistency between the decisions in the case of *Scott* v. *Brown, Doering, McNab & Co.* (1) and in the case of *Taylor* v. *Bowers* (4) is merely apparent and not real. In the former case the fraud may be taken to have been carried into effect by the mere fact that the purchase of shares in a projected company by the defendant with the plaintiff's money which money the plaintiff desired to recover by the suit was published to induce the public to believe that there was a real market for the shares which, as a matter of fact, there was not or the decision may have turned on the fact that the illegal contract was " indictable for a criminal conspiracy at Common Law." It would appear that there is a class of illegal contracts against which relief would be granted in spite of the fact that the illegal purpose has been partially or wholly carried into effect. Contracts against public policy would seem to fall in this category, for instance cases of marriage brokage, see *Hermann* v. *Charlesworth* (6). Be that as it may, the law applicable to the present case is settled by the decision of their Lordships of the Privy Council in the case of *Petherpermal Chetty* v. *Muniandi Servai* (7), in which the cases of *Taylor* v. *Bowers* (4); *Symes* v. *Hughes* (5); and *In re Great Berlin Steamboat Co.* (8) are referred to as authorities for the propostion laid down in that case. Lord Atkinson, in delivering the judgment of the Privy Council, laid down the following proposition :—

" To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver lose the right to claim the aid of the law to recover the property he has parted with."

The question of fact argued in this connection by the learned Counsel for the appellants is that the purpose of the fraud was not carried into effect. The only facts satisfactorily proved are as follows : —On the date of the sale in question Wala Qadr Wazir Mirza held a decree of about Rs. 17,000 against Mansab Ali for sale of certain villages. Presumably, the decree was on the basis of mortgage. Before the sale of the mortgaged property the decree-holder took out attachment of the village in suit on the 12th January 1880 (Ext. B 50). Mt. Zainabunnissa, the mother of Nazir Husain, lodged objection on behalf of Nazir Husain, who was a minor then, to this attachment on the 12th March 1880 (Ext. B 51). The objection was obviously directed against the action of the decree holder, who was, therefore, the primary opposite party ; but Mansab Ali was also made a *pro forma* party to those proceedings. The objection was based on the sale-deed of the 27th March 1879 which is the part of the present suit. It succeeded and the village Saraiyan was released from attachment (Ext. B 52). It is common ground that Saraiyan was never attached again either by Wala Qadr or by any other creditor of Mansab.

(5) (1869) 9 Eq. 475 ; 39 L. J. Ch. 804; 22 L. T. 462.

(6) (1905) 2 K. B. 123 ; 78 L. J. K. B. 620 ; 93 L. T. 284 ; 54 W. R. 22; 21 T. L. R. 368.

(7) 35 I. A. 98 ; 10 Bom. L. R. 590 ; 12 C. W. N. 562 ; 5 A. L. J. 290 ; 7 C. L. J. 529 ; 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.).

(8) (1884) 26 Ch. D. 616; 54 L. J. Ch. 68 ; 57 L. T. 445.

Ali for the purpose of satisfying any debt of Mansab Ali. On these facts the learned Subordinate Judge has come to the conclusion that the purpose of the fraud must be taken to have been carried into effect. There is a clear authority in favour of this conclusion in the case of *Banke Behary Dass* v. *Raj Kumar Dass* (9). We are inclined to think that the decision in the case just now mentioned falls within the principle of the ruling of their Lordships of the Privy Council in the case of *Petherpermal Chetty* v. *Muniandi Servai* (7) cited above and is in accordance with that principle.

The learned Counsel for the appellants, however, argued that if Wala Qadr's decree was satisfied by Mansab Ali by means other than the attachment and sale of the village Saraiyan it must be taken that the purpose of the fraud was not carried out. We realize the force of this contention but we are of opinion that the basis of it is wanting. What are the facts? The mortgaged property was sold under the decree-holder's application of the 20th August 1883 and a sum of Rs. 16,727-9-1 was realized as the sale-proceeds. There still remained a balance of Rs. 750-8-11 principal and Rs. 337 8-0 interest, total Rs. 1,088-0-11 as the judgment-debt against Mansab Ali on the 7th December 1889 (Exts. B54 and B 55). This balance is not proved to have ever been paid to the decree-holder either by Mansab Ali or by his successor-in-interest. Indeed, there is some evidence of a satisfactory character that it was never paid. Wala Qadr had assigned this decree to Raja Kazim Husain Khan. In the year 1897 Mansab Ali applied to be declared an insolvent to the Court of the District Judge of Fyzabad. This application arose by reason of his arrest in execution of a Rent Court decree held by Raja Kazim Husain Khan against him for a trifling sum of Rs. 92 With the application he attached two lists: list No. 1, showing the property and value of it held by him, and list No. 2, showing the debts due from him. He verified the contents of this application as true to his knowledge and belief. The property mentioned in list No. 1 consisted of a few clothes and a few utensils, the total value of both being Rs. 10-6-0. In list No. 2 he gave the names of his creditors with the amount of debt due to each, the total of such debts being Rs. 7,692. In this list is mentioned Raja Kazim Husain Khan as a holder of a decree of the Court of Subordinate Judge of Bara Banki for Rs. 5,500. It may be mentioned here that the decree of Wala Qadr which Raja Kazim Husain Khan had purchased and of which we have been speaking, was of the Court of the Subordinate Judge of Bara Banki. It may be that the figure of 5,500 is a mistake for a smaller amount; but the fact remains that it is not shown that Raja Kazim Husain Khan held any decree of the Court of the Subordinate Judge of Bara Banki as against Mansab Ali other than the one which he had purchased from Wala Qadr. Our conclusion is that on the date of the application (Ex. B1), that is, 29th November 1897, Wala Qadr's decree was not paid up in full. We are, therefore, of opinion that the fraud contemplated by Mansab Ali in executing the sale-deed of the 27th March 1879 was carried into effect not only so far that the attachment of the village Saraiyan was released on the basis of this deed, but also in that it deprived one of his decree-holders from realizing a portion of his decree by the attachment and sale of Saraiyan which was a part of his assets and would have been available to his creditors, if this fraudulent sale-deed had not been executed.

As regards the second point of limitation, an exhaustive argument was addressed to us by the learned Counsel for the parties as to whether Article 142 or Article 144 of the Indian Limitation Act applied to this case. We, however, think that it is not necessary to decide this question, which, on the facts as we find them, becomes merely of an academic interest.

It is perfectly clear that, in pursuance of the deed of sale dated the 27th March 1879, Nazir Husain was put in possession of the village in suit We have already observed that his name was entered in the revenue papers in place of Mansab Ali's. Nazir Husain was then a minor and the property was managed on his behalf by his father, Muhammad Husain. In the petition of objection against the attachment of village Saraiyan in execution of Wala Qadr's decree, which was filed by Mt. Zainabunnisa as guardian of her minor son, Nazir Husain, the fact that the minor

(9) 27 C. 231; 4 C. W. N. 289; 14 Ind. Dec. (N. S.) 158.

was in possession was prominently stated and, what is of greater importance, is the ground of the order releasing the village from attachment. That order is as follows:—"On the evidence on record it must be held that Nazir Husain has possession. Mauza Saraiyan must, therefore, be released. Ordered accordingly." Further, it is but reasonable to presume that Nazir Husain was put in possession of the village in furtherance of the design of the deed of sale. Then there are repeated admissions of Mansab Ali, to which we will make specific reference hereafter, that he was out of possession. We have, therefore, reached the conclusion that Mansab Ali divested himself of the possession of the same. We are further of opinion that Nazir Husain's possession at its inception was not, and cannot be treated to be adverse to Mansab Ali. As between these two persons it must be held that the possession of Nazir Husain was not in his own right as the real purchaser of the village in suit, but under the secret arrangement between them that the ostensible vendee will hold possession thereof for the benefit of Mansab Ali. This arrangement gave rise to a constructive trust and Nazir Husain was under an obligation to hold the property in trust for Mansab Ali and not for any benefit of his own: *Gur Narayan* v. *Sheo Lal Singh* (10). This condition of things naturally flows from the fact now admitted that the object of Mansab Ali in executing the sale-deed in question was to defraud his creditors without intending in reality to part with his proprietary rights in the village: in other words, Nazir Husain held the property *benami* for Mansab Ali. But the subsequent events and their developments leave no room for doubt in our mind that Nazir Husain's possession of the village became hostile to the proprietary rights of Mansab Ali in that property, certainly from the year 1890 at latest and continued to be so when the 12-annas share of the village passed into the possession of the brothers of Nazir Husain under the mutation which was effected in their favour in 1895 at the instance of Nazir Husain. It may be remarked that to this transfer of possesion under the mutation Mansab Ali was no party. In the year 1890 three events happened successively each of which, in our judgment, had the effect of altering the character of Nazir Husain's possession from friendly to hostile, but whether each is or is not enough by itself to give a start to the adverse possession of Nazir Husain against Mansab Ali, we are perfectly clear in our minds that the cumulative effect of the three is such. We have already observed that Muhammad Husain, father of Nazir Husain, was managing the property on behalf of the latter during his minority. In the plaint it is stated that Nazir Husain was about 10 or 11 years old at the date of the sale, that is, March 1879. We may take this as a fairly accurate statement. Nazir Husain was, therefore, of full age in 1890. Now, the first thing which happened in that year is the criminal prosecution of his father Muhammad Husain by Mansab Ali under sections 406 and 415 of the Indian Penal Code (Criminal breach of trust). Muhammad Husain was convicted by the Court of first instance, but acquitted by the Court of appeal. Mansab Ali gave evidence in support of the prosecution (Ex. 6). In answer to questions put in cross-examination he stated: "After this case had come on for one or two hearings in Court our *rasm* came to an end." By 'our' he means that of Nazir Husain and himself. It is pretty clear from the same statement that he wanted Nazir Husain to reconvey the property to him and for that purpose a stamp of the value of Rs. 40 was purchased. Apparently Nazir Husain expressed his intention to abide by the wishes of Mansab Ali, but he disappeared soon after without giving effect to them and this revealed his determination to keep the property to himself.

The second event which happened was that, during the pendency of the criminal proceedings, Mansab Ali applied for mutation of names in his favour. In the deposition mentioned above he stated as follows: "I was desirous of getting back the property through the Court. I gave a petition to this effect to the Tahsildar after the institution of this case. Before this prosecution was instituted I was not desirous of getting back the village not knowing the accused's dishonesty." It is manifest from this that Muhammad Husain and his son, Nazir Husain, had made it

(10) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. 1 (P. C.) 12 Bur. L. T. 122; 46 I. A. 1 (P.C.).

ɔvious to Mansab Ali that they were going keep the property for themselves. We ay mention here that Mansab Ali also ated : " My estate has been managed by the ɔused and others" (Ex. 6). It is agreed that ansab Ali's attempt to recover possession ɣ means of mutation of names in his favour iled.

The third event which happened in or about ıe same year, that is, 1890, was a dispute ɔtween Mansab Ali and Nazir Husain which d to proceedings under section 145 of the ode of Criminal Procedure. The learned ıbordinate Judge is of opinion that this dis-ıte related to the possession of the village . suit. We agree with that opinion. Exhibit) is a copy of a letter written by Muham-ıad Hussain to Mansab Ali. This copy was otained in the year 1890 and the heading ıows that the original was filed in the roceedings under section 145 of the Code of riminal Procedure. The letter relates to illage Saraiyan, which is mentioned therein y name ; and it is reasonable to presume ıat it was filed in those proceedings by Man-ɜb Ali, and was accepted by the Court in ɣidence because it was relevant to those roceedings. It follows that the proceedings ɜlated to village Saraiyan. The learned Sub-ɾdinate Judge refers to some other evidence lso in support of his conclusion. That evi-ence is, in our opinion, of doubtful admissi-ility. We think that the intrinsic evidence ırnished by Exhibit 49, coupled with the ɜasonable probabilities surrounding it, is ufficient upon which we may base our own onclusion in this behalf. To Exhibit 49 may e added Exhibit 50, which is also a letter ddressed by Muhammad Husain to Mansab ıli. The copy now filed was taken in the ear 1890, and the heading shows that the ɾiginal was a part of the record of the ɾoceedings under section 145 of the Code of Criminal Procedure. We have seen that the nutation in favour of the brothers of Nazir Iusain was made in the year 1895. In 1896 Mansab Ali was examined as a witness in a ase between two persons in respect of certain lots of land in village Saraiyan in the Court of he Tahsildar of Nawabganj. His deposition vas recorded on the 25th June 1896. Therein ıe stated as follows :—

" Nazir Husain is in possession under that sale-deed. He does not pay the profits since 5 or 6 years. He used to do so formerly. Litigation, criminal as well as revenue, goes on between me and Nazir Husain. I am not at all on friendly terms with him. Our dealings with one another are not those of relations." The reference to the 5 or 6 years takes us back to the year 1890, which year, in our opinion, as we have shown above, gives us the land-mark of definitely hostile relations between Nazir Hussain and Mansab Ali. In the year 1901 Nazir Husain mortgaged the 4-annas share in the village in suit which had remained with him after the mutation of names of the 12-annas share in favour of his brothers in 1895 (Exhibits D2, D4, D5). In May 1905 the mortgagee entered into possession of that share under a decree of Court (Exhibit D8) and is still in possession of it and is defendant No. 4 in this suit. In 1904 Nazir Husain's equity of redemption in the said 4-annas share was sold in execution of a simple money decree against him and was purchased by his father, Muhammad Husain (Exhibit B 48). In the years 1903 and 1905 the mortgagee obtained decrees for profits in respect of the 4-annas share against Altaf Husain, now deceased, brother of Nazir Husain, who was a lambardar of the village since 1902 if not earlier (Exhibit E9). Altaf Husain paid the Government Revenue in the Government Treasury for the village in suit in his capacity as a lambardar from the year 1902 to the year 1907 (Exs. B15 to B38). On the death of Altaf Husain, his brother, Ashfaq Husain, defendant No. 2, was made the lambardar of the village, and he still continues to be so. On these materials the conclusion at which we have arrived is that the possession of Nazir Husain and through him of his brothers, who came in by virtue of the transfer under the mutation proceedings of 1895, was adverse to Mansab Ali from the year 1890. The suit is, therefore, barred by limitation.

The appellant's learned Counsel relied before us upon a large number of letters (Exs. 9 to 48) purporting to have been written by Nazir Husain to Mansab Ali from time to time. These letters, if true, certainly displace the finding as to adverse possession but, in agreement with the Court below, we are satisfied that their genuineness is not established. The learned Subordinate Judge had dealt with

them carefully and exhaustively and as the reasons for our opinion in this behalf are the same as those of the learned Subordinate Judge it will serve no useful purpose to repeat them in this judgment. We will, however, make a few general observations. These letters purport to show that Nazir Husain used to pay large sums of money to Mansab Ali within each year of his possession right up to the death of Mansab Ali From the *Khataunis Khewats* of several years on the record it can be safely inferred that the net profits of the entire village amounted to something between Rs. 600 and Rs. 700 a year. The letters, when collected together for any particular year, will show that the payments amounted to Rs. 900 to Rs. 1,200 a year. To this may be added the fact that the mortgagee of the 4-annas share was constantly realizing by decrees of Court his share of the profits and the further fact that, since the year 1895, Nazir Husain had ceased to be in possession of the 12-annas share which he had transferred to his brothers ; and his remaining 4-annas share was taken possession of by the mortgagee in the year 1901. We would give here some of the yearly payments alleged to have been made under these letters. For the years 1895 to 1902 those payments are given in the judgment of the learned Subordinate Judge except for the year 1899 in which, according to one of the letters, Exhibit 36, Rs. 1,100 were paid.

1903	Rs. 1,100 (Exs. 26 and 27)
1904	„ 900 (Ex. 25)
1905	„ 1,200 (Exs. 21, 22 and 23)
1906	„ 1,000 (Exs. 19 and 20)
1907	„ 1,300 (Exs. 16, 17 and 18)

These letters, therefore, cannot be genuine. In agreement with the learned Subordinate Judge we reject these letters (Exs. 9 to 49) as not proved. Our finding as to adverse possession consequently stands.

There were two subsidiary matters mentioned at the hearing of the appeal to which we may now conveniently advert. Defendant No. 3 is a minor. It appears from the proceedings of the Court below that one Munshi Sajjad Ali, a pleader, was appointed by that Court as the guardian *ad litem* of the minor. In the memorandam of appeal to this Court, however, the appellants changed the guardian of their own accord and put the minor under the guardianship of Nazir Husain, defendant No. 1. It was, however, agreed on all sides at the hearing of the appeal that this change has done no harm whatsoever to the minor. We have, therefore, treated Nazir Husain as a duly appointed guardian of the said minor. If it is necessary to record a formal order we do it hereby, and Nazir Husain should be treated to have been appointed guardian by us for the purposes of this appeal.

The other matter relates to three documents which are printed in Appendix I of the record. They were printed on an application made by the appellants to this Court. The Court, however, in passing the order for their being printed reserved the question of their being admitted or not admitted in evidence to be decided at the hearing of the appeal. We are of opinion that they should not be admitted. In the first place, they were not mentioned by the learned Counsel for the appellants in his agruments at the opening of the appeal, though they were mentioned in reply. In the second place, one of the grounds on which the application was based was, that they were tendered in evidence before the lower Court. This is not borne out by the record. Thirdly, the pleadings in the case sufficiently indicated the position taken up by the defendants in respect of the matter to which these documents are stated to relate. We refer to paragraph 18 (*b*) of the written statement of the defendant No. 3 which was filed on the 21st July 1920 ; the plaintiffs' evidence was closed on the 23rd February 1921 and the defendants' evidence had not begun till the middle of May of the same year. If the plaintiffs wanted to rely on these papers they should have produced them, at the latest, before the defendants produced their evidence.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

SHRIRAM *v.* RAJARAM

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 456-B OF 1921.

September 5, 1923.

Present:—Mr. Kotval, A. J. C.

SHRIRAM—DEFENDANT—APPELLANT

versus

RAJARAM AND OTHERS—PLAINTIFFS—DEFENDANTS 3 4—RESPONDENTS.

Hindu Law—Berar—Mayukha or Mitakshara—"Mitakshara read with Mayukha" and other similar expressions, meaning of.

In Berar Mayukha predominates where it differs from Mitakshara. [p. 369, col. 2.]

In the rulings of Nagpur Judicial Commissioner's Court where expressions such as "Mitakshara read with Mayukha", or "Mitakshara as interpreted in the Bombay Presidency", or "Mitakshara as interpreted in Western India", are used, what is meant is that, where the Mitakshara and the Mayukha differ, the Mayukha is to predominate. [p. 368, col. 2.]

Appeal from the decree of the Additional District Judge, Amraoti, dated the 30th September 1921, in Civil Appeal No. 73 of 1921.

Mr. *R. R. Jaywant*, for the Appellant.

Dr. *H. S. Gour*, and Mr. *A. V. Khare*, for the Respondent 1 (others *ex parte*)

JUDGMENT.—In execution of a decree against defendant No. 2 Kashi Bai, the daughter of Mst. Bhulai, deceased, and Kashi Bai's husband Bansaji, defendant No. 3, Shriram, defendant No. 1, got a house attached and sold. Defendant No. 4 Singraji purchased it. The plaintiff Rajaram who is Bhulai's son sues for a declaration that the house, which he alleges is his ancestral property, is not liable to be attached and sold in execution of the decree against Kashi Bai. Bhulai was a resident of Berar where also the property in suit is situated.

Shriram pleaded that the house was acquired by Bhulai and that after Bhulai's death Kashi Bai became entitled to it and was in possession as her heir. Kashi Bai admitted the plaintiff's claim. Bansaji did not appear and defend the suit. Singraji pleaded that the house belonged to one Sakharam Selki, that Sakharam mortgaged it to Bhulai, that Bhulai foreclosed it and became its owner, and that on her death Kashi Bai became the owner. The plaintiff replied that the mortgage though written in Bhulai's name was really to his father Janshet who had advanced the money secured by it; that Bhulai foreclosed it after Janshet's death and held the house on plaintiff's behalf till 1907 when she died, and that since that time the plaintiff has been in possession. He urged that even if the house belonged to Bhulai he was her legal heir and entitled to it.

It has been found by the lower Courts that the house in dispute was the *stridhan* property of Bhulai and not the property of Janshet. The question is who became entitled to it after Bhulai's death, the plaintiff Rajaram or defendant Kashi Bai or both? The trial Court held that Kashi Bai inherited the property after Bhulai's death. The lower Appellate Court has held that both Rajaram and Kashi Bai inherited the property in equal shares. Shriram appeals and contends that Kashi Bai inherited to the exclusion of Rajaram.

The lower Appellate Court has found that the house in dispute was Bhulai's *Anvadheyaka Stridhan* since the money advanced by her on the mortgage was given to her by her father after her marriage. It is admitted that if the *Stridhan* in question is *Anvadheaka* and the Mitakshara applies the daughter succeeds in preference to the son, but that if the Mayukha applies the son and daughter succeed in equal shares. It is, however, contended on the appellant's behalf that there is nothing to support the finding that the money advanced by Bhulai was given to her by her father. The evidence of Sakharam (P. W. 5) affords sufficient basis for the finding that the money was given to Bhulai by her father at the time of the mortgage when she was already married. The finding that the *Stridhan* was *Anvadheyaka* must, therefore, stand.

The question then is whether the Mitakshara or the Mayukha applies in this case. The lower Appellate Court holds that the "Bombay School" is followed in Berar and has applied the Mayukha. It is said that the Mayukha applies only in certain parts of the Bombay Presidency, namely, Gujrat, North Konkan and the Island of Bombay; *Vyas Chimanlal Harjiwan* v. *Vyas Ramchandra Asharam* (1), and outside these places the Mitakshara applies. Therefore, it is argued the Mayukha

(1) 24 B. 367; 2 Bom. L. R. 163; 12 Ind. Dec. (N. S.) 778.

cannot be applied indiscriminately in Berar since it is not applicable indiscriminately in Bombay. But whatever may be said about the application of the Mayukha as regards the Bombay Presidency, so far as Berar is concerned we find it accepted in a number of rulings that the Mayukha applies in Berar in preference to the Mitakshara when the two differ. In *Girjabai* v. *Vyankatesh* (2) it was held that the law compounded of Mitakshara, Mayukha and custom which obtains in the Bombay Presidency is applicable to Marathas in Berar. In *Ram Prasad* v. *Subu Bai* (3) Stanyon, A. J. C., referred to the above ruling and observed: " In my own experience of judicial work in Berar I never found it disputed, but on the contrary invariably taken for granted, that the Mitakshara, read with Mayukha, was the predominating authority on Hindu Law in Berar cases." This case was followed in *Dawlatrao* v. *Govindrao* (4). In *Musammat Chandrabhaga* v. *Vishwanath* (5) which was a case from Berar, it was held that the parties were presumably governed by the Bombay School of Hindu Law, namely, the Mitakshara as interpreted by the Mayukha, that being the *lex loci* in Berar. In *Bhadia* v. *Musammat Bhagi* (6) and *Madho* v. *Janki* (7) the view in *Ram Prasad* v. *Subu Bai* (3) appears to have been accepted.

It seems to me that in the local rulings where expressions such as "Mitakshara read with Mayukha" or "Mitakshara as interpreted by the Mayukha" or "Mitakshara as interpreted in the Bombay Presidency" or "Mitakshara as interpreted in Western India" are used, what is meant is that where the Mitakshara and the Mayukha differ the Mayukha is to predominate.

I, therefore, hold that the rights of the parties must be determined with reference to the Mayukha. According to that law both Rajaram and Kashi Bai inherited the house in dispute. The appeal, therefore, fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

S. D.

(2) 2 Berar, L. J. 135.
(3) 4 N. L. R. 31.
(4) 1 Ind Cas. 243; 5 N. L. R. 18.
(5) 20 Ind. Cas. 557; 9 N. L R 102.
(6) 23 Ind. Cas. 229; 10 N. L. R. 24.
(7) 36 Ind. Cas. 514; 12 N. L. R. 148.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1790 OF 1919.

March 26, 1923.

Present :—Mr. Justice Martineau, and Mr. Justice Zafar Ali.

SHAHADAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANESH DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Shamilat, *whether accessory to* khewat *land—Mortgage of khewat land*—Shamilat *acquired subsequent to date of mortgage—Extinguishment of right of redemption*—Shamilat, *whether transferred to mortgagee.*

The rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, and a transfer of the latter does not *ipso facto* convey any rights in the former to the purchaser. [p 370, col. 1.]

A clause in a *wajib-ul-arz* providing that shares in the *shamilat* are proportionate to the *khewat* lands held by each proprietor cannot confer any rights in the common land on a purchaser of *khewat* land to whom such rights have not been conveyed by the deed of sale Such a clause in a *wajib-ul arz* merely fixes the measure of the right of the proprietors in the *shamilat* with reference to their separate or *khewat* lands, for purposes of partition and cannot be construed to work forfeiture of valuable rights in the land by automatically transferring them to a purchaser of *khewat* lands. [p. 370, col. 1.]

Ram Das v. *Amir Shah*, 118 P. R. 1901 ; 34 P. L. R. 1902 ; *Malak Singh* v. *Muhammad*, 65 P. R. 1889; *Baja Mal* v. *Hukma*, 42 P. R. 1897, followed.

Parem Chand v. *Sardara*, 10 P. R. 1894, dissented from.

Mirza v. *Kahan Singh*, 52 Ind. Cas. 539 ; 96 P. R. 1919, distinguished.

Plaintiffs executed a mortgage of certain *khewat* lands in favour of defendants prior to 1856. In the latter year a large area of Government waste land was entered in the Revenue Records as *shamilat* of the village. In 1881 plaintiffs sued to redeem their mortgage, but their suit was dismissed as time barred. In 1905, the *shamilat* was partitioned and plaintiffs' share was entered in the name of the defendants who had become owners of the *khewat* land which had been mortgaged to them. Plaintiff's brought the present suit for possession of the *shamilat* land-

***Held*, (1) that it must be assumed that Government made a present of the waste in 1856 to the proprietary body of the village and that the plaintiffs, who were at that time members of that body, became rightful owners of a share in it in proportion to their *khewat* holding ;**

(2) that the mere fact that they had subsequently lost their *khewat* land did not operate to

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transfer their rights in the *shamilat* to the defendants.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 20th May 1919.

Mr. *B. D. Kureshi*, for the Appellants.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.

Zafar Ali, J.—The plaintiffs (respondents) are successors-in-interest of persons who in the first Settlement Record of 1856 were entered as mortgagees of certain shares in two wells and lands attached thereto. The owners of one of the two wells sued for redemption in 1881, but their suit failed on the ground that it was instituted more than 60 years after the mortgage. In consequence of this decision the mortgagees (plaintiffs) were entered as owners in the Revenue Records. In 1905 the *shamilat* of the plaintiffs' *patti* was partitioned and the land now in dispute fell to the plaintiffs' share by virtue of their being *khewatdars* or proprietors in the *patti* and was duly mutated in their names. But in 1908 followed another mutation order by which the names of the defendants, who are the representatives of the old mortgagors, were substituted for those of the plaintiffs. The latter instituted the present suit in 1917 for possession of that land. Their case was that, as stated in paragraph 86 of Steedman's Settlement Report of the Jhang District, there were, before the advent of British rule, no villages in that District with fixed boundaries; that it was after annexation that village boundaries were demarcated and the waste area, which fell within the boundaries of each village, was allotted to that village and described in the revenue papers as *shamilat*, though it originally belonged to Government; that at the time of the first Regular Settlement of 1856 they were owners and not the mortgagees as the mortgagors' right to redeem had become extinct long before the year 1856, and that they as owners of *khewat* lands became entitled to a share in the *shamilat* thus formed by act of Government for the benefit of persons who were then proprietors of *khewat* lands, and who, according to the *wajib-ul-arz*, were co-sharers in the *shamilat* in proportion to their *khewat* lands. The Courts below accepted this theory and the plaintiffs' suit was decreed.

In deciding that the mortgagors' right to redeem had been extinguished before 1856 the Courts below acted upon the assumption that the rule of limitation barring the right of redemption on the expiration of 60 years from mortgage was in force from the date of the mortgage in question. But the learned Counsel for the defendants-appellants points out that no law of limitation was in force in the Punjab in 1856 or before that, and that the first Limitation Act was enacted in 1859. Therefore, he argues that, in the absence of any law of limitation, it could not be said that the mortgagors ceased to be the proprietors of the land mortgaged or that their right to redeem was lost by lapse of time. Presumably, the revenue authorities described the parties in the records of 1856 as mortgagors and mortgagees because this relationship between them was admitted by all concerned. The learned Counsel for the plaintiffs has nothing to urge to the contrary on this point and, therefore, it is not possible to hold that the mortgagees had become owners in or before 1856. On this view of the matter, the plaintiffs' claim as originally set out in their plaint must fail because they laid claim to the *shamilat* on the ground that they were proprietors in the village when it was formed. The learned Counsel for the plaintiffs-respondents advances, however, the argument that in early times *shamilat* was not of much value and was considered accessory to the *khewat* lands and that, consequently, when *shamilat* accrued in this case it went with the mortgage. But it is obvious that it could not go with the mortgage because it was not even in existence when the mortgage was effected.

Next, it is argued, upon the basis of the entries in the *wajib-ul-arz* declaring shares in the *shamilat* to be in proportion to the *khewat* holdings, that as the plaintiffs are now the owners of the *khewat* land which once belonged to the defendants the *shamilat* should go to them and not to the latter. But even if it be conceded that Government waste land was converted into *shamilat* in 1856 in the way stated above, it would follow that Government made a present of this waste area to the proprietary body of

the village and that the mortgagors, who were at that time members of that body, became rightful owners of a share in it in proportion to their *khewat* holding. Therefore, the question is, whether they lost that share subsequently when their right to redeem the *khewat* land was extinguished. On this point the learned Counsel for the plaintiffs-respondents cites *Parem Chand* v. *Sardara*, (1) which is the solitary authority for the proposition that " the *khewat* carries with it as appurtenant to it a proportionate share of the common land." But in spite of this ruling, which was referred to in *Ram Das* v. *Amir Shah* (2), it was decided in that case by a reference to other authorities that the rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, that a sale of the latter does not *ipso facto* convey any rights in the former to the purchaser, and that a clause in the *wajib-ul-arz* providing that shares in the *shamilat* are proportional to the *khewat* lands held by each proprietor cannot confer any rights in the common land on the purchaser not conveyed by his deed of sale. The following pasages may be quoted from this judgment :—

" It has been repeatedly held by this Court, *Maluk Singh* v. *Muhammad* (3) and *Baja Shah* v. *Hukma* (4), that the rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, and that where a person comes into Court alleging purchase of the former, the *onus* of establishing it is on him, which is not discharged by proof that lands of separate *khatas* have been sold to him."

" *Shamilat* lands are lands held in joint ownership with other proprietors of the *patti* or village, as the case may be, and there can be, in the nature of things, no necessary presumption that they are transferred because the separate land of the proprietor is transferred. Frequently, they are more valuable than the individual holdings of the village owners. The clause in the *wajib-ul-arz* relied on by the plaintiffs merely fixes the measure of the right of the proprietors in the *shamilat* with reference to their separate or *khewat* lands, presumably in accordance with custom and mutual agreement among them. The rule so laid down is to be acted on at the time of partition, but it does not follow that because the *khewat* land has been sold, the *shamilat* land must be given to the purchaser without his paying for it, or its being transferred to him, or must lapse to the rest of the proprietary body. A clause in the *wajib-ul-arz* meant to define the rights of the village owners in the *shamilat* for the purpose of partition cannot be construed to work forfeiture of valuable interests in property in this manner."

Mirza v. *Kahan Singh* (5), cited on behalf of the rerpondents, is not applicable to this case. The ancestors of the plaintiffs in that case had given up the whole of their holding and quitted the village for good and, therefore, it was held that they had abandoned all the rights they had in the village including rights in the *shamilat*. In the present case there is nothing to show that the defendants have quitted the village or that they own no other land therein. On the other hand, it appears from the partition papers of 1905, copy of which is on the record, that they were still owners of other *khewat* and *shamilat* lands in the village at the time of that partition. Therefore, the allegation that they had ceased to be proprietors in the village is not well founded. *Duni Chand* v. *Muhammad Bakhsh* (6) and *Jalal* v. *Beli Ram* (7), relied on by the Courts below and again referred to in this Court, are also not in point. In *Duni Chand* v. *Muhammad Bakhsh* (6) also the dispute was in respect of the *shamilat* of a village in the Jhang District and paragraphs 85 and 86 of Mr. Steedman's Settlement Report of 1880 for the Jhang District were referred to therein. As the defendants in that case had purchased *khewat* holdings in 1836 and 1851, and as it was found that they (defendants-purchasers) had been receiving a share of the profits derived from the *shamilat* and had broken and brought under cultivation certain areas of it, they were declared to have acquired a share in the *shamilat*. In the present case it is not even alleged that the plaintiffs-respondents ever enjoyed the *shamilat* in any way.

(1) 10 P. R. 1894.
(2) 113 P. R. 1901 ; 34 P. L. R. 1902.
(3) 65 P. R. 1889.
(4) 42 P. R. 1897.
(5) 52 Ind. Cas. 539 ; 96 P. R. 1919.
(6) 8 P. L. R. 1907 ; 36 P. W. R 1907.

GANESH DAS *v.* RAJA SURAJ PAL SINGH

The facts of *Jalal* v. *Behram* (7) were briefly as below :—One Ghasita was the original owner of 25 *ghamaos* of *khewat* land, but Singha had been in possession thereof for 25 years when Ghasita sued in 1863 to recover possession. His suit was dismissed as barred by time. At the subsequent Regular Settlement of 1865 Ghasita's name was removed and the other proprietors and Singha were entered as ordinary *maliks* and the *shamilat* was described as owned by the *malikan*. This entry was repeated at the Settlement of 1891-92 and continued up to the time of the suit. Under these circumstances, it was held that Ghasita or his representatives had lost their rights in the *shamilat*. Therefore, this case is quite distinguishable from the present.

Another point taken up by the Counsel for the plaintiffs-respondents was that in the redemption suit of 1910 the mortgagors' claim for possession of *khewat* as well as *shamilat* land was dismissed. But it is obvious that in that case the mortgagees were in possession of both *khewat* and *shamilat* lands and, further, the questions now raised were not considered in that case.

I would, therefore, accept the appeal and, reversing the judgments and decrees of the Courts below, dismiss the plaintiffs' suit with costs throughout.

Martineau, J.—I concur.

Z. K. *Appeal allowed.*

(7) 9 P. L. R. 1907 ; 87 P. W. R. 1907.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 148 OF 1923.

January 30, 1924.

Present :—Mr. Justice Lindsay.

GANESH DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAJA SURAJ PAL SINGH—PLAINTIFF—AND CHHIDDA—DEFENDANT—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887) Sch II, Art. 35 (i)—Suit to recover value of trees cut and removed by defendant, whether cognisable by Small Cause Court

A suit by a landlord to recover the value of trees belonging to him cut and removed by the defendant who had purchased them in execution of a decree obtained against the tenant of the plaintiff falls under Article 35 (i) of Schedule II to the Provincial Small Cause Courts Act and is, therefore, excluded from the cognisance of a Small Cause Court.

Civil Revision from an order of the Judge of the Court of Small Causes at Kasganj, dated 24th July 1923.

Mr. *Panna Lal*, for the Applicants.

Mr. *Asthana*, for the Opposite Parties.

JUDGMENT.—This application must succeed. The suit was tried in the Court of Small Causes and the defendants, who are the applicants here, put forward the plea that the suit was not cognizable in the Small Cause Court. The lower Court decided this issue against the defendants and gave a decree to the plaintiff.

It is necessary to state the facts which are relevant to the matter now under discussion. It appears that Ganesh Das, the first defendant, held a simple money decree against one Chhidda who was impleaded as defendant No. 3.

In execution of his decree he attached and brought to sale certain trees which were standing on the occupancy holding of his judgment-debtor.

After the trees had been sold, but apparently before they were cut down, the present plaintiff, Raja Suraj Pal Singh, the *zemindar*, brought a suit for a declaration that these trees were not liable to be taken in execution as being the property of the judgment-debtor, Chhidda, but that they belonged to him. The Raja lost his suit in the first Court but he won in the Court of the District Judge in appeal on the 3rd of August 1922. After that he applied to the Court under section 144, Civil Procedure Code, and asked that the value of the trees might be paid over to him by the decree-holder and the auction-purchaser. This application was disallowed with the result that this suit was brought on the 5th July 1923.

The above facts are all set out in the plaint. The relief claimed was Rs. 150 by way of damages arising out of the unlawful attachment and sale, in execution, of the plaintiff's property.

The Judge of the Court below disposed of the objection to jurisdiction on the ground that the claim was not a claim for compensation for wrongful attachment. In the opinion of the learned Judge it was only a case of

"damages for the trees belonging to the plaintiff and cut by the defendants." Even so, it seems to me that if the claim was of the nature described by the learned Judge, it was still a claim which was outside the cognizance of the Court of Small Causes [cf. Article 35, clause (ii).]

I agree with the argument put forward on behalf of the applicants here that this suit is really a suit of the nature described in Article 35 (j) of the Schedule to the Small Cause Court Act, and, that being so, it was not competent for the Court below to deal with it.

I, therefore, allow this application, set aside the decree of the Court below and direct that the record be sent back to the Judge of the Court below with directions to return the plaint to the plaintiff for presentation to the proper Court. The applicants are entitled to their costs both here and in the Court below.

Z. K. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 95 OF 1922.

July 17, 1923.

Present.—Mr. Baker, O. J. C.

NANHELAL—DECREE-HOLDER—APPELLANT

versus

MANGILAL—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXI, r. 16—Benamidar—Right to execute decree.

A *benami* assignee of a decree for one of the judgment-debtors cannot apply to execute against the other judgment-debtor under the provisions of O. XXI, r. 16 of the Civil Procedure Code.

Panachand v. *Sundrabai*, 31 B. 308; 9 Bom. L. R. 409, dissented from.

Sadagopa Aiyengar v. *Sellammal*, 72 Ind. Cas. 86; 43 M. L. J. 761; 31 M. L. T. 463; (1922) A I. R. (M.) 510 followed.

Appeal from the order of the Subordinate Judge, Hoshangabad, dated the 22nd June 1922, in execution case arising out of civil suit No. 7 of 1917 dated 28th June 17.

Mr. *M. Gupta*, for the Appellant.

Messrs. *V. Bose*, and *J. Sen*, for the Respondent.

JUDGMENT.—The facts of this case are that Jagannath, Chhotelal and others obtained a decree against Mahadeo and Mangilal (respondent). Mahadeo died and his heirs are Babhutilal and Sheoprasad. Plaintiff Nanhelal is the assignee of the decree and wishes to execute it against Mangilal alone.

Mangilal contends that Nanhelal is a *benamidar* for the co-judgment-debtor Babhutilal and that he cannot execute the decree under O. XXI, r. 16. He also contended that he is liable for only half the debt and that he has made an arrangement with Babhutilal and Sheoprasad, to which Nanhelal was a party, for the satisfaction of the decree. The First Subordinate Judge, Hoshangabad, dismissed the application, holding that Nanhelal was not the real assignee and had no right to execute the decree.

The only point that has been taken in appeal is whether O. XXI, r. 16, Civil Procedure Code, is a bar to execution of a decree by a *benamidar* for one of the judgment-debtors and whether the applicant Nanhelal is such a *benamidar*.

It is contended on behalf of the appellant that the decree in question was against Mahadeo. His legal representatives Babhutilal and Sheoprasad do not, therefore, fall under the definition in O. XXI, r. 16, Civil Procedure Code. It was held in *Panachand* v. *Sundrabai* (1), that a decree for money against several persons means a personal decree for the payment of money by two or more defendants jointly. That ruling has been dissented from in *Sadagopa Aiyengar* v. *Sellammal* (2), where it was held that the expression "decree for money against several persons" is not restricted to a personal decree for money against two or more defendants." Therein the Court held that the observation of Chandavarkar, J., in *Panachand* v. *Sundrabai* (1) that a 'decree for money against several persons' means a personal decree for the payment of money by two or more defendants jointly, puts an unduly narrow interpretation on this section. The spirit of the rule is, that a judgment-debtor should not, by acquiring the interest of a decree-holder, be allowed to put himself into a

(1) 31 B. 308; 9 Bom. L. R. 409.

(2) 72 Ind. Cas. 861; 43 M. L. J 761; 31 M. L. T. 468; (1922) A. I. R. (M.) 510.

position in which he can force the other judgment-debtors to pay the whole of the decree amount, when his proper remedy is a suit for contribution, and for this purpose it does not seem to signify whether the assignee decree-holder is one against whom a personal money decree has been passed or one who has been directed to pay the decree amount out of the proceeds of the property in his hands.

The Bombay case inserts the word 'personally' which does not occur in O. XXI, r. 16. Further, under section 52 of the Civil Procedure Code the judgment-debtor would, in certain circumstances, be personally liable even in a case like the present. The same man cannot be both plaintiff and defendant ; cf. *Rustomji* v. *Purshonndas* (3), I am of opinion, following *Sadagopa Ayyangar* v. *Sellamal* (2), that the provisions of O. XXI, r. 16 will apply to a case like the present. It has also been held that a *benamidar* cannot apply to execute a decree. Cf. *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (4), *Balkishen Das* v. *Bedmati Koer* (5), and *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi* (6).

As regards Nanhelal's being a *benamidar* for Babhutilal it is admitted that they are relations and Nanhelal and his witnesses admit that he purchased the decree with the object of recovering the whole amount from Mangilal. Nanhelal's brother Ganesh Ram is in the service of Babhutilal. The learned Additional District Judge has elaborately discussed Nanhelal's financial position in his lengthy judgment. In estimating the evidence we start with the basis that, on his own showing, Nanhelal purchased this decree not for the purpose of making any profit out of it, but for the purpose of preventing it being executed against his relative Babhutilal. In one place he says pressure was put on him to do so by his relatives who threatened that they would not return certain ornaments to him unless he did so. The lower Court has not believed this particular statement, but when it is admitted that the assignment was for the benefit of Babhutilal to prevent the decree being executed against him, there is a presumption that the purchase was *benami* for Babhutilal. It is not likely that Nanhelal would pay a large sum of money and involve himself in litigation for the purpose of benefiting Babhutilal, unless he was acting merely as a *benamidar* for Babhutilal. If the evidence is read in the light of these admissions, it will appear that the view of the lower Court that Nanhelal is not the real assignee of the decree is correct, and that this assignment was made in the interests and for the benefit of one of the judgment-debtors Babhutilal, and Nanhelal merely lent his name to the transaction which is against the provisions of O XXI, r. 16, Civil Procedure Code.

The decree of the lower Court must be confirmed and the appeal dismissed with costs.

G. R. D. *Appeal dismissed.*

(3) 25 B. 606 ; 3 Bom. L. R. 227
(4) 16 C. 365 ; 15 Ind. Jur. 381 ; 8 Ind. Dec. (N.S.) 284.
(5) 20 C. 888 ; 10 Ind. Dec. (N.S.) 268.
(6) 32 Ind. Cas. 952 ; 40 M. 296 ; 3 L. W. 186 ; 19 M. L. T. 124 ; (1916) 1 M. W. N. 188.

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO. 1164 OF 1922.

January 24, 1924.

Present :—Mr. Justice Mukerji.

SOBHA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM PRASAD—PLAINTIFF—RESPONDENT.

Takavi *advance—Attachment and sale of debt due to tenant—Suit to recover debt—Plea of payment, whether can be taken.*

Certain tenants borrowed money from the Government as *takavi*. This was sought to be realised by attachment of the rent said to have been payable to the borrowers by their sub-tenants. The latter protested that they had paid up the rent and nothing was due from them, but their application was dismissed in default. The alleged debt was then put to auction and was purchased by the plaintiff who brought a suit to recover the amount from the sub-tenants. It was found that the latter had paid up the rent previous to the attachment ;

Held, that the suit was liable to be dismissed as there was no guarantee that the debt purchased by the plaintiff was actually due and the dismissal of the defendants' protest did not in any way operate to bar their plea of payment in answer to the suit.

Second appeal against the decree of the Officiating District Judge of Budaun, dated the 28th April 1922.

DULA SINGH *v.* BELA SINGH

Mr. *H. Mushtaq Ahmad*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This is a simple matter. But it clearly appears that the lower Court has gone astray. Certain tenants borrowed money from the Government as *takavi*. This was sought to be realised by attachment of the rent said to have been payable to the borrowers by their sub-tenants, the present appellants. The appellants protested that they had paid up and nothing was due by them. Their application containing this protest was dismissed for default. Then the debt, namely, the rent supposed to be payable, was put to auction-sale and was purchased by the respondent Ram Prasad. Ram Prasad then brought this suit, out of which this appeal has arisen, in the Revenue Court for recovery of a sum of a Rs. 200, rent and interest. The appellants who are the principal defendants in the case (the sub-tenants) contended *inter alia* that they had really paid up and the auction-purchaser purchased nothing.

The Court of first instance disbelieved this story and decreed the suit. There was an appeal lodged before the learned District Judge. He sustained the plea of payment ; but he thought, it is difficult to see really what he thought, the judgment is entirely unintelligible. I called upon the learned Counsel for the respondent Ram Prasad to sustain the decree of the lower Court on any ground he thought fit to do so. The decree is really unsupportable. It appears to me that what was sold was a debt supposed to be due. There was no guarantee at the time of the sale either by the Government or by anybody else that the debt was really owing. The fact that the alleged debtor's protestation was not heard owing to their own default makes no difference. Even if the Court had held that their plea of payment had not been established it could not be said that that finding would operate as *res judicata*. It is not the case of an objection to the attachment of a property by a third party under O. XXI, r. 58 of the Code of Civil Procedure. In such a case, unless the unsuccessful objector brings a suit to obtain a declaration of his title within a period of one year, the decision of the Court executing the decree is taken to be conclusive. An authority for this proposition will be found in the case of *Maharaja of Benares* v. *Patraj Kunwar* (1). Further, the Court which was selling the debt was not a Court constituted under the Civil Procedure Code and was not authorised to exercise the powers laid down in O. XXI of the Civil Procedure Code. The law on the point lays down that the loans advanced are to be realised as if they were arrears of revenue, *vide* Act XII of 1884, section 5.

The appeal succeeds and the suit of the plaintiff-respondent fails. The suit is dismissed with costs throughout which will include fees in this Court on the higher scale

Z. K. *Appeal allowed.*

(1) A. W. N. (1905) 277 ; 28 A. 262.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2120 of 1922.

March 27, 1923.

Present :—Mr. Justice Campbell.

DULA SINGH—PLAINTIFF -APPELLANT

versus

BELA SINGH—DEFENDANT—RESPONDENT.

Transfer of Property (Act IV of 1882) s. 55 (2)—Sale—Covenant for title whether implied in Punjab.

The Transfer of Property Act is not in force in the Punjab Its provisions are no doubt useful guides in deciding points of equity and are frequently so applied by the Courts of this Province, but there is no obligation upon the Courts so to use the Act as if every particular detail of it was the law of the Province.

The question whether the broad principle contained in section 55 (2) of the Transfer of Property Act is to be applied to a particular case in the Punjab depends upon the facts of that case.

Plaintiff purchased a house from the defendant which the latter had purchased at an insolvency sale, of which the plaintiff was aware. A third person subsequently established his right to one-half of the house and plaintiff was deprived of that portion. Thereupon he brought the present suit to recover the purchase-money which he had paid to the defendant,

Held, that as the plaintiff was aware that the defendant had purchased the house at an insolvency sale he must have known that the latter was conveying to him the interest which he had acquired in the auction and that the plaintiff was to stand at his shoes ;

DULA SINGH *v.* BELA SINGH

that, therefore, equity did not demand that the Court should presume a covenant for title in favour of the plaintiff.

Second appeal from the decree of the District Judge of Amritsar, dated the 1st May 1922.

Lala *Kahan Chand*, for the Appellant.

Lala *Mehr Chand*, for the Respondent.

JUDGMENT.—In this case a house, stated to be the property of one Jowala Singh, insolvent, was sold by auction by the Official Receiver for Rs. 255, to Bela Singh on the 27th August 1917. Bela Singh obtained a sale-certificate from the Court on the 25th January 1918 and on the 7th October 1919 sold the house for Rs. 650 to Dula Singh. No sale-deed was drawn up but Bela Singh handed over to Dula Singh the sale-certificate and a receipt for the money.

Subsequently, one Khushala secured a decree that the whole of the house did not belong to Jowala Singh and that half of it belonged to him (Khushala). Dula Singh, accordingly, was deprived of half the house and he then brought the present suit against Bela Singh for the return of his purchase-money, Rs. 650, alleging that there had been an oral agreement between Bela Singh and himself that the whole of the purchase-money would be returned if the whole or any part of the house were to be lost by him.

Both the Courts below concurred in holding that Dula Singh had failed to prove any such oral agreement. In the memorandum of appeal to the lower Appellate Court the vague claim was made that, apart from the oral agreement, the plaintiff was entitled to a decree on other grounds also. The learned District Judge disposed of this by saying that there appeared to be no other ground on which in the present suit the plaintiff-appellant was entitled to recover anything. The dismissal of the suit by the trial Court was upheld.

Dula Singh has now come to this Court on second appeal and claims, on the strength of section 55 (2) of the Transfer of Property Act, that, in the absence of any stipulation to the contrary, Bela Singh must be presumed to have guaranteed to Dula Singh a good title. Reference is made to *Basaraddi Sheikh* v. *Enajaddi Maleah* (1) where it was held that, in the absence of any contract to the contrary, there is, under section 55 (2) of the Transfer of Property Act, an implied covenant for title on the part of the vendor.

The Transfer of Property Act, however, is not in force in this Province. Its provisions no doubt are useful guides in deciding points of equity and are frequently so applied by the Punjab Courts, but there is no obligation on the Courts to so use the Act as if every particular detail of it was the law of the Province. The question whether the broad principle contained in section 55 (2) is to be applied to a particular case depends upon the facts of that case. In the present instance, there is no doubt that Dula Singh knew exactly what he was buying, *i.e.*, property purchased by Bela Singh at a forced sale. The sale is mentioned in the receipt for the price given by the vendor and the sale-certificate was handed over to Dula Singh. It was plain, therefore, to Dula Singh that Bela Singh was conveying merely what he had acquired at the auction and that he (Dula Singh) was to stand in the shoes of Bela Singh as a purchaser in an involuntary sale. In the circumstances, it does not appear to me that equity demands that the Court shall presume Bela Singh to have covenanted for title, particularly as the suit was brought upon an alleged special agreement which was not proved and since the benefit of the principle contained in section 55 (2) of the Transfer of Property Act appears to have been claimed specifically in second appeal for the first time I am not prepared to interfere and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 25 C. 293 ; 2 C. W. N. 222 ; 13 Ind. Dec. (N. S.) 200.

SONBA *v.* BABYA

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 324-B OF 1922.

November 22, 1923.

Present :—Mr. Kinkhede, A. J. C.

SONBA—DEFENDANT NO. 2 —APPELLANT

versus

BABYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Partition suit—Parties—Stranger alienee in possession of part of joint family property whether necessary party.

O. II, r. 2 of the Civil Procedure Code does not require that every suit should include every claim or every cause of action which the plaintiff may have against the defendant. [p. 377, col. 2.]

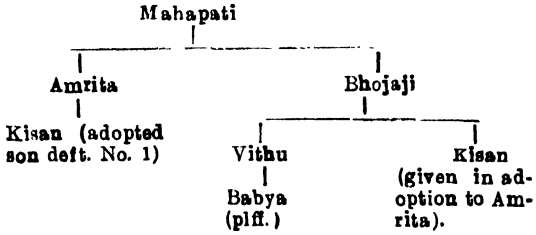
In a suit for partition of joint family property the plaintiff is not bound to join as party a stranger alienee in possession of a part of the joint property and, therefore, a subsequent suit for recovery of possession of the property from the alienee is not barred by O II, r. 2 of the Civil Procedure Code. [p. 377, col. 2.]

Appeal against the decree of the District Judge, East Berar, Amraoti, in Civil Appeal No. 250 of 1921, decided on the 8th April 1922.

Mr. *M R. Dixit*, for the Appellant.

Mr. *V. R. Pandit, R. B.*, for the Respondent.

JUDGMENT.—This is an appeal by defendant No. 2 Sonba, a transferree from defendant No. 1 Kisan. The plaintiff Babya gives the following genealogical tree in the plaint from which his relationship with defendant No. 1 will be clear :—



Kisan was given in adoption to Amrita. Amrita and Bhojaji formed a joint family owning amongst other property fields Survey Nos. 30 and 42 Mouza Udapur, Taluq Darwha. Vithu, the father of plaintiff, died in a state of jointness. Plaintiff and defendant No. 1 could not pull on together since 1915 and, therefore, plaintiff demanded from defendant No. 1 his half share in the estate in 1917. But the defendant No. 1 gave plaintiff the eastern half share out of the southern half portion of Survey No. 42 held by him and it is in plaintiff's separate possession along with his share of the house by virtue of a registered partition-deed, dated 1st December 1919. But as Survey No. 30 and northern half portion of Survey No. 42 were already sold by defendant No. 1 and were in the possession of the stranger purchasers, no partition was or could be then effected in respect of them. One Ganuwarthi had purchased the whole of Survey No. 30 in which the plaintiff had half share. He settled the dispute with the plaintiff relating to the latter's half share in that field by paying him Rs. 250 and taking a sale-deed from him in respect of that share on 29th May 1920. The plaintiff demanded a half share of the northern portion of Survey No. 42 which was sold by defendant No. 1 to defendant No. 2 Sonba by a registered sale-deed, dated 15th Febuary 1915 from the alienee Sonba, but the latter declined to give him his share and, therefore, the present suit has been instituted for recovery of a separated half share out of the said northern portion of the field. This suit was filed on 23rd October 1920. The defendant No. 1 was practically a *pro forma* defendant, and supported the plaintiff's claim. The contesting defendant is defendant No. 2. He raised several pleas but we are not concerned with all of them. The plea with which this second appeal is concerned is the plea of the bar O. II, r. 2, Civil Procedure Code, by reason of the present claim not having been included in the previous suit, No. 102 of 1920, which the plaintiff had filed against the present defendant No. 1 in the Court of the Munsif, Yeotmal, for partition and possession of his share in the houses and moveables held by defendant No. 1. But in that suit, No. 102 of 1920, the present defendant No 2 was not made a co-defendant.

As regards the bar of O. II, r. 2 of the Civil Procedure Code, by reason of the previous suit, No. 102 of 1920, the plaintiff urged that that suit was based upon a specific grievance of the plaintiff against defendant No. 1 alone, and, consequently, the claim for half share out of the alienated northern half portion of Survey No. 42 enforceable as against defendant No. 2 was not joined in that suit. It was

also pointed out that the land was held and possessed by a stranger to the family from before the date of that suit and the plaintiff was not legally bound to include his present claim in the former suit for partition against a member of the family. In other words, the plaintiff's contention was that his cause of action for recovery of his half share out of the alienated northern portion of Survey No. 42 was distinct from the cause of action which formed the basis of the former suit, No. 102 of 1920. The relevant issue is No. 7.

"(7) Whether the present suit is barred under O. II, r. 2, Civil Procedure Code?"

The Court of first instance held that the suit was barred by O. II, r. 2 of the Civil Procedure Code. The Court of first instance accordingly dismissed the plaintiff's suit.

The lower Appellate Court upset the dismissal by holding that the suit was not barred by O. II, r. 2, Civil Procedure Code. The learned Counsel who appeared for the appellant-defendant No. 2 did not press the other pleas of *res judicata* and limitation raised by him as grounds Nos. 2 and 3 in the memorandum of second appeal. The only plea raised is about the bar of O. II, r. 2, Civil Procedure Code.

Admittedly, the northern half portion of Survery No. 42 which is now in dispute was not in the possession of defendant No. 1 at the time when the former suit, No. 102 of 1920, was instituted. It was in the possession of defendant-appellant since its purchase by him. The second defendant was not a party to the said suit. Just as being a prior alienee he could not be estopped as being privy in estate by a judgment obtained in an action against the alienor commenced after the alienation dated 15th Febuary 1915, *Abdul Alli* v. *Mukhan Abdul Husein* (1). Similarly, he could not claim the benefit of that litigation for setting up the bar of O. II, r. 2, Civil Procedure Code against the present suit. On this ground alone the finding of the Court of first instance was liable to be set aside as the District Judge very rightly did upset it. Although O. II, r. 2 of the Civil Procedure Code requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, still that rule does not require that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant; Cf. *Mothoor Mohun Mundul* v. *Khemunkuree Dossee*, (2) affirmed by the Privy Council in *Ramhurry Mondul* v. *Mothoor Mohun Mondul* (3). It is clear that the former suit, No. 102 of 1920, was a suit for partition of certain moveable and immoveable property by one member against another member of the family. The plaintiff was not bound to join in that suit his distinct cause of action against the stranger purchaser, defendant No. 2. It was held by that learned Hindu Judge of the Bomaby High Court, Justice Ranade, in *Purushottam* v. *Atmaram Janardan*, (4) on the authority *Narayan* of *Hari* v. *Ganpatrau* (5), that the rule that every partition suit shall embrace all the joint family property is subject to certain exceptions such as (i) where different portions of it are situated in and out of British India: *Raamcharya* v. *Anantacharya* (6); (ii) where a portion of it is not immediately available for partition by reason of its being in the possession of mortgagees, or because it was *inam* land which required Government permission to give Courts jurisdiction: *Narayan* v. *Pandurang* (7), *Balkrishna* v. *Hari* (8) and *Pattaravy Mudali* v. *Audimula Mudali* (9). He has also pointed out a third class of cases which could be similarly excepted from the rule, *viz.*, where the property was held in partnership by the joint family along with strangers who had no interest in the family partition among the sharers, and who could not, therefore, be made parties in the family partition suit. Cases are possible where the mere fact that the partition has been effected, does not by itself, in the absence of an agreement to that effect, bar the right for partition of property still undivided, and in respect of which the members may retain their share in the undivided estate. The whole village or a particular community may have joint property in a common pasturage or a forest, and such common enjoyment may continue even after

(1) 10 Ind. Cas. 890; 35 B. 297; 13 Bom. L. R. 268

(2) 5 W. R. 182.
(3) 20 W. R. 450.
(4) 23 B. 597; 1 Bom. L. R. 76; 12 Ind. Dec. (N. S.) 399.
(5) 7 B. 272; 4 Ind. Dec. (N. S). 183.
(6) 18 B. 389; 9 Ind. Dec. (N. S.) 768
(7) 12 B. H. C. R. 148.
(8) 8 B. H C. R. 64.
(9) 5 M. H. C. R. 419.

MIRZA MUHAMMAD HASAN BEG *v.* MIRZA SHAKIR BEG

there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit. The cause of action, *i. e.*, the fact or facts which afforded grounds for complaint in the former partition suit, was the plaintiff's relationship in the family, and his desire to have the property still left with the family, divided into shares. While the cause of action in the present suit is the right of the plaintiff to ignore or avoid the alienation made by a member of the family so far as it prejudicially affected the plaintiff's interest in the alienated item of the joint family property. The causes of action being thus distinct, O. II, r. 2, Civil Procedure Code, can have no operation here. There is, therefore, ample authority for the view that the present suit was not barred by reason of the non-inclusion of the plaintiff's claim for a half share of the northern half portion of Survey No. 42 in the former suit. The ground No. 1, therefore, fails.

As a result of the above decision, the appeal stands dismissed with costs. The costs in the lower Courts will be paid as already ordered.

G. R. D. *Appeal dismissed.*
S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 127 OF 1923.

November 15, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

MIRZA MUHAMMAD HASAN BEG AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

MIRZA SHAKIR BEG AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), Sch II, para 1 (2)—Reference to arbitration with verbal consent of parties—Estoppel by conduct—Dispute in appeal referred to arbitration—Arbitrator's power to take or refuse additional evidence—Award—Appeal.

The expression "application shall be in writing" in para 1, cl (2), of the Second Schedule, Civil Procedure Code, is not merely directory. [p. 379, col. 2.]

Shama Sundaram Iyer v. *Abdul Latif*, 27 C. 61 ; 4 C. W. N. 92 ; 14 Ind. Dec. (N. S.) 41, and *Abdul Hamid* v. *Riaz-ud-din* 30 A 32 ; 4 A. L J. 691 ; A. W. N. (1907) 273, **not followed.**

Where with the verbal consent of parties the Judge of an Appellate Court referred the matter in dispute between the parties to arbitration, the parties accepted the reference, signed their names on the order sheet of the Court, attended the arbitration proceedings, produced certain documentary evidence and the arbitrator gave his award :

Held, **that the parties were estopped from impeaching the legality of the award on the ground that the original reference was not in writing.** [p. 380, col. 1.]

Luxumibai v. *Hajee Widina Cassum*, 28 B. 629 ; 1 Bom. L. R 617 ; 12 Ind Dec. (N.S) 420 ; and *Mahomed Musa* v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 42 C. 801 ; 17 Bom. L. R. 420 ; 21 C. L. J. 231 ; 28 M. L. J. 548 ; 19 C. W. N. 250 ; 18 A. L. J. 229 ; 17 M. L. T. 143 ; 2 L. W. 258 ; (1915) M. W. N. 621 ; 42 I. A 1 (P.C.) **relied upon.**

Where a dispute pending in appeal is referred to arbitration the arbitrator has power to decide whether he should accept additional evidence or not. [p. 380, col. 2.]

An arbitrator is a judge of all matters whether of fact or of law and a Court hearing objections against an award is not a Court of Appeal sitting in judgment over the award. [p. 380, col. 2.]

Badruddin Hasan v. *Amir Begam*, 13 Ind. Cas. 520; 14 C. C. 308, and *Amir Begam* v. *Badruddin Hasan*, 13 Ind. Cas. 625; 36 A. 336; 18 C. W. N. 755; 1 O.L.J. 249; 12 A. L. J. 537; 17 O C. 120; 16 Bom. L. R. 413; (1919) M. W. N. 472 ; 16 M. L. T. 355; 27 M L. J. 181 ; 19 C. L. J. 494 (P.C.) ; 1 L. W. 1015 **relied upon.**

Application against the decree of the District Judge, Rae Bareli, dated 17th April 1923, upholding decree of the Additional Munsif, Rae Bareli, dated 22nd August, 1923.

Mr. *Radha Krishna*, for the Applicants.

Messrs. *Zahur Ahmad* and *Vilayat Husain*, for the Opposite Parties.

JUDGMENT.—The applicants brought a suit in the Court of the Additional Munsif of Rae Bareli for possession of a 1 *kirant* share in village Serai Mughlan, District Rae Bareli. The suit was dismissed. The plaintiffs preferred an appeal against the decree of the Munsif to the Court of the District Judge of Rae Bareli. During the pendency of the appeal in the last mentioned Court, the parties agreed to refer the matter in dispute to arbitration. Mr. Muhammad Shwaib, a practitioner of that Court, was appointed the sole arbitrator with the consent of the parties. He accepted to act as arbitrator and finally he gave his award. The applicants were dissatisfied with the award, and raised several objections against it. The learned District Judge has overruled those objections and confirmed the award, and directed a decree to be prepared in terms

thereof. The net result of the award was the confirmation of the decree of the Court of first instance and dismissal of the appeal preferred against it. The present application seeks to impugn the validity of the award.

In the first place, it is to be observed that the application does not fall within the terms of section 115 of the Code of Civil Procedure under which it purports to have been made. The learned Judge was clearly acting within his jurisdiction by referring the matter in dispute between the parties to arbitration with the consent of these parties. Reference to arbitration having thus been made and the arbitrator having consented to act, the learned Judge ceased to have any jurisdiction over the matter in dispute This is in accordance with clause (2) of paragraph 3 of the Second Schedule to the Code of Civil Procedure. He again became seized of the jurisdiction when the arbitrator submitted his award to the Court by the order of which the reference had proceeded. Objections being filed against the award, the Court had jurisdiction to deal with them under paragraphs 12, 14 and 15 of the Second Schedule to the Code. The objections in the present case were so dealt with by the learned Judge, and his final order is founded upon the provisions of paragraph 16 of the same Schedule. According to those provisions he has refused the application praying for an order to set aside the award and pronounced judgment in accordance with it. He has, therefore, acted throughout within jurisdiction and I discover neither any illegality nor any material irregularity on the part of the learned District Judge in the exercise of his jurisdiction. This will be a sufficient ground to dismiss this application.

A point of law of some importance was, however, raised at the hearing of this application and I think it desirable that I may express my own opinion on it. In the first instance, it was argued that in the present case there was no application in writing by the parties, asking the Court in which the appeal was pending, to refer the matter to arbitration, and inasmuch as clause (2) of paragraph 1 of the Second Schedule to the Code of Civil Procedure requires that an application contemplated by that clause shall be in writing, the reference to arbitration was wholly *ultra vires*. There are decisions which lay down the proposition that the provision of clause (2) is merely directory, see, for instance, the cases of *Shama Sundram Iyer* v. *Abdul Latif* (1) and *Abdul Hamid* v. *Riazuddin* (2). These decisions were passed under the old Code of Civil Procedure but there is no material difference between the provisions of the old Code and the new Code in this behalf. Speaking for myself, I am not prepared to hold broadly that the requirement imposed by clause (2) that the application shall be in writing is merely directory. My own opinion in the matter is that the applicants are estopped from raising the plea that the application for reference was not in writing with the object of defeating the entire arbitration proceeding and the award following it. I prefer to rest my decision on the grounds stated by Jenkin's C. J. in the case of *Luxumibai* v. *Hajee Wadina Cassum* (3). The learned Chief Justice observed: "Here, however, the matter has advanced a stage further, the order has actually been made and the case has reached that point at which it may be asked whether the rule that consent cures error should not be applied." In the case before him he applied that rule and in support of his opinion he quoted the cases of *Tyernan* v. *Smith* (4) and *Andrews* v. *Elliott* (5). The learned Chief Justice also distinguished the two Privy Council decisions in the cases of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (6) and *Stafford Bettesworth Haine* v. *The East India Company* (7).

In the present case, the objection which I am now considering, was not taken in the Court below. These applicants accepted the reference, signed their names on the order sheet of the Court in relation to the order of

(1) 27 C. 61 ; 4 C. W. N. 92 ; 14 Ind. Dec. (N. S.) 41.
(2) 30 A. 32 ; 4 A. L. J. 691 ; A W. N. (1907) 273.
(3) 23 B. 629; 1 Bom. L. R. 617 ; 12 Ind. Dn. (N. S) 420.
(4) (1856) 25 L. J. Q. B. 359 ; 6 El. and Bl. 719 ; 2 Jur. (N. S.) 860 ; 119 E. R. 1033 ; 106 R R 782.
(5) (1855) 25 L. J. Q. B. 1 ; 5 El. and Bl. 502 ; 1 Jur. (N. S.) 1046 ; 119 E. R. 567 ; 103 R. R. 585.
(6) 6 M. I, A. 134.
(7) 6 M. I. A. 467 ; 11 Moor. P. C. 39 ; 4 W. R. P. C. 99 ; 1 Suth P. C. J. 274 ; 117 R. R. 14 ; 14 E. R. 609 ; 19 E. R. 175.

reference, attended the proceedings which the arbitrator held for the purpose of making his award and attempted to produce certain documentary evidence before him which he declined to receive. Now that the award has gone against them, I think it is too late for them to impeach the legality of it on the ground that the original application for reference was not in writing. In the case of *Mahomed Musa* v. *Aghore Kumar Gunguli* (8) the rule on which I rely was stated by Lord Shaw in the following terms: "To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (9) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is, a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, 10th edition, section 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiae*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable". His Lordship added, that there is nothing either in the law of India or of England inconsistent with the principle above stated, but that, on the contrary, these laws follow the same rule.

It was further argued that the arbitrator refused to receive documentary evidence which the applicants desired to produce in support of their case before him, and that this refusal amounted to misconduct on his part sufficiently grave to vitiate the award. I do not agree with this contention. The arbitrator has stated in writing the grounds on which he acted in the matter of refusing to receive the evidence. His opinion was, that the case had come before him from a Court of Appeal where it was pending in the form of an appeal from the decree of the Court of first instance and that he could only act within such jurisdiction over the matter as could be exercised by the Court of Appeal. His opinion may be wrong. I am not concerned with that, but he certainly had power to decide whether he should accept additional evidence or not. He was arbitrator on all matters whether of fact or of law. The Court hearing objections against an award is not a Court of Appeal sitting in judgment over the award. In case of *Badruddin Hasan* v. *Amir Begam* (10) a Bench of this Court laid down the proposition that, where the award is good on the face of it the parties cannot object to the arbitrator's decision either upon law or fact, and the Courts will not ordinarly review his discretion provided he acts within his authority and behaves fairly to each party; nor will they interfere with his judgment on any mere ground of mistake. This decision was upheld by their Lordships of the Privy Council on appeal, see *Amir Begam* v. *Badruddin Hasan*, (11). The application is dismissed with costs.

S. D. *Application dismissed.*

(8) 28 Ind Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 23 M. L. J. 548; 19 C. W. N. 250; 18 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.)

(9) (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(10) 13 Ind. Cas. 520; 14 O. C. 308.

(11) 23 Ind. Cas. 625; 36 A. 336; 18 C. W. N. 755; 1 O L. J. 249; 12 A. L. J. 537; 17 O. C. 120; 16 Bom. L. R. 413; (1914) M. W. N. 472; 16 M. L. T. 85; 27 M. L. J. 181; 19 C. L. J. 494; P. C. 1 L. W. 1015; (P. C.)

NAGPUR JUDICIAL COMMISSIONERS COURT.

SECOND CIVIL APPEAL NO. 312-B OF 1922.

October 12, 1923.

Present:—Mr. Kinkhede, A. J. C.

TULSIRAM—PLAINTIFF APPELLANT

versus

ANUSUYA—DEFENDANT—RESPONDENT

Contract Act (IX *of* 1872) *s.* 68,—"*Necessaries*"—*A mixed question of law and fact*—*Transfer of Property Act* (IV *of* 1882) *s.* 100—*Charge*—*General words*—*Property not specified*—*Charge, whether created*—

TULSIRAM *v.* ANUSUYA

Account-books, whether sufficient to prove purpose of loan.

The question of what are "necessaries" within the meaning of section 68 of the Contract Act is not a pure question of law but is a mixed question of law and fact and as such cannot be allowed to be raised for the first time in second appeal when it has no foundation in the pleadings. [p. 381, col. 2.]

Mere general words are insufficient to create a charge on property either moveable or immoveable if it is not specifically indicated. A covenant that the obligee should recover from the "person and property" of the debtor is too wide to fasten a charge on any of his property. [p. 382, col. 1.]

A mere covenant to charge an estate does not create a charge unless the property can be identified by existing facts and circumstances so that there may be no ambiguity about them. There must be expression of a present intention coupled with the necessary words of hypothecation in order to constitute it. [p. 382, col. 1.]

A creditor is bound to prove purposes for which loan is borrowed by independent and reliable evidence and mere entries in his account-books will not constitute such proof. [p. 382, col. 2.]

Appeal from the decree of the District Judge, Akola, dated the 18th February 1922, in Civil Appeal No. 12 of 1920.

Mr. *N. G. Bose, R. B.*, for the Appellant.

Messrs. *A. V. Khare* and *K. K. Gandhe*, for the Respondent.

JUDGMENT.—The present appeal arises out of a suit to enforce a simple money-bond, dated 24th July, 1914 (Ex. P-1) executed by Aheliabai, defendant No. 1, for herself and as the guardian of her minor adopted son Yeshwant Rao, defendant No. 2. The consideration of the bond which is Rs. 2,000 is made up of the balance due on previous transactions of loans or on account of price of articles supplied to the minor's guardian from time to time. The plaintiff claimed relief against the person and property of both the defendants. The first Court decreed the claim against defendant No. 1 but dismissed it as against the minor defendant No. 2 or his estate on the ground that no benefit to the defendant No. 2 was proved. Defendant No. 2 died and in his place his widow Anusuya's name was substituted by the District Judge, Akola, who confirmed the finding as to absence of benefit and dismissed the plaintiff's appeal. It is against this dismissal of the claim as against defendant No. 2 Yeshwant Rao or his legal representative that this appeal has been preferred. Both the Courts below held that the plaintiff failed to prove that the several items which formed the consideration of the bond in suit were borrowed by defendant No. 1 for the benefit of her minor son or his estate. This finding of fact precludes me from entertaining this second appeal.

It is, however, contended that the District Judge decided the case against the plaintiff under the erroneous impression that "there is no clause in it (bond Ex. P-1) which purports to bind the estate of Yeshwant Rao (*vide* paragraph 4 of the lower Appellate Court's judgment). My attention is drawn to the following clause in the bond, Ex. P-1. "This bond is binding on my estate and heirs", and it is contended on the strength of these words that the bond (Ex. P-1) is a document which creates a charge against the estate of the minor and that, as plaintiff had expressly asked the relief against the estate of the minor defendant No. 2, the Courts below ought to have decreed the claim against the estate, on the strength of the said clause.

In the argument the learned pleader developed the point and very ingeneously urged that even assuming that the words mentioned above did not make the bond in suit a document purporting to bind the estate of the minor, still, upon a scrutiny of the various items which went to form its consideration, the Courts below ought to have concluded that, at any rate, majority of them represented the "necessaries" supplied to the minor for which section 68 of the Indian Contract Act provided a statutory charge. To take up the last argument first: a perusal of the Order Sheets dated 7th May 1918, 5th July 1918 and 26th February 1919 and the pleadings recorded in the case will clearly show that plaintiff was not able to make any satisfactory statement as to the purposes of the loans and as regards the existence of legal necessity or benefit to the minor defendant No. 2. It is rightly pointed out by the defendant No. 2's learned pleader before me that, the question of what are "necessaries", is not a pure question of law but is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal:

MANNI LAL *v.* RANI

Jagon Ram Marwari v. *Mahadeo Prasad Sahu* (1) as it has no foundation in the pleadings. I do not feel inclined to entertain it here particularly as by the death of the minor his legal representative would not be able to prove the special circumstances within the knowledge of the infant himself which make those articles not necessaries—(page 779 *ibid*). The argument as regards the statutory charge under section 68 of the Contract Act, therefore, fails.

The next point is, whether the bond in suit creates any charge on the estate of the minor. No authority has been cited in support of the proposition that the words quoted above are sufficient to impose a valid charge upon the estate. On the contrary, the respondent contends that several ingredients are wanting to make the covenant a covenant binding the estate of the minor. It is pointed out that the responsibility rested on the creditor when the bond was taken for the debt to take care that the bond was so drawn as to render the estate of the minor in law liable for the debt. *Krishnan Cheity* v. *Vellaichami Tevan* [*Arumugam Chetti* v. *Duraisinga Tevar*] (2). Section 100 of the Transfer of Property Act which deals with immoveable property clearly contemplates that the property which is made security for the payment of money to another must be specific property of the debtor:—vide *The Collector of Etawah* v. *Beti Maharani* (3) followed in *Kishan Lal* v. *Rani Bhawan Kuar* (4): see also *Jagatdhar Narain Prasad* v. *A. M. Brown* (5). Mere general words are insufficient. Similarly, for creating a charge on moveables, the property or funds must be specifically indicated: *Watson* v. *The Duke of Wellington*, (6) and *Percival* v. *Dunn* (7). In other words, a covenant that the obligee could recover from the "person and property" of the debtor is too wide to fasten a charge on any of his property. See also *Batchu Ramajogayya* v. *Vajjula Jagannadham* (8). Although the law does not require a writing to create a charge, it is fairly arguable that in order to be valid, a charge must conform to the requirements of the Registration Act if a writing is executed or relied upon in support of the charge. A mere *covenant to charge* estate does not *create a charge*, unless the property can be identified by existing facts and circumstances so that there may be no ambiguity about them. There must be expression of a present intention coupled with the necessary words of hypothecation in order to constitute it. I cannot find any such expressions in the bond in suit as would make it an instrument creating a charge on any portion of the minor's estate. The argument that the charge was created by acts of parties also, therefore, fails.

One more argument remains to be considered. The lower Courts have accepted the entries in the account-book as correct for the purpose of holding that the bond in suit was for consideration but they erred in rejecting them as constituting no proof of the purposes mentioned therein. I do not see any force in the argument, particularly as the creditor was bound to prove the purposes by independent and reliable evidence which is miserably lacking in the present case. The result is that the appeal stands dismissed with costs.

G. R. D. *Appeal dismissed.*

S. D.

(1) 1 Ind. Cas. 724; 36 C. 768 at p. 778; 13 C. W. N. 643.

(2) 12 Ind. Cas 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077.

(3) 14 A. 162; A. W. N. (1892) 27; 7 Ind. Dec. (N. S.) 474.

(4) 8 Ind. Cas. 864.

(5) 33 C. 1133 at p. 1153; 4 C. L. J. 121; 10 C. W. N. 1010.

(6) (1830) 1 Russ & M. 602; 8 L. J. (O. S.) Ch 159; 39 E. R. 231; 32 R. R. 298.

(7) (1885) 29 Ch. P. 128; 54 L. J. Ch. 570; 52 L. T. 320.

(8) 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1311 OF 1922.

January 21, 1924.

Present:—Mr. Justice Lindsay, and Mr. Justice Sulaiman.

MANNI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat RANI—(PLAINTIFF)—AND *Musammat* PARBATI—DEFENDANT—RESPONDENTS.

Custom—Pre-emption—Hissedar karibi, meaning of—*Hindu widow whether* karibi *of co-widow.*

The word *karibi* means a relation by blood or marriage. A Hindu widow is, therefore, a *karibi* of her co-widow.

GAJJAR *v.* GURU SURDUL SINGH

When custom allows a preferential right of pre-emption to a *hissedar karibi* over a mere *hissedar*, a Hindu co-widow who is also a co-sharer has a preferential right of pre-emption in respect of a sale by her co-widow as against a co-sharer who is a mere stranger.

Kuria v. *Jafri*, 33 Ind. Cas. 801, distinguished.

Second Appeal from a decree of the District Judge of Farrukhabad, dated the 14th September, 1922.

Gulzari Lal, for the Appellants.

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

JUDGMENT.—This is a defendants' appeal arising out of a suit for pre-emption.

The plaintiff and the vendor in this case are co-widows and they admittedly are co-sharers in the plot described as grove which has been sold. Both the Courts below have decreed the suit holding that there is a custom under which a "*hissedar karibi*" is entitled to preference as against other co-sharers and that the present plaintiff comes within the definition of the expression *hissedar karibi* of the vendor. The defendant transferee is also a co-sharer in the same grove but is not in any way related to the vendor. There is now before us no dispute as to there being a right of pre-emption with regard to the sale-deed. The only question is, whether the plaintiff has preference as against the transferees. Both the Courts below have come to the conclusion that, having regard to the fact that these ladies belong to the same Hindu family and by marriage have become members of the family, they are *hissedars karibi* of each other.

On behalf of the defendants it is contended before us that the word *karibi* means a blood relation and that, therefore, the plaintiff and the vendor who are connected with each other only through marriage are not blood relations. The word *karibi* is derived from the word *karib* which is defined in Wilson's glossary as meaning near, near to; also near in relationship, a kinsman, a relative, a connection by birth or marriage, excepting the relation of parent and child.

It was also pointed out in the Full Bench case of *Khuman Singh* v. *Hardai* (1) that the word *karibi* is sometimes ambiguous but in connection with other words it may have a very wide meaning. Mr. Justice Karamat Husain in a case reported in *Radhay Parshad* v. *Nannu* (2) was of opinion that the word *rishtedaran karibi* meant near relations by blood or marriage. In the present case the word *rishtedar* is not used at all, we have only the word *karibi* and that, in our opinion, simply means relation.

We may point out that in a case reported in *Jagrani* v. *Bisheshar Dube* (3) it was held that a son-in-law was not a *rishtedar karibi* because he was not connected with the Hindu family whose daughter he had married. It was also pointed out that the cases of Hindu females are different on the ground that they become members of the families into which they marry. This remark distinguishes that case from another case of the same Bench *Kuria* v. *Jafri* (4) which was a case of Muhammadans and where it was held that the two widows of two deceased brothers were not near relations so as to come within that category. In this view of the matter, we are of opinion that the view of the Courts below on this point was correct.

The result, therefore, is that this appeal must fail and it is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 11 A. 41; A. W. N. (1889) 1; 6 Ind. Dec. N. S.) 455.

(2) 5 Ind. Cas. 669.

(3) 35 Ind Cas. 701; 14 A. L. J. 449; 38 A. 366 (F. B.).

(4) 33 Ind. Cas. 801.

LAHORE HIGH COURT.

CIVIL REVISION NO. 963 OF 1922.

May 21, 1923.

Present:—Mr. Justice Moti Sagar.

GAJJAR—DEFENDANT—PETITIONER

versus

GURU SURDUL SINGH—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887) *Sch.* II, *Art.* 8—"*Rent*", *meaning of—Damages for use and occupation, suit to recover, nature of—Jurisdiction of Small Cause Courts.*

RAKHMABAI *v.* VITHUSA

The word "rent" in Article 8 of Schedule II to the Provincial Small Cause Courts Act is intended to be understood in the ordinary sense of a return in money or kind for the enjoyment of specific property held by one person from or under another, and does not include damages for the use and occupation of land by a trespasser.

A suit to recover such damages, therefore, does not fall within the Article and is not excluded from the cognisance of a Small Cause Court

Chuni Lal v. *Shazada Khanam*, 158 P. R. 1884 dissented from *Vira Pillai* v. *Rangasami Pillai*, 22 Mad. 149 ; 8 Ind. Dec (N. S.) 106 relied on.

Petition under section 25 of Act IX of 1887, for revision of the order of the Munsif, with Small Cause Court powers, of Jullundur, dated the 24th October 1922.

Lala *Fakir Chand* and Mr. *Sagar Chand*, for the Petitioner.

Lala *Badri Das*, *R. B.*, for the Respondents.

JUDGMENT.—This is an application for revision of an order, dated the 24th of October 1922, passed by a Munsif having the powers of a Judge of Small Cause Court, at Jullundur, awarding plaintiff a decree for Rs. 15 on account of rent of some land. It is argued that the order is without jurisdiction, inasmuch as the suit was one for the recovery of rent other than house rent and consequently excluded from the cognizance of the Small Cause Court by reason of Article 8 of the second Schedule of the Provincial Small Cause Courts Act of 1887. On behalf of the defendant the contrary view has been presented that the sum claimed is not in the nature of rent but of damages for use and occupation of land held by him as a trespasser and consequently cognizable by a Court of Small Causes. The facts are that on the occasion of *Baisakhi* festival in the month of April 1921 the defendant put up a temporary shop on some land owned by the plaintiff. The plaintiff thereupon brought this suit for the recovery of Rs. 30 on account of rent of this land. The defendant denied that the land belonged to the plaintiff and stated that it was a public place. The trial Court found against the defendant and, holding that the land belonged to the plaintiff, passed a decree for Rs. 15 in his favour.

The question for decision is whether the suit is one for rent or for damages for use and occupation. I have given a careful consideration to this matter and the conclusion at which I have arrived is that the contention of the respondent is correct and that the suit is not for rent but for damages for use and occupation of the land held by the defendant as a trespasser. Reliance, is placed on behalf of the petitioner on *Chunni Lal* v. *Shazada Khanam* (1) where it was held that the expression "rent" in section 6 of the Small Cause Court Act, 1865, was not limited in meaning to rent due on contract but included money claimable in respect of premises of the plaintiff used and occupied by the defendant without a contract. The question, however, was not fully discussed in this authority and it does not appear on the facts stated whether the land was occupied by the defendant with or without the permission of the plaintiff. On the other hand, Mr. Badri Das contends that the word " rent " in the section, was intended to be understood in the ordinary sense of a return in money or kind for the enjoyment of specific property held by one person from or under another. In my opinion this seems to be the correct view, and a decision of the Madras High Court in *Vira Pillai* v. *Rangasami Pillai* (2) points to the same conclusion. The present claim is obviously not of this nature and is, therefore, not excluded from the cognizance of the Court of Small Causes.

I do not see any force in this petition and dismiss it with costs.

Z. K. *Application dismissed.*

(1) 158 P. R. 1884.
(2) 22 M. 149 ; 8 Ind. Dec. (N. S.) 106.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 60-B OF 1921.

September 28, 1923.

Present :—Mr. Kotval, A. J. C., and Mr. Prideaux, A. J. C.

RAKHMABAI—PLAINTIFF—APPELLANT

versus

VITHUSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Benefit of family—Test.—Debt secured on family property, whether antecedent—Mortgage by father—Sons not born, whether can contest.

RAKHMA *v.* VITHUS

The right way of judging in ordinary cases whether a loan on a mortgage of family property for purchasing an estate constitutes a benefit to the family is not by looking at the ultimate result of the purchase-many years after but to determine the question of benefit with reference to the time of purchase. [p. 386, cols. 1 & 2.]

A debt incurred on the security of the family property is not "an antecedent debt" [p 886, col. 2]

Sons and grandsons not born at the date of a mortgage take by their birth an interest in the family property subject to the mortgagee's rights in respect of the father's shares as they existed at the date of the mortgage and they are not entitled to object to the alienation of such shares. [p. 887, col. 2]

Appeal from the decree of the Additional District Judge, Amraoti, dated the 30th June 1921, in Civil Suit No. 49 of 1919.

Dr. H. S. Gour and *Mr. M. B Marathe*, for the Appellant.

Mr. N. G. Bose, R. B. and *Mr. G. V. Deshmuk*, for the Respondents.

JUDGMENT.—The facts and issues material to the decision of this appeal are as follows. Vithusa, defendant No. 1, Puransa, defendant No. 2 and Nagosa, defendant No. 3, are brothers. They and a fourth brother Govindsa, now deceased, executed a mortgage, Exhibit P-1, on the 19th December 1907 in favour of Puranmal, deceased husband of the plaintiff Rukhmabai. The consideration was Rs. 7,500 made up as follows :—

Rs. 1,500 were to be paid by the mortgagee to Sheolal Ramlal, a mortgagee of some land in Mouza Parwatpur belonging to the mortgagors ;

Rs. 5,500 cash borrowed and paid to Madho Rao and others from whom the mortgagors had purchased two fields Nos. 17 and 24 situated in mouza Fazalpur also called Khaparkhed for Rs. 6,500 on the same day, *i. e.*, the 19th December 1907 ;

Rs. 500 taken for the use of the family.

The property mortgaged consisted of fields situated in five villages and included the two fields purchased from Madhorao and others with the borrowed money.

The plaintiff admits repayments to the extent of Rs. 8,925 and asks for a decree for Rs. 15,000 according to the rule of Damdupat.

The defendants Nos. 4 to 18 are the sons and grandsons of the mortgagors. Defendants Nos. 7, 8, 9, 10, 12, 13, 15, 16 and 17 were not born at the date of the mortgage. Defendant No. 4 was major and the remaining defendants were minors at the date of the mortgage. The defendants Nos. 4 to 17 are joined on the ground that they are members of a joint family with defendants 1 to 3 and are entitled to redeem the mortgage. These defendants pleaded that there was no legal necessity for the mortgage-debt nor any benefit of the family therefrom and that their shares were not liable. It was also pleaded that the defendants who had effected a partition should each be allowed to redeem his respective share by paying a proportionate part of the mortgage-debt as the mortgage had been split up by the mortgagee consenting to a sale of the part of the mortgaged property. The plaintiff replied that the debt was incurred for legal necessity; that defendant No. 4 who they admitted was major at the time of the mortgage gave his consent to the mortgage and that the defendants who were not born at the date of the mortgage could not raise the question of legal necessity or benefit.

The issues on these pleadings were,—

2. Was the debt such as to bind the shares of defendants Nos. 4 to 17 in the property ?
3. Can defendants Nos. 7, 8, 9, 10, 12, 13, 15, 16 and 17 who were born after the mortgage in suit raise the question about the nature of the debt and the liability of their shares for it ?
6. What right of contribution exists between the parties by reason of sale of part of the property to Syed Ajamal Hasani and others and what was the value of the several items of the mortgaged property on the date of mortgage ?
7. Had Sheoram, defendant No 4, been consulted and had he agreed to the mortgage in suit ?

The lower Court found on issue 2 that the purchase of the fields was not for the benefit of the family ; that the Rs. 500 said to have been paid for the use of the family were not proved to have been paid for cultivation or any family purpose ; that out of the item of Rs. 1,500 Rs. 800 were paid to the mortgagee Sheolal and Rs. 700 to the mortgagors ; that

the latter item was not for a purpose necessary or beneficial to the family and that the Rs. 800 paid to Sheolal did not constitute an antecedent debt. On issues 3 and 7 the lower Court found that Sheoram had not consented to the mortgage and that the defendants who were not born at the date of the mortgage could raise the question of the non-liability of their shares. On issue 6 it held that the question of contribution did not arise. On these findings the lower Court passed a decree for the full claim and costs against defendants No. 1 to 3 and declared that the shares of these defendants and Govindsa would be liable for the amount decreed.

The plaintiff appeals challenging the above findings and urging that the decree should have been passed against all the defendants and that at any rate a decree against the entire fields Nos. 17 and 24 purchased with the money borrowed from the plaintiff should have been passed.

It will be convenient to decide the questions involved in issues 2 and 7 first. As regards the consent by Sheoram, we agree with the lower Court that it is not proved. The only witness examined to prove it is P. W. 5. The witness is indebted to the plaintiff and is not corroborated by any other evidence on the record. There is no particular reason why Sheoram, if he had no objection to the mortgage, did not sign or was not pressed to sign the mortgage-deed. The evidence is unconvincing and insufficient to prove Sheoram's consent.

As regards the binding nature of the consideration we agree with the lower Court that the purchase of the fields was not an act beneficial to the joint family. This will be plain if we look at the result of the transactions of the purchase and the mortgage so far as it affects the family property. Before these transactions the family was in possession of 106½ acres unencumbered land. After the transactions the family came to hold this area plus 63 acres 8 gunthas, the area of the purchased land, with an encumbrance of Rs. 5,500 carrying interest at 1 per cent. per annum liable to be increased to 1½ per cent. per annum compound rate. We do not think that the right way of judging in ordinary cases whether a loan on a mortgage of family property for purchasing an estate constitutes a benefit to the family is by looking at the ultimate result of the purchase many years after. The fact that the purchase turned out to be a good bargain many years after its date is not a ground for holding that it was for the benefit of the family when it was made. A speculative and hazardous purchase may turn out in the end to be a good bargain but it cannot for that reason be held to have been beneficial to the family. The question of benefit must be determined with reference to the time of the purchase. In our opinion the transaction could not have been considered at the date of the mortgage one for the benefit of the family. Even judging from the result the transaction can scarcely be said to be such. It has necessitated the selling away of a part of the family lands for part satisfaction of the mortgage-money. The purchase was admittedly followed by costly litigation.

As regards the item of Rs. 1,500 which the mortgagee retained to pay to Sheolal, only Rs. 800 were paid to him. Sheolal's debt was incurred on the security of the family property and was, therefore, not an antecedent debt according to the rulings of the Privy Council and the mortgagee must be deemed to have known that the sons were not liable for its payment. As regards the Rs. 700, they were paid to the mortgagees themselves about a year after the date of the mortgage. There was no reason whatsoever for paying this amount after it was discovered that it was not required for the particular purpose to which it was to be applied. The payment was neither for a necessary purpose nor for the benefit of the family.

As regards the item of Rs. 500, there is neither any evidence that there was legal necessity for it nor that it was taken for the benefit of the family.

No case of reasonable enquiry by the mortgagee was pleaded and we do not think that if any reasonable enquiry had been made the mortgagee would have been satisfied that the loan was necessary or for the benefit of the family.

It is urged that, at any rate, equity requires that a decree should have been passed against the whole of the two fields purchased with the mortgagee's money. At the most, a

decree could be passed against 5,500|6,500ths, that is 11|13ths, of those fields for the fields were purchased for Rs. 6,500 and only Rs. 5,500 were borrowed from the plaintiff for payment to the vendor. But in view of the fact that land of the value of Rs 7,000 belonging to the family has been sold and the purchase-money paid to the mortgagee in part satisfaction of the mortgage-money, we do not think that any equity arises in favour of the plaintiff on the ground that the family will receive at the plaintiff's expense benefit for which it has not paid.

It is next contended that the sons and grandsons not born at the date of the mortgage took by their birth an interest in the family property subject to the mortgagee's rights in respect of the fathers' shares as they existed at the date of the mortgage and that they were not entitled to object to the alienation of such shares. This contention must be upheld: *Hazari Mal* v. *Abaninath Adhurioya* (1), *Tulshi Ram* v. *Babu Lal* (2), *Abdul Rahman* v. *Muhammad Yar* (3) and *Jowala Prasad* v. *Protap Udai Nath Sahi Deo* (4) which are against this contention are from provinces where alienation of the joint family property by the father without the consent of the coparceners or without legal necessity is not valid even to the extent of the father's share and cannot properly be applied in the present case where the alienation is good to the extent of the father's share. *Sobharam Teli* v. *Makdu* (5) was a case of a gift which was wholly invalid. We think the true principle is laid down in *Chinnu Pillai* v. *Kalimuthu Chetti* (6). The share of the father to which the mortgagee is entitled is the share to which the father would have been entitled if a partition had been made at the date of the mortgage. The shares of the fathers in this case at the date of the mortgage were Vithusa 1/16th, Puransa and Nagosa 1|8th each and Govindsa ¼ that is 9|16ths.

(1) 18 Ind. Cas. 625 ; 17 C. W. N. 280 ; 17 C. L. J. 38.
(2) 10 Ind. Cas. 908; 33 A. 654; 8 A. L. J. 733
(3) 4 A. 190; A. W. N. (1882) 1; 2 Ind. Dec. (N.S.) 801.
(4) 37 Ind. Cas. 184 ; 1 P. L. J. 497 ; (1917) Pat. 27 ; 2 P. L. W. 406.
(5) 12 C. P. L. R. 63
(6) 9 Ind. Cas. 596 ; 35 M. 47 ; (1911) 1 M. W. N. 238 ; 9 M. L. T. 389 ; 21 M. L. J. 246.

No question of contribution arises nor, in view of the above findings, any question under the last paragraph of section 60 of the Transfer of Property Act

The decree of the lower Court is defective in several respects. A fresh decree will now be drawn up in accordance with the above findings. The parties will be further heard as to the form and terms of the decree.

G. R. D. *Decree modified.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 96 OF 1923.

July 31, 1923.

Present :—Mr. Wazir Hasan, A. J. C.

TIRBHAWAN DIT SINGH AND ANOTHER—
—PLAINTIFFS—APPLICANTS

versus

SURAJ BALI—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 148—Decree directing payment of money within certain period—Default—Extension of time—Power of Court—Revision.

An order dismissing an application under section 148 of the Civil Procedure Code for extension of the time limited for the payment of money under a decree is open to revision. [p. 388, col. 1.]

Bhola v. *Sheo Darshan Singh*, 24 Ind. Cas. 109 ; 1 O. L. J. 191, distinguished.

A Court has no jurisdiction to extend time for the payment of money prescribed in a decree when the effect of such an extension would be to alter the terms of a decree which has become final between the parties. [p. 388, col. 2.]

Application against the order of the Munsif, Tarab Ganj, at Gonda, dated 28th April 1923.

Mr. *Ghulam Hasan*, for the Applicants.

Mr. *M H. Qidwai*, for the Respondent.

JUDGMENT.—This is an application under section 115 of the Code of Civil Procedure. The applicants obtained a decree on the 31st October 1922 in a suit instituted by them in the Court of the Munsif of Tarabganj. The suit was for the cancellation of a certain instrument. In granting the decree the Court imposed the condition of payment of

Rs. 737 8-0 by the plaintiffs to the defendant within three months from the date of the decree. The decree further provided for the contingency of default of payment within the period prescribed by it. It said that in default the suit was to stand dismissed. The plaintiffs did not comply with the condition imposed by the decree. More than a fortnight after the prescribed period had expired, they asked that the money which they then wanted to pay in satisfaction of the condition of the decree might be accepted. This application was treated and rightly as one asking for extension of time within the provisions of section 148 of the Code of Civil Procedure. Following a series of decisions of this Court, the learned Munsif has refused to extend time on the ground that he had no jurisdiction to alter the terms of the decree, and that section 148 of the Code of Civil Procedure did not confer such a jurisdiction on him. This application is against the order just now mentioned.

At the time of the admission of this application, the learned Judicial Commissioner referred to a decision of a predecessor of his in the case of *Bhola* v. *Sheo Darshan Singh* (1) supporting the view that no application under section 115 lay in a case like this for the reason that an appeal lay. I am of opinion that the decision is not applicable to this case. The original decree passed by the Court of first instance was complete in its terms and the suit of the plaintiffs was to stand dismissed not because of any subsequent order or decree the Court might pass in the event of default in payment but it would be because of the terms of the decree itself. In the present case an application to extend time under section 148 of the Code of Civil Procedure was made. That application has been thrown out on the ground that the Court had no jurisdiction to entertain it. A revision would, therefore, lie against such an order under section 115 of the Code because, clearly, no appeal could lie from that order.

I have, therefore, heard the application on its merits.

Two points were urged at the hearing of the application : I. On the 24th March 1923 the plaintiffs and the defendant filed a joint application before the learned Munsif asking that the hearing of the application filed by the plaintiffs for extension of time might be adjourned to enable them to come to an amicable settlement. The application was granted and the case was adjourned. At the adjourned hearing, however, the defendant took up the objection that the Court had no power to grant an extension of time. If the application of the 24th March 1923 were filed within the period prescribed by the decree for the payment of the money it might have worked out as an estoppel against the defendant but it was filed long after the period had expired and in the end proved abortive altogether. On the strength of this application it was argued that the defendant, as well as the Court, by accepting the application had given their tacit consent to the extension of time.

That the defendant had such an intention may be conceded, but it is impossible to treat that intention as amounting to a valid consent, more so when the subsequent conduct of the defendant was clearly contradictory to his previous intention. The application of the 24th March 1923 and the circumstances subsequent to it did not give the Court any jurisdiction to extend time which it had not under the law.

The second question is, whether the learned Munsif was right in his opinion that he had no jurisdiction to act under section 148 of the Code of Civil Procedure and extend time for the compliance with the condition of the decree. I am of opinion that the learned Munsif was right. This Court has repeatedly held that Courts have no jurisdiction to extend time where the effect of such an extension would be to alter the terms of a decree which has become final between the parties. The learned Munsif has referred to some of the cases decided by this Court on this point. Other cases will be found collected in the case of *Janga Singh* v. *Lachhmi Narain* (2). This view of the provisions of section 148 of the Code coincides with the view taken of those provisions by the High Court of Allahabad, for instance, see the case, of *Suranjan*

(1) 24 Ind. Cas. 109 ; 1 O. L. J. 191.

(2) 57 Ind. Cas. 488; 23 O. C. 254; 7 O. L. J. 878; 2 U. P. L. R. (J. C.) 171.

Singh v. *Ram Bahal Lal* (3), referred to by the learned Munsif in his judgment.

The application is dismissed with costs.

Z K. *Application dismissed.*

(3) 21 Ind. Cas. 585 ; 35 A. 582; 11 A. L. J. 950.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 994 OF 1922.

January 17, 1924.

Present :—Mr. Justice Mukerji.

B. KISHUN DAYAL SAHI—DEFENDANT—APPELLANT

versus

LT. SAHIBZADA RAVI PRATAB NARAIN SINGH AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy tenant—Usufructuary mortgage by tenant—Landlord, whether can recover rent from mortgagee.

A landlord cannot sue the usufructuary mortgagee of an occupancy tenancy for rent of the holding, as the relationship of landlord and tenant does not subsist between the parties, the occupancy tenant being prohibited from making such a transfer of the tenancy.

Mahesh Singh v. *Ganesh Dube*, 15 A. 231 ; A. W. N. (1893) 130 ; 7 Ind. Dec. (N. S.) 866 (F. B.), followed.

Second appeal against the decree of the Second Additional District Judge of Gorakhpur, dated the 14th February, 1922.

Mr. *S. P. Sinha*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The sole question for determination in this appeal is, whether a landlord can sue the usufructuary mortgagee of an occupancy tenancy for rent.

The respondent brought the suit out of which this appeal has arisen for recovery of rent of an occupancy holding from two sets of defendants The appellant who was the mortgagee with possession constituted the second set. He pleaded that there was no relationship of landlord and tenant between him and the plaintiff and he could not be held liable for the rent. The suit failed as against the appellant in the Court of first instance, but the learned Additional Judge of Gorakhpur decreed the suit against the appellant as well.

For the respondent Mr. Haribans Sahai argued that the mortgagee had been paying rent and thereby converted himself into a tenant. But there was no such allegation of the plaintiff in the Court below and there was no such finding. No doubt, the principal tenants said that the mortgagee had been paying rent and they should be held liable. But, as I have said, there was no issue on the point and there was no decision.

The mortgage in question was created before the present Tenancy Act came into force. According to the rulings of this Court, an occupancy tenant could, in spite of the provisions of section 9 of Act XII of 1881, sub-let his right to occupy the lands and it naturally followed from this that, he could transfer his right of possession to a mortgagee. It was in this view alone that this Court upheld, as between the mortgagor and the mortgagee, an usufructuary mortgage by an occupancy tenant. The leading case is that of *Khiali Ram* v. *Nathu Lal* (1). At page 231 of the same volume * will be found another Full Bench case *Mahesh Singh* v. *Ganesh Dube*, (2) in which it was considered whether an occupancy tenant could sub-let his holding in perpetuity. The Court remarked that the term of the sub-tenancy was really immaterial and said that such sub-letting could not make the sub-lessee a tenant of the landlord. If any authority were needed for a clear proposition like this, this Full Bench case of *Mahesh Singh* v. *Ganesh Dube* provides one. There is no contract between the mortgagee of an occupancy tenancy and the landlord and because the tenant is prohibited by law from making a valid transfer, he, by the very fact of the transfer, cannot convert the transferee into a tenant in his own place. In the case of *Saudagar Singh* v. *Ganga Singh* (3) it was distinctly held by a Bench of two Judges of this Court that, even in the case of a fixed rate tenancy, the mortgagee did not become a tenant of the landlord even if he paid the rent with his own hand. It was observed that the

(1) 15 A. 219; A. W. N. (1893) 125 ; 7 Ind. Dec. (N.S.) 859 (F. B).

(2) 15 A. 231 ; A. W. N. (1893) 130 ; 7 Ind. Dec. (N.S.) 866 (F. B).

(3) 69 Ind. Cas. 274; 19 A. L. J. 707.

* 15 A.

payment would be payment on behalf of the mortgagor.

My conclusion is that the decree of the learned Judge of the Court below against the appellant was wrong.

The appeal is allowed and the suit of the respondent as against the appellant is dismissed with costs throughout.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 25 OF 1922.

September 5, 1923.

Present :—Mr. Kotval, A. J. C.

JUGAN—DEFENDANT—APPELLANT

versus

AMANSINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908)—Decree for joint possession—Possession disturbed—Fresh suit for joint possession, whether maintainable—Co-sharer in exclusive possession of some land—Claim for joint possession of other land, whether can be allowed.

If the joint possession obtained under a previous decree is disturbed, a suit may be filed for its restoration. [p. 390, col. 2.]

The circumstance that one of the co-sharers is in exclusive possession of certain home farm land which is recorded as his *sir* at the Settlement is a good ground for not awarding joint possession of the land in dispute. [p. 391, col. 2.]

Appeal from the decree of the District Judge, Chhindwara, dated 10th March 1922, in Civil Appeal No. 13 of 1922.

Mr. *J. K. R. Cama, K. B.*, and Mr. *V. R. Pandit, B. B.*, for the Appellant.

Mr. S. B. Gokhale, for the Respondent.

JUDGMENT.—This judgment governs the disposal of Second Appeal No. 257-B of 1922 also.

The first objection to the lower Appellate Court's decree is that joint possession not having been claimed in the plaint should not have been allowed. But though it was not claimed in the plaint an alternative claim for it was made in the pleadings and it is made the subject of the 4th issue. It is not argued that the plaintiff should not have been allowed to make the alternative claim. It is next urged that the plaintiff, having already obtained joint possession under the decree in his favour, he should not be allowed to maintain a suit for it and that his remedy lies in a partition. But there is no reason why, if the joint possession obtained under the decree is disturbed, the plaintiff should not be able to sue for its restoration.

The lower Appellate Court has decreed joint possession relying on *Hayat Khan* v. *Button Khan* (1). It is urged that joint possession should not have been decreed as the defendants (here appellants) have shown special circumstances for not allowing it. Reliance is placed on *Padmasingh* v. *Sahadeo Sao* (2), where a claim for joint possession was disallowed. The circumstances urged are, first, that the Settlement *pardha* is in favour of the defendants. But this fact cannot be a circumstance which entitles the defendant, to resist the plaintiffs' claim for joint possession if it is otherwise proved. The next circumstance is that the defendants have been in exclusive possession for six years before suit. But it has been found, and the finding is not challenged by the appellants, that the plaintiff was already in joint possession from 1899 till 1912—13 of the *sir* land in the village to the extent of 14a. 3p. with the defendants who owned the remaining 1a. 9p. share. The plaintiffs' title to joint possession must be taken to have been denied and he must be taken to have been excluded from joint possession after 1912—13 and the fact that he delayed bringing a suit till 1920 is not the kind of special circumstance which disentitles the plaintiff from being again placed in joint possession. In *Padmasingh* v. *Sahadeo Sao* (2), the plaintiffs who were purchasers from co-sharers were never in possession themselves and their vendors had also been excluded from possession for very many years. The defendants were in fact in undisturbed possession for at least 20 years. The third circumstance relied on is that the plaintiff is admittedly now in exclusive possession of certain *khudkasht* land. This ground has considerable force. The defendants, however, state that what they

(1) 3 Ind. Cas. 54; 5 N. L. R. 105
(2) 14 C. P. L. R. 76.

urged in the lower Courts was not an arrangement amounting to a partition but an arrangement for exclusive physical possession and enjoyment such as is referred to in *Jaggannath* v. *Ramprasad* (3). In the plaint, however, the plaintiff claimed sole ownership of the fields in suit by virtue of the decree in his favour. But in his oral pleading dated the 21st August 1920 he stated that originally he had obtained joint possession of all the *sir* plots to the extent of 14 a. 3 p. and that, subsequently, about the year 1903-04, an arrangement was entered into according to which he was given the plots in suit and other plots for his share of 14 a. 3 p. and that he continued in possession of them under the arrangement. It is complained that the lower Appellate Court was wrong in assuming that the plaintiff pleaded an arrangement amounting to a partition; but I think the statement that the plaintiff was given the plots in suit and other plots for his share of 14 a. 3 p. *sir* justifies the conclusion that in the lower Appellate Court the plaintiff meant to plead and pleaded an arrangement amounting to a partition as appears from paragraphs 5 and 6 of that Court's judgment. Such an arrangement not being proved, the plaintiff at the most is entitled to joint possession of the fields in dispute. But the circumstance that he is himself in exclusive possession of certain home farm land which is now recorded as his *sir* at the Settlement seems to be a good ground for not awarding joint possession of the land in dispute. The plaintiff prays, and the prayer is not opposed, that if the arrangement is not proved and it is considered that he is not entitled to joint possession at least a decree declaring his right to joint possession of the fields in dispute should be passed. I think this is a reasonable course to follow in the circumstances of the case. I, therefore, modify the decree of the lower Appellate Court and direct that a decree be passed in favour of the plaintiff declaring that he is entitled to joint possession of the fields in dispute to the extent of his share of 14 a. 3 p. in the village. Each party will pay its own costs in all Courts. The cross-objection was not argued and is dismissed.

G. R. D. *Decree modified.*

(3) 46 Ind. Cas. 272; 14 P. U. L. R. 101.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 417 OF 1923.

January 18, 1924.

Present :—Sir Grimwood Mears, Kt. K. C., Chief Justice, and Mr. Justice Piggott.

RAO ADYA SARAN SINGH—APPLICANT

versus

JAGANNATH—OPPOSITE PARTY.

Government of India Act (5 & 6 *Geo.* V, *c.* 61) *s.* 107—*High Court, power of superintendence of, scope of.*

The power of superintendence vested in the High Court under section 107 of the Government of India Act, was not intended to authorise the Court in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court on the ground that such orders have proceeded on an error of law or an error of fact. [p. 393, col. 2]

Muhammad Sulaiman Khan v. *Fatima*, 9 A. 104; A. W. N. (1886) 309; 5 Ind. Dec. (N. S) 500, followed.

Application under section 107 of the Government of India Act.

Messrs. *P. L. Banerji* and *U. S. Bajpai*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

JUDGMENT.—This is an application of a somewhat unusual character. It is perhaps advisable that we should explain precisely the circumstances under which it comes to be presented. The suit out of which it arose was one filed in the Court of an Assistant Collector. The plaintiff in that suit, alleging himself to be the proprietor of certain land in the possession of the defendant as a rent-free grantee, claimed to resume the said grant under the provisions of section 154 of the Local Tenancy Act (II of 1901). The trial Court fixed a large number of issues and decided all of them. In substance, it came to the conclusion that the plaintiff was entitled to the relief claimed and it decreed that relief accordingly. There was an appeal by the defendant to the Court of the District Judge and it is not denied that, under the circumstances, an appeal lay to that Court. The District Judge came to the conclusion that the land in possession of the defendant was not liable to resumption under section 154 aforesaid. By reason of the provisions of section 153 of the same Act the Court, hearing a suit for the resumption of a rent-free grant and finding the grant not li-

able to resumption on grounds other than those specified in section 151 of the Act, is bound to proceed to determine whether that land is liable to assessment of rent, or whether the holder thereof is liable to pay the revenue assessed thereon. The District Judge proceeded to deal with this matter himself. He found on the evidence that this land had been held rent-free for fifty years and by two successors to the original grantee, and on this finding held that the defendant must be deemed to hold the land in proprietary right. This made it necessary that the revenue payable by the defendant should be determined. There were no materials on the record upon which this could be done. The District Judge, therefore, passed an order in which he stated that the appeal was allowed with costs, but that the record must go back to the Assistant Collector in order that the revenue payable by the defendant might be determined. The order is not happily worded. It does not embody the important finding that the defendant is declared to be the proprietor of the land. Moreover, it does not refer to any provision of the law on the strength of which the case is remanded to the Court of first instance for further proceedings. The defendant assumed that the order of the Appellate Court at that stage must be treated as an order of remand under O. XLI, r. 23 of the Code of Civil Procedure and he was advised that no appeal from such an order would lie to this Court. There is a decision to that effect in the case of *Anandgir* v. *Sriniwas* (1). When the Assistant Collector had carried out the direction given him, the plaintiff presented to the Court of the District Judge an appeal against the final decree in the suit. The District Judge held that no appeal lay to him and passed an order returning the appeal for presentation to the proper Court, meaning thereby no doubt the Court of the Commissioner of the Division. Against this order no appeal lay and even an application in revision would not have been entertained by this Court in the existing state of the authorities. We feel bound to remark that it is a matter deserving the attention of the Legislature whether some definite procedure ought not to be provided, by which the question as to whether an appeal in a particular instance lies to the District Judge or to the Revenue Courts, might be brought before this Court for adjudication. The application before us now, however, has nothing to do with this order of the District Judge refusing to entertain the plaintiff's appeal against the final decree of the Assistant Collector. Our jurisdiction is being invoked under section 107 of the Government of India Act in respect of the order by which the learned District Judge, after having adjudicated the defendant in the suit to be the proprietor of the land in question, remanded the case to the Court of first instance to have the amount of the revenue payable by him determined. In argument before us this order has been treated as an order of remand under O. XLI, r. 23 of the Code of Civil Procedure. Looking at the order in this way, it has been contended that it is not a proper order, because the trial Court had disposed of every single issue fixed in the suit and the necessity for a further proceeding in that Court had arisen under the provisions of the Tenancy Act by reason of the District Judge's finding that the defendant was entitled to be declared the proprietor of the land in suit. It has further been suggested that, under the circumstances, the District Judge would have been better advised to remit an issue to the trial Court under O. XLI, r. 25 of the Civil Procedure Code, calling for a finding as to the amount of the revenue payable. Certainly, if this had been done, the District Judge would then have been in a position to pass a decree in appeal determining every question which had arisen on the pleadings, or which required to be determined under the provisions of the law, and against such decree a second appeal would have lain to this Court. Looking into this matter in the course of the arguments addressed to us to-day, we find some reason to doubt whether the District Judge's order is really one under the provisions of O. XLI r. 23 of the Civil Procedure Code. If it is not, it would have to be described as a decree in the suit, and in that case it would seem that an appeal might have been presented to this Court. We appreciate the difficulty in which the plaintiff was placed. The ruling of this Court to which we have already referred was passed in a suit very similar to the one now before us and only distinguishable from it by reason of the fact that it was a suit instituted by the holder of the rent-free grant for a declaration that he had become by

(1) 47 Ind. Cas. 1008; 16 A. L. J. 711; 40 A. 652.

operation of law proprietor of the same. The difference between the two cases, therefore, is that, in the case referred to as a ruling, the whole of the proceedings had throughout been under section 158 of the Tenancy Act whereas we are dealing here with a proceeding initiated under section 154 of the same Act and it only required to be supplemented by a further proceeding under section 158 because of the decision arrived at by the Appellate Court and the provisions of section 153 of the Act. We are not in a position, as the matter now stands before us, to pronounce a final opinion as to whether a distinction could be drawn in principle between the present case and that of *Anandgir* v. *Sriniwas* (1) already referred to ; still less can we undertake to reconsider that case or to pronounce an opinion as to whether it was rightly decided. Obviously, if upon a correct view of the law the order drawn up by the Court of the District Judge on the judgment delivered by him when he heard and determined the appeal filed by the defendant did amount to a decree, then there is no foundation for the application now before us. It would be, on the face of it, absurd for this Court to issue a direction to the District Judge to draw up a decree on the basis of a certain judgment, if, as a matter of fact and of law, such a decree had already been prepared. We must, therefore, deal with the application before us on the assumption that the order which it is desired to call in question is not a decree, but is an order of remand, whether such remand be assumed to be based upon the provisions of rule, 23 Order XLI of the Civil Procedure Code, or on some inherent power of remand exercisable by the Appellate Court independently of that rule. Looking at the matter from this point of view, it seems to us that we are really being asked to hold that the District Judge made an improper exercise of his discretion in passing this order of remand, instead of either remitting an issue under Order XLI, rule 25 of the Civil Procedure Code, or drawing up his decision on the appeal in such a form as to put it beyond boubt that the said decision was a decree and not an order of remand. Now, in the case of *Muhammad Salaiman Khan* v. *Fatima* (2), it was held, as long ago as the year 1886, that the power of superintendence vested in this Court, which is now embodied in section 107 of the Government of India Act, was not intended to authorise this Court, in the exercise of the authority so given, to interfere with and set right the orders of a Subordinate Court on the ground that such order has proceeded on an error of law or an error of fact. We approve of the principle laid down in this decision and we propose to follow it. It is, in our opinion, fatal to this present application. We dismiss it accordingly with costs.

Z. K. *Application dismissed.*

(2) 9 A. 104 ; A. W. N. (1886) 309 ; 5 Ind. Dec. (N. S.) 502.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 57 OF 1922.

September 18, 1923.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

TH. JAI INDER BAHADAR SINGH—DEFENDANT—APPELLANT

versus

TH. SHEO INDER BAHADAR SINGH—PLAINTIFF—RESPONDENT.

Taluka—Mortgage held by talukdar—Mortgage decree Property purchased by talukdar, nature of—Costs of mortgage-suit Contribution—Limitation Act IX of 1908) Sch. I, Art. 141—Mortgage—Mortgagee, interest of, whether immoveable property—Civil Procedure Code (Act V of 1908), s. 66, scope of—Suit by beneficial owner against auction-purchaser, maintainability of. [p. 395, col. 1]

When the holder of a *taluqa* brings suits to enforce mortgages held by his predecessor and in execution of the mortgage-decrees purchases the mortgaged properties, the properties cannot be considered as accretions to the *taluqa* property but must be treated as properties governed by the personal law of inheritance of the original mortgagee and his other heirs under that law are entitled to recover their shares in the properties subject to the payment of their proportionate shares of the costs of the mortgage suits. [p. 396 .]

Rajindra Bahadar Singh v. *Raghubans Kumar*, 48 Ind. Cas. 218; 21 O C 106; 24 M. L. T. 282 ; 5 O. L. J. 401 ; 8 L. W. 570 ; 40 A. 470; (1918) M. W. N. 831; 28 C. L. T. 456 ; 23 C W N. 101 ; 20 Bom. L R. 1075 ; 45 I. A. 134 (P C) ; *Rajindra Bahadar Singh* v. *Raghubans Kumar*, 11 O. C. 206 ; *Bandhu Ram* v. *Chintamon Singh*, 66 Ind. Cas. 402; 26 C. W. N. 406 ; 8 A. L. T. 205 ; 20 A. L. J. 495 ; (1922) A. I. R. (P.C.) 215, *Ganga Sahai* v. *Kesri*, 30 Ind Cas. 265 ; 42 I. A. 177 ; 19 C. W. N. 1175 ; 18 M. L. T. 203 ; 29 M.

TH. JAI INDER BAHADAR SINGH *v.* TH. SHEO INDER BAHADAR SINGH

L. J. 829 ; 2 L. W. 837 ; 13 A. L. J. 999 ; 17 Bom. L. R. 998 ; 37 A. 545 ; 22 C. L. J. 503 ; (1915) M. W. N. 718 (P. C.), followed

Amina Bibi v. *Najmunnissa Bibi*, 27 Ind. Cas. 712; 37 A. 238 ; 13 A. L. J 255 ; *Abdul Ghaffar* v. *Nur Jehan Begam*, 29 Ind. Cas. 817 ; 37 A. 434 ; 13 A. L. J. 686, distinguished.

The interest of a mortgagee in the property mortgaged is immoveable property for the purposes of Article 141 of Schedule I to the Limitation Act. The provisions of section 66 of the Civil Procedure Code were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchases. [p. 397, col. 2]

Ganga Sahai v. *Kesri*, 30 Ind. Cas. 265 ; 42 I. A. 177 ; 19 C. W. N. 75 ; 18 M. L. T. 203 ; 29 M. L. J. 829 ; 2 L. W. 837 ; 13 A. L. J. 999 ; 17 Bom. L. R. 998 ; 37 A. 545 ; 22 C. L. J. 503 ; (1915) M. W. N. 718 (P. C.) ; *Bodh Singh Doodhooria* v. *Ganesh Chander Sen*, 12 B. L. R. 817 ; 19 W. R. 366 ; 3 Sar. P. C. J. 253, followed.

Appeal against the decree of the Sub-Judge of Khuri, dated the 27th May 1922.

Messrs. *Ishri Pershad* and *Saliq Ram*, for the Appellant.

Messrs. *Basudeo Lal* and *Sita Ram*, for the Respondent.

JUDGMENT.—After the confiscation of Oudh following the Mutiny of 1857, the *Taluq* of Mahewa situate in the District of Kheri was granted by the British Government to Thakur Balbhaddar Singh under the *Sanad* of the 19th October 1859, and was in his possession till his death which occurred on the 12th December 1898. His brother, Sheo Singh, then obtained possession of the estate and mutation of names was effected in his favour in the Revenue Records. Thereupon Balbhaddar Singh's widow, Rani Raghubans Kuar, instituted a suit in the Court of the Subordinate Judge of Sitapur for recovery of the possession of the *taluqa* and some other properties against Sheo Singh. Rani Raghubans Kuar succeeded in both the Courts in India. Sheo Singh preferred an appeal against the decree of this Court to His Majesty's Privy Council. His appeal was allowed in 1905. The judgment of their Lordships of the Privy Council is reported in *Sheo Singh* v. *Raghubans Kunwar* (1), Sheo Singh died during the pendency of the appeal before the Privy Council. His eldest son, Rajindra Bahadur Singh, was substituted as the appellant in place of his deceased father. The Privy Council decree granted a declaration "that the *taluqa* Mahewa, as constituted at the date of the *Sanad*, with accretions (if any) or properties (if any) appurtenant to the *taluqa*, has passed to the appellant, and that, as to any other property of the deceased, the decrees of the Courts below are not affected." To determine what property fell under one category and what under the other the case was remitted for inquiry to the Courts in India. The inquiry was accordingly made and was finally disposed of by their Lordships of the Privy Council by their judgment of the 25th February 1918 in *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (2). The properties now in suit were not the subject-matter of the inquiry then conducted.

It appears that Thakur Balbhaddar Singh held a large number of mortgagees of immoveable property. Some of these mortgages were put in suit by Rani Raghubans Kuar and decrees were obtained thereon. Rani Raghubans Kuar died on the 23rd July 1910. On her death the reversionary heirs of Thakur Balbhaddar Singh, in respect of the non-*taluqdari* property, were the sons of Sheo Singh, namely, Rajindra Bahadur Singh, Sheo Indir Bahadur Singh, Mahendra Bahadur Singh and Narindra Bahadur Singh. Rajindra Bahadur Singh put other mortgages held by Thakur Balbhaddar Singh in suit, obtained decrees thereon and proceeded to execute those decrees as well as the decrees which Rani Raghubans Kuar had obtained in her lifetime, reference to which has already been made. In execution of both classes of the decrees the mortgaged properties were put to sale and purchased by Rajindra Bahadur Singh. Rajindra Bahadur Singh died in October 1912. The defendant-appellant, Jai Indra Bahadur Singh, succeeded to the estate under the Will of Rajindra Bahadur Singh, dated the 14th

(1) 32 I A 203; 2 C L. J. 194; 27 A. 634; 9 C. W. N. 1009; 15 M. L J. 352; 8 O. C. 317 (P. C.).

(2) 48 Ind. Cas. 213; 21 O. C. 106; 24 M. L. T. 282; 5 O L. J. 401; 8 L. W. 570; 40 A. 470; (1918) M. W. N. 831; 28 C. L. J. 456; 28 C. W. N. 101 ; 20 Bom. L. R. 1075; 45 I. A. 134 (P. C.).

June 1907. He was a minor at the date of the succession and, consequently, his estate came under the superintendence of the Court of Wards. Sheo Indir Bahadur Singh is the plaintiff in the suit, out of which this appeal has arisen, and is the father of the defendant-appellant. The plaintiff claims a one-fourth share in the properties purchased in execution of the mortgage-decrees on the basis of his title to that share in the non-*taluqdari* property of Thakur Balbhaddar Singh which fell into the possession of himself and his other three brothers on the death of Rani Raghubans Kuar. This claim was resisted by the defendant-appellant. The grounds of defence will appear from the issues framed by the Court below. They were, —

1. Is the plaintiff entitled to the share claimed in the property in suit as reversioner to Thakur Balbhaddar Singh under the Hindu Law ?

2. Is the suit or any part of it barred by limitation ? If so, what part ?

3. If the claim for plaintiff's share in any property is decreed, is the defendant entitled to any amount by way of contribution to the costs of the suits by which the properties were acquired ? If so, to what amount ?

4. To what amount of mesne profits, if any, is the plaintiff entitled ?

5. Is the suit barred by O. II, r. 2, Schedule I, of the Civil Procedure Code ?

All these issues were decided by the Court below in favour of the plaintiff-respondent and inquiry into the amount of mesne profits was directed to be made later under O. XXV, r. 12 of the Code. A decree was accordingly made by that Court in favour of the plaintiff except with reference to the properties mentioned in paragraphs 14 and 15 of the plaint and which are items 4 and 5 in the list of properties attached to the plaint. In respect of these two items the suit has been dismissed for the reason that the plaintiff gave up his claim with regard to them. There is no cross-appeal relating to those items before us.

The subject-matter of issue No. 5 quoted above was not argued before us by the learned pleader for the appellant. The decision of the Court below on issues 1, 2 and 3 was challenged. It was argued, in the first instance, that the plaintiff was not entitled to any share in the property though he would be entitled to a share in the money for which they were purchased if that claim were not barred by limitation. The learned Subordinate Judge opens in his judgment the discussion of issue No. 1 with the following remarks : — "The only question raised under this issue is whether the property in suit is to be considered as accretion to the *taluqa* property and is, therefore, to be governed by the terms of the *Sanad* or whether it is to be treated as property governed by the Hindu Law of inheritance. Parties are agreed that the plaintiff has no title in the former case and that he has a title in the latter case." He decided, on the authority of the decision in the case *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (3), that the properties in suit cannot be treated as accretion to the *Sanad* property. To the authority relied upon by the learned Subordinate Judge may be added the decision of their Lordships of the Privy Council in the case of *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (3), already referred to In this decision their Lordships approved of the opinion expressed by Mr. (afterwards Sir Edward) Chamier in the case reported in 11 Oudh Cases 256 (3). In the appeal before us, the decision of the learned Subordinate Judge on this point was not challenged. It follows that the title to the properties in suit is regulated by the Hindu Law of inheritance, and it would seem that, in virtue of the agreement of the parties referred to by the learned Subordinate Judge in the quotation given above, nothing remains to be said against the title of the plaintiff-respondent to the one-fourth share in those properties. The argument of the learned pleader for the appellant is a clear attempt to go behind the said agreement. On the merits of the argument, we have no hesitation in coming to the conclusion that the plaintiff is entitled to a one-fourth share in the properties in suit. The mortgages, which eventually resulted in the acquisition of these properties were admittedly owned by Thakur Balbhaddar Singh and on his death they devolved by right of inheritance under the Hindu Law on his widow, Rani Raghubans Kuar. The fact that Rani Raghubans Kuar and the defendant's

(3) 11 O. C. 256.

father, Rajendra Bahadur Singh, had obtained decrees on those mortgages and the latter had purchased the mortgaged properties at auction-sales in execution of those decrees does not affect the plaintiff's title which arose on the death of Rani Raghubans Kuar. The title to those properties must depend on the nature of the title which the plaintiff had in the mortgages themselves. That he acquired a title in those mortgages on the death of Rani Raghubans Kuar as one of the reversioners of the estate of Thakur Balbhaddar Singh cannot be doubted.

The learned pleader for the appellant relied on two decisions of the Allahabad High Court in the cases of *Amina Bibi* v. *Najm-un-Nissa Bibi* (4) and *Abdul Ghaffar* v. *Nur Jahan Begam* (5). They were both cases of simple money decrees in execution of which properties of the judgment-debtors were attached, put up to sale, and purchased. We do not think that those decisions can be any guide in the determination of the question before us. The whole argument of the learned pleader for the appellant is answered by two recent decisions of their Lordships of the Privy Council, the second of which has a marked analogy with the case before us. The first one is the case of *Bandhu Ram* v. *Chintamon Singh* (6). In that case a simple money bond stood in the name of Raj Dhari, a member of a joint family. Raj Dhari was one of the three sons of Chandan Singh. After the date of the bond, partition took place at which the three sons of Chandan Singh took a one-third share each but remained joint. Later, there was a separation amongst the sons of Chandan Singh. After this seperation had taken place, Raj Dhari bought the property then in suit in execution of a decree on the bond which stood in his name. Subsequently, Raj Dhari sold the property to the defendant, who was the appellant before their Lordships of the Privy Council. Raj Dhari's brother then instituted the suit, out of which the appeal arose, for recovery of one-third of the property bought by Raj Dhari. Their Lordships, having held that the consideration for the bond which eventually resulted in the decree in execution of which Raj Dhari had purchased the property in suit was joint family property, decreed the suit for possession. The second case is that of *Ganga Sahai* v. *Kesri* (7). In that case the claim was for a share in property purchased under a sale held under a mortgage-decree on the ground that one-third of the amount advanced on the mortgage transaction belonged to the claimant's ancestor, Bahadur Singh. In delivering the judgment of the Privy Council, Mr. Ameer Ali said : "Their Lordships agree with the Courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one-third share of the properties purchased by him in execution of the joint mortgage decree." It need hardly be said that the fact of there having been a joint decree on the mortgage in that case makes no difference in principle. The present case is one where the mortgages originally stood in the name of a person whose heirs the present parties are. We, therefore, reject the argument..

It was next urged that the learned Subordinate Judge was wrong in applying Article 141 of the first Schedule of the Indian Limitation Act to the plaintiff's suit and that the Article applicable is 62 of the same Schedule. This argument rested on the ground that the plaintiff was not entitled to any share in the properties in suit and, consequently, Article 141, which relates to the recovery of immoveable property, was inapplicable. But we have already held that the plaintiff is entitled to a one-fourth share in the immoveable properties in suit. To this may be added that the interest of a mortgagee in the property mortgaged is immoveable property. So the plaintiff had all along a title in immoveable property. This title did not and could not fall into possession earlier than the death of Rani Raghubans Kuar. We are, therefore, of opinion that the learned Subordinate Judge was right in applying Article 141 to this suit.

On the question of title, it was lastly contended by the learned pleader for the appellant that he was protected by the provisions of section 66 of the Code of Civil Procedure, his predecessor having acquired the properties,

(4) 27 Ind. Cas. 712 ; 37 A. 238 ; 18 A. L. J. 255.
(5) 29 Ind. Cas. 347 ; 37 A. 434 ; 18 A. L. J 686.
(6) 66 Ind. Cas. 402 ; 26 C. W. N. 406 ; 8 P. L. T. 295; 20 A. L. J. 495 ; (1922) A. I. R. (P. C.) 215.

(7) 30 Ind. Cas. 265 ; 42 I. A. 177 ; 19 C. W. N. 1175; 18 M. L T. 208; 29 M. L. J. 329; 2 L. W. 887 ; 18 A. L. J. 999 ; 17 Bom. L. R. 998 ; 37 A. 545 ; 22 C. L. J. 508 ; (1915) M. W. N. 713; (P. C.)

in which the plaintiff now claims a share, at auction-sales and having obtained certificates in respect of those sales from the Court. This contention may well be answered in the language of their Lordships of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (7) already referred to: "In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchases. An example of this will be found in the case of *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen* (8), decided by this Board in 1873." We accordingly overrule this contention. On the question of title, therefore, the conclusion at which we arrive is that the decree of the learned Subordinate Judge awarding possession to the plaintiff-respondent over a one-fourth share in the properties in suit except the items Nos. 4 and 5 mentioned in the list attached to the plaint is correct.

The last point urged in appeal related to issue No. 3. We have already mentioned that some of the decrees were obtained by the Rani Raghubans Kuar. They are mentioned in paragraphs 21 and 22 of the plaint. In respect of the costs of these decrees the defendant claimed a contribution from the plaintiff to the extent of Rs. 5,179-2-0. The learned Subordinate Judge rejected this claim on the ground stated by him in the last paragraph of his judgment, printed at page 22 of part I of the Paper Book. This decision is not challenged before us though it was the subject-matter of ground No. 6 in the Memorandum of Appeal.

Now remains the defendant's claim in respect of contribution to the costs of the suits brought by Rajindra Bahadur Singh. This claim was also rejected by the learned Subordinate Judge but it has been urged in grounds Nos. 9 and 10 of the Memorandum of Appeal. We think that the decision of the learned Subordinate Judge cannot be maintained in this respect. The grounds on which he has acted seem to be two: 1. That the defendant's as well as the plaintiff's estate in the non-*taluqdari* property was under the administration of a Receiver from the time of Rani Raghubans Kuar's death up to some date in 1920 and the Court of Wards entered into possession of the defendant's estate soon after the death of Rajindra Bahadur Singh. The Manager of the Court of Wards was also the Receiver of the property and the administration of both classes of the properties was carried on by the same staff and establishment. The learned Subordinate Judge does not express himself in that manner but what he means is, that the plaintiff's share in the reversionary estate being in the same hands as that of the defendant's estate, it is difficult to reach the conclusion that the expenditure in the suits on the mortgages were incurred only out of the defendant's money. The second ground is that Rajindra Bahadur Singh had been allowed costs of the suits which he had brought against the judgment-debtors and in cases where he has recovered such costs either out of Court or by execution through Court there is no reason to compel the plaintiff to make any contribution to the costs of such cases.

As to the first ground, our opinion is that the facts on which it rests do not lead to the conclusion at which the learned Subordinate Judge has arrived. It is admitted that Rajindra Bahadur Singh instituted the suits on the mortgages, obtained decrees in those suits, put them into execution and the properties were finally sold thereunder and purchased by him: *ex facie* he must be presumed to have incurred all the necessary expenditure relating to those proceedings and the defendant as his heir, would be entitled to call upon the plaintiff to make a contribution in respect of that expenditure in proportion to his share in the properties. It would, of course, be open to the plaintiff to show that he or his estate has already made the contribution in full or in part but so long as that is not proved the defendant is certainly entitled to an order for contribution.

As regards the second ground, it may be a reasonable one for the reduction of the claim for contribution but it is certainly not a ground for the total rejection of it. If Rajindra Bahadur Singh has recovered any costs of the

(8) 12 B. L. R. 317; 19 W. R. 356; 3 Sar. P. C. J. 253.

suits which he had brought, from the judgment-debtors of those suits either out of Court or by execution through Court, the defendant's claim for contribution will be reduced by the amount or amounts so recovered and this, on the face of it, is a matter calling for an inquiry.

On these grounds we affirm the decree of the Court below for possession of a one-fourth share in the properties mentioned above in favour of the plaintiff. We further direct that an inquiry be made into the claim of contribution made by the defendant on the lines indicated above. As the parties had had an opportunity to produce evidence in this behalf no fresh evidence will be admitted. This inquiry may be conducted on the materials on the record along with the inquiry into the amount of mesne profits to which the plaintiff is clearly entitled and the result of both the inquiries will be embodied in a final decree to be hereafter prepared by the Court below. The amount of mesne profits and the amount of contribution will be set off against each other and the excess, if any, will finally be ordered to be paid by the party who may be found to be liable for it. The record of the case will be sent down to the Court below for this purpose. The respondent will have his costs of the appeal in this Court and the appellant will bear his own costs. The order of the Court below as to the costs in that Court will stand.

Z. K. *Decree affirmed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 333-B OF 1922.

October 26, 1923.

Present:—Mr. Kinkhede, A. J. C.

TULSIRAM—APPELLANT

versus

TUKARAM AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872) s. 116—Estoppel—Mortgagor, whether can deny title to property mortgaged—Mmortgagee aware of defect in mortgagor's title—Fraud—Burden of proof—Findings based on conjectures—Facts twisted to suit law—Registration Act (XIV of 1903), s. 28—Title of mortgagor in dispute—Sub-Registrar, whether has jurisdiction to go into question of title—Refusal to register because title defective—Knowledge of parties that title is disputed, whether affects legality of deed—Presumption as to knowledge of law.

In a mortgage-suit, the mortgagor is estopped from pleading that he had no title to the property mortgaged at the date of the mortgage [p. 399, col. 1.]

The plea of estoppel is not, however, available to the mortgagee if he is proved to have been aware of the actual state of facts as regards the mortgagor's title to the property. [p. 399, col. 1.]

The law presumes good faith in every transaction, and fraud and collusion are exceptions. The burden, therefore, of proving invalidating circumstances such as these lies on the party who affirms them. [p. 400, col. 1.]

Conjectures do not supply the place of evidence and, in the absence of evidence, a Court cannot base its decision on mere conjectures. [p. 400, col. 1.]

Every man must be presumed to have known the law and to have acted for his benefit.

The province of a Judge is first to find facts and then to apply the law to those facts and not to twist the facts to suit the law. [p 400, col. 2.]

The requirements of section 28 of the Registration Act are all that have to be complied with; if any portion of the property to which the document relates is situate within the jurisdiction of the Sub-Registrar where the deed is registered, that being sufficient to give him jurisdiction, it is not the province of the Sub-Registrar to enquire or investigate into the title of the mortgagor or vendor or others presenting the documents to registration and to refuse admitting them to registration on the ground of want of title of the executants. [p. 401, col. 1.]

The knowledge of the parties to a document that the title of the executant is in dispute, does not affect the validity of the document and the Sub-Registrar has no jurisdiction to refuse registration on that ground. [p. 401, col. 2.]

Appeal against the decree of the District Judge, Amraoti, dated 25th March 1922 in, Civil Appeal No. 168 of 1921.

Mr. *G. R. Pradhan*, for the Appellant.

Mr. *V. R. Pandit*, R. B., for the Respondents.

JUDGMENT.—Plaintiff-appellant's suit based upon a mortgage dated 19th May 1909 has been dismissed on the ground that the deed was not duly registered. This question of registration depended upon the decision of two questions, (1) whether at the date of the mortgage the mortgogor was the owner of 1 acre of land of Mouza Wadali which, along with other fields, was given as security, and (2) whether the mortgagee was then aware of the want of mortgagor's title. There is no dispute as to the existence of that item of property. It is situate at Mouza Wadali in Akot Taluq while the bulk of the other property comprised in the security is situate in

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Daryapur Taluq. The document was written, signed, attested and registered at Akot on 19th May 1909. The original mortgagor as also the original mortgagee are both dead. The present suit had been instituted by the original mortgagee's son against the mortgagor's husband's brother who inherited the mortgaged property and against transferees from the mortgagor's husband. The following preliminary issues will give an idea of the pleadings urged by the defendants :—

"1. Whether the mortgagor had no title to the field Survey No. 21, 1 acre.

"2. Whether it was included in the mortgage to practise fraud upon registration.

"3. Whether the mortgagee was aware of the fraud if any."

The findings of the first Court may be summed up as under,—

(1) that Gopi, the mortgagor, had no title to the said 1 acre of land of Survey No. 21 of Wadali on the date of the mortgage in suit ;

(2) that Gopi did not really intend to mortgage that 1 acre as he had no title to it, and that the said 1 acre was included in the mortgage merely with a view to have the deed registered at Akot :

(3) that there is no direct evidence to prove that the mortgagee was a party to the fraud, but that there were facts from which inference of fraud could reasonably be drawn, and that the inclusion of the item of property situate at Wadali was intended to be fictitious and that the mortgagee was aware of the intended fraud at the date of the mortgage.

The result was that the plaintiff's suit was dismissed with costs. The appeal to the District Judge was disposed of in a meagre judgment. The findings of the lower Appellate Court are as under,—

(1) that the whole field Survey No. 21 had been transferred and that nothing remained in possession of Mt. Gopi at the time of the mortgage in suit ;

(2) that there is no direct evidence that the mortgagee was aware of the fraud, but the device seemed to be such an obvious one that the Court thought itself bound to hold that the mortgagee knew of it. In other words, that both the mortgagor and mortgagee were aware of the fact that Gopi was not in possession of any part of Survey No. 21 of Wadali at the date of the execution of the mortgage in suit.

Plaintiff has come up in second appeal. I am clearly of opinion that, so far as the finding on the question of mortgagor Gopi's title to the 1 acre of Survey No. 21 of Mouza Wadali is concerned, it is based on evidence both oral and documentary, and I am precluded from interfering with it in second appeal. But the question still remains whether, in spite of this, she believed that she had a claim to that land and, therefore, she and her husband dealt with that property as if it was her or his property, and they had subsisting interest therein.

As regards the finding about the mortgagor and mortgagee having intended to practise fraud on the Sub-Registrar, I must at once say that I am not prepared to accept it. There is, as admitted by the Courts below, absolutely no evidence. Moreover, the mortgagor, the mortgagee and the writer of the mortgage-deed in suit are all dead ; there is nothing in the present state of the record to show that the attesting and identifying witnesses who might presumably have thrown some light are still in existence or have not become incapable of giving evidence.

In a mortgage-suit the mortgagor is not allowed to deny his own title to the property. He is estopped from pleading that he had no title to the property at the date of the mortgage. This estoppel is based upon the principle that the mortgagee having, on the faith of the representation of the mortgagor that he had a good transferable interest in the property he purported to mortgage, advanced money on the security of the property he could not be prejudiced by any subsequent plea of want of title by the mortgagor. But if the mortgagee is proved to be well aware of the actual state of facts as regards the mortgagor's title to the property, then the plea of estoppel is not available to him. This itself shows that, whoever wants to get out of the estoppel must establish knowledge on the part of the mortgagee of the defect in the mortgagor's title, otherwise the estoppel will preclude proof of

want of title, in a mortgage-suit. The law presumes good faith in every transaction and fraud and collusion are exceptions. The burden, therefore, of proving invalidating circumstances such as these lies on the party who affirms them. The burden of proof, therefore, lay on the defendants to prove that the mortgagor Gopi had communicated her intention to the mortgagee to deceive the Sub Registrar into admitting the document to registration by mentioning in it an item of property not belonging to her but situate within his jurisdiction, and further that both collusively induced the Sub-Registrar to admit the document to registration. If evidence is wanting to prove this fact I fail to see how a Court of Justice can base its decision on mere conjectures Conjectures do not supply the place of evidence. There may be ground for suspicion and Gopi's conduct in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. *Mina Kumari Debi* v. *Bijoy Singh Dudhisi* (1) The Court will not be justified in drawing inferences adverse to the mortgagee and impute to him knowledge of facts which will invalidate his document unless the party relying on such facts has laid any foundation for their application. The law's presumptions cannot be lost sight of. Every man must be presumed to have known the law and to have acted for his benefit. A mortgagee will not deliberately or knowingly take an invalid security or be a party to a collusive or fraudulent arrangement which might recoil on himself. The ordinary course of human conduct is entirely against imputation of such an intention. The mere circumstance that the item of 1 acre was worth Rs 25 and, therefore, did not in itself afford ample security to the mortgagee ought not to make any difference in principle. Merely because the mortgagor may have, with a view to deceive a Sub-Registrar, adopted a certain device in the year 1900 in connection with certain transactions with certain persons, there is no presumption that she must have necessarily acted in the same manner in connection with another transaction of a different nature with a different individual eight years thereafter. It does not also follow that the other party to the transaction also shared her intention to deceive the Sub-Registrar and thus agreed to lose the benefit of his own valuable security for the purpose of merely avoiding the inconvenience of a journey to a more distant place for registration. It is incompatible with ordinary common sense and course of human conduct to expect a man to risk his money like this. No one would try to deceive himself however willingly he may become an instrument for deceiving third persons. Under these circumstances, I will presume that the representations contained in the recitals in the mortgage-deed in suit were true, and were believed to be true by the mortgagee, and that he acted upon that belief.

The following extracts from the first Court's judgment will show how artificially the facts of the case have been twisted to suit the law laid down by the Privy Council in *Harendra Lal Roy Chowdhri* v. *Haridasi Debi* (2):—

> "The above findings show that the case clearly falls within the rule laid down by the Privy Council in *Harendra Lal Roy Chowdhri* v. *Haridasi Debi* (2), and is on all fours with *Urkudya* v. *Doma* (3). For the plaintiff reliance is placed on *Pahladi Lal* v. *Musammat Laraiti* (4) and on *Dirg Pal Singh* v. *Pahladi Lal* (5), which do indeed show that in order to bring a case within the principle of the Privy Council ruling above referred to it must be shown that the mortgagee was a party to or was cognisant of the fraud. I have, however, found that this condition, too, has been fulfilled in the present case. I hold, therefore, that registration of the mortgage in suit is invalid and consequently the mortgage is invalid."

The province of a Judge is first to find facts and then to apply the law to those facts, and not to twist the facts to suit the law.

(1) 40 Ind. Cas. 242 ; 44 C 662 at. p. 672 ; 1 P. L. W. 425 ; 5 L. W. 711 ; 32 M. L. J. 425 ; 21 C. W. N. 585 ; 21 M. L. T. 314 ; 15 A. L. J. 382 ; 25 C. L. J. 508 ; 19 Bom L. R. 424 ; (1917) M. W. N. 478 ; 44 I. A. 72 (P. C.).

(2) 23 Ind. Cas. 637 ; 41 C. 972 ; 19 C. L. J. 424 ; 27 M. L. J. 80 ; (1914) M. W. N. 462 ; 16 M. L. T. 6 ; 18 C. W. N. 817 ; 1 L. W. 1050 ; 16 Bom. L. R. 400; 12 A. L. J 774 ; 1 I. A. 110 (P. C.).

(3) 50 Ind. Cas. 764 ; 15 N. L. R 75.

(4) 48 Ind. Cas. 200 ; 41 A. 22 ; 16 A. L. J. 871.

(5) 54 Ind. Cas. 528 ; 42 A. 176 ; 18 A. L. J. 187; 2 U. P. L. R. (A.) 99.

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(6) As pointed out in *Pahladi Lal* v. *Musammat Laraiti* (4) and *Musammat Ram Dai* v. *Ram Chandrabali Debi* (6) the requirements of section 28 of the Registration Act are all that have to be complied with : if any portion of the property to which the document relates is situate within the jurisdiction of the Sub-Registrar where the deed is registered, that is sufficient to give him jurisdiction. It is not the province of the Sub-Registrar to enquire or investigate into the title of the mortgagor or vendor or of others presenting documents to registration and to refuse admitting documents to registration on the ground of want of title of the executants. In the Privy Council case the item of property was non-existent within the jurisdiction of the Sub-Registrar who registered the deed and that circumstance was treated as an index of the intention of both the parties to deceive the Sub-Registrar. Such is not, however, the case here. That case is easily distinguishable from the present one, firstly, because the 1 acre of Survey No. 21 of Wadali is situate within the jurisdiction of the Sub-Registrar of Akot and, secondly, because the executant, although she may have no title or her title may have become extinct, still she presumably believing that she had a subsisting title to that item of property, actually represented to her transferee that she had it, and induced the latter to advance money on the faith of that title, and the latter in his turn, acting upon that belief permitted its inclusion in the property sought to be transferred by the instrument. If the recital in the deed had been false in the sense that it falsely described certain property as *existent* within the jurisdiction of the Sub-Registrar whereas, as a matter of fact, it did not so exist or was not situate within his jurisdiction, that recital might have been a fraudulent recital as against the Sub-Registrar, because, but for that representation through the medium of that recital, the Sub-Registrar would not have been induced to accept the deed for registration. Can it be argued with any show of reason that, if a person who lays claim to a certain item of property which is in the possession of trespassers, but who having no funds to fight out his case, executes a sale-deed in favour of a financer and inserts in the deed to be registered words to the effect that his title to one of the items of the property is disputed and was denied by the trespassers in possession within 12 years and, therefore, he is in a hurry to file the suit within 12 years of such denial, the Sub-Registrar will be in a position to refuse to admit the deed for registration although the requirements of the provisions of section 28, Indian Registration Act, are duly complied with. I am clearly of opinion that the Sub-Registrar will have no jurisdiction to refuse registration on that ground. Both the parties enter into the transaction with full knowledge of the fact that the title of the vendor to one of several items of property situate within the jurisdiction of the Sub-Registrar is likely to be the subject of a very serious litigation and may turn out to be of no avail to the vendee and, therefore, he may have to run a great risk in taking a conveyance regarding it, but that is no ground for holding that, because the parties are aware of such defect in the title of the executant, the validity or otherwise of the deed should in any way be affected thereby. The document must operate against such interest as the executant may then have in the property covered by the deed. I am fortified in this view by the rulings of the Allahabad, Calcutta, Madras and Patna High Courts reported in *Pahladi Lal* v. *Musammat Laraiti* (4), *Dirgpal Singh* v. *Pahladi Lal* (5), *Kunhi Sankaran Nambiar* v. *Narayanan Tirumunpu* (7), *Brojo Gopal Mukerjee* v. *Abhilash Chandra Biswas* (8), and *Musammat Ram Dai* v. *Ram Chandrabali Debi* (6).

The case of *Urkudya* v. *Doma* (3) is easily distinguishable from the present case. In that case the mortgagee was examined as a witness and the Court gave a clear finding based on evidence that the mortgagee *knew* the mortgagor's intention to practise fraud. In view of the finding that, even though Gopi's intention in including the item of 1 acre of Wadali in the mortgage-deed may have been to practise deception still that intention was not shown to have been shared by the mortgagee, the case does not fall within the purview of the Privy Council ruling on which the case in *Urkudya* v. *Doma* (3) is based.

(6) 52 Ind. Cas. 446 ; 4 P. L. J. 433.

(7) 55 Ind. Cas. 86 ; 43 M. 405 ; (1920) M. W. N. 205 ; 11 L. W. 192 ; 38 M. L. J 251.

(8) 5 Ind. Cas. 127 ; 14 C. W. N. 582.

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For those reasons I set a side the dismissal of the suit and remand the case for trial on the merits.

The appellant will get costs of this appeal from the respondents who will bear their own. All the Costs of the lower Appellate Court and of the Court of first instance hitherto incurred other than Court fee on the plaint shall be paid by the defendants respondents who will bear their own. The Court fee on the plaint shall abide the event.

G. R. D. and S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 379 OF 1920.

January 22, 1924.

Present :—Mr Justice Kanhaiya Lal and Mr. Justice Stuart.

Babu KANHIYA LAL—DEFENDANT-APPELLANT

versus

ASHRAF KHAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 11, expl. IV —Suit to protect property from sale as wakf, *dismissal of—Suit, subsequent, on basis of personal right*—Res judicata.

It is not obligatory on a party seeking to protect certain property as *wakf* property from an impending sale, to assert in the same suit any personal right thereto, to which he may afterwards find himself entitled, in case the property is not found to be *wakf* property, and the omission to set up a personal right in the suit does not operate as *res judicata* in a subsequent suit in which such a right is set up. The identity of the causes of action for the two suits is immaterial. [p. 403, Col. 1.]

Ali Moidin Ravuthan v. *Elayachanidathal Kombi Achen*, 5 M 249; 6 Ind. Jur. 463; 2 Ind. Dec. (N. S.) 167, relied on.

Second appeal against the decree of the District Judge of Allahabad, dated the 28th January, 1920.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.

Kanhaiya Lal, J.:—The dispute in this appeal relates to a house which was mortgaged along with another house by Najabat Khan in favour of the defendant-appellant and his brother Madho Prasad in 1892. On the death of Madho Prasad his interest devolved on the defendant-appellant. The defendant-appellant brought a suit to enforce his mortgage and got a decree for sale against the present defendants Nos. 2 to 6 as the heirs of Najabat Khan and in execution thereof he got the two houses aforesaid put up to sale.

A suit was then brought by the present plaintiffs-respondents other than Musammat Umda Bibi for a declaration that the house now in dispute was used as an *Imambara* and was *waqf* property; that the other house was his exclusive property by inheritance from Fateh Khan, and that neither of those houses was liable to sale in execution of the above decree. That suit was dismissed in regard to the house now in dispute on a finding that it was not proved to be *waqf* property, but decreed in regard to a share in the other house which was found to be the property of Fateh Khan, the common ancestor of the then plaintiffs and the mortgagor.

The present suit has been filed by the same plaintiffs and a lady named *Musammat* Umda Bibi for the protection of their interests in the house, which was previously described as *waqf* property, from the impending sale. The Courts below decreed the claim.

The first question for consideration is whether the omission of the plaintiffs other than *Musammat* Umda Bibi to set up the title, now sought to be enforced in the previous suit operates as a bar to the present claim. In the previous suit the then plaintiffs sought to protect the entire house in question on the ground that it was *waqf* property. They had asserted a right to offer prayers and to perform religious rites therein in their personal capacity as beneficiaries, but the object of the suit was not to protect their personal rights alone but to protect the entire house which they had described as *waqf* property. In the present suit they seek to enforce their personal interests in the said house as the heirs of Fateh Khan. They had not excluded the present house from their claim in the previous suit. In fact, they were claiming one of the houses mortgaged in their personal rights and seeking to protect the other house now

in dispute on the ground that it was a *waqf* property. Having asserted that the latter was a *waqf* property, they could not have consistently claimed the same property as their personal property except possibly in an alternative form. They were, however, not under an obligation to adopt the latter course. Section 11 of the Code of Civil Procedure requires that the decision in a previous suit would not be a bar to a decision in a subsequent suit unless the matter in issue was directly and substantially in issue in the previous suit between the same parties or between parties under whom they or any of them claim, litigating under the same title. The title set up in the previous suit was a title based on the property in dispute being treated as *waqf* property, in which the plaintiffs were interested as much as other persons entitled to offer prayers therein. In the present suit they are claiming a personal title in themselves as the heirs of Fateh Khan. Explanation 4 of that section provides that any matter which might and ought to have been made a ground of defence or attack in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, but it is not obligatory on a party seeking to protect certain property as *waqf* property from an impending sale to assert in the same suit any personal right thereto, to which he may afterwards find himself entitled, in case the property in question is not found to be *waqf* property. It is immaterial whether they could have joined in the previous suit an alternative claim for the protection of the personal share they are now seeking. There was no obligation to join the two claims and their omission to set up the present title in the previous suit does not, therefore, bar the decision of that matter in the present litigation. As observed in *Ali Moidin Ravuthan* v. *Elayachanidathil Kombi* (1), the identity of the the cause of action is immaterial. The right in which relief was claimed in the previous suit was not the same in which the relief is claimed in the present one. The former suit was brought for the protection of what was described as public property. The present suit has been brought for protection of personal or private rights. So far as the house in dispute went, the capacity in which the plaintiffs sued was not the capacity in which they are now suing, and section 11 of the Code of Civil Procedure has, therefore, no application.

The second point for consideration is, whether the claim was barred by adverse possession. It is stated that in 1865 a suit for partition was brought by one Rahamat Ali Khan, the predecessor-in-title of two of the plaintiffs, against Najaf Khan and Najabat Khan for partition of his share in the house in question, and a decree was obtained in respect of which no steps were taken to obtain execution. The finding of the Courts below, however, is that, in spite of that omission, the plaintiffs have been in possession of the disputed property and that the mortgagor or his heirs have not been in adverse possession of the same. In the face of that finding, the above contention is without any force.

The other pleas taken in the memorandum of appeal have not been pressed.

The appeal must, therefore, fail and is dismissed with costs including in this Court fees on the higher scale.

Mukerji, J.: - Assuming that the present claim might have been made as a claim in the alternative in the former suit, it is perfectly clear to my mind that it ought not to have been so added. The result of combining the two claims would have been this. In the same breath, the plaintiffs would have been under the obligation to adduce evidence that the property had been dedicated and belonged to the Almighty, and in the same breath it would have been obligatory on them to adduce evidence to show that it was nobody else's property but theirs. In claiming the property as their own they would have been obliged to trace how the property descended and what share was theirs. Thus, contradictory issues would have arisen and the trial would have been immensely complicated. It was never, therefore, desirable that the two claims should be combined. This is enough to discredit the plea of *res judicata*. I agree in the rest of the judgment of my learned brother and in the order proposed.

(1) 5 M. 239; 6 Ind. Jur. 468; 2 Ind. Dec. (N. S.) 167.

Z. K. *Appeal dismissed.*

RAM MEHR *v.* PALI RAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 907 OF 1919.

February 4, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

RAM MEHR—PLAINTIFF—APPELLANT

versus

PALI RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XLI, s. 25—Punjab Courts Act (VI of 1918) s. 41 (3)—Appeal, second—Remand, findings on—Finding of fact, whether can be questioned—Finding on question of custom—Certificate whether necessary—Custom—Ancestral property, whether liable for debts of predecessor—Mauzah Narah, Tahsil Sonepat, Rohtak District.

When the finding and evidence upon an issue of fact remanded by the High Court in second appeal under O. XLI, r. 25 of the Civil Procedure Code are returned to the High Court, the finding is conclusive and cannot be challenged on the evidence before the High Court as in the case of a first appeal. [p 404, col. 2.]

Balkishen v. *Jasoda Kuar*, 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N. S.) 908; *Nehal Singh* v. *Sewa Ram*, 40 Ind. Cas. 128; *Beni Pershad Kuari* v. *Nand Lal Sahu*, 24 C. 98; 12 Ind. Dec. (N. S.) 780; relied on.

All that is laid down in section 41 (3) of the Punjab Courts Act is that no appeal shall lie to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the lower Appellate Court. There is no provision that when once an appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing. [p, 405, col. 1.]

The provision as to a certificate is only intended to apply as a condition precedent to the filing of an appeal and not as a condition precedent to the challenging of a finding on a question of custom remanded to the lower Appellate Court. Once a second appeal has been legally instituted the appellant can contest at the hearing any findings of the lower Appellate Court which are against him, so long as he has taken exception to them in his ground of appeal. [p. 405, col. 1.]

When, therefore, an issue on a question of custom is remanded in second appeal under O. XLI r. 25 of the Civil Procedure Code, the finding on that issue recorded by the lower Appellate Court can be questioned before the High Court without a certificate. [p. 405, col. 2.]

There is no custom in village Narah, Tahsil Sonepat, Rohtak District, under which ancestral immoveable property is liable in the hands of the holder for the just debts of his predecessor. [p. 405, col. 2.]

Second appeal from the decree of the District Judge of Karnal, dated the 7th July 1919.

Mr. *Sagar Chand* and Sh. *Niaz Mohammad*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.

Scott-Smith, J.—A return has now been made by the District Judge to this Court's orders of remand of the 13th January and 11th December 1922. The finding on the first issue is in the affirmative, on the second that the plaintiff's father had not an unfettered right of alienation with regard to these properties, on the third that there is a special custom in the locality in which the parties' village is situate which makes ancestral property in the hands of the next holder liable for the just debts of his predecessor, and on the fourth that the defendant has made improvements valued as follows:—

On property B	...Rs.	2,500
On property C	"	450
On property D	"	821

At the hearing Mr. Shamair Chand on behalf of the respondent raised two preliminary points,—

(1) that findings of fact by the District Judge upon the issues remanded to him cannot be challenged before us, and

(2) that the findings as regards custom cannot be challenged without a certificate, having regard to section 41 (3) of the Punjab Courts Act.

As regards the first point, it was held in *Balkishen* v. *Jasoda Kuar* (1) that, when the finding and evidence upon issues remanded under O. XLI, r. 25, Civil Procedure Code, are returned to the High Court the finding is conclusive and cannot be challenged on the evidence before the High Court as in first appeal. The *ratio decidjendi* was, that a second appeal is not allowed on questions of fact. This was followed in a case reported as *Nehal Singh* v. *Sewa Ram* (2) and in *Beri Parshad Kuari* v. *Nand Lal Sahu* (3) same view was taken. We agree with the decisions in these cases and we hold that the findings of fact returned to us by the lower Appellate Court cannot be challenged.

(1) 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N.S.) 908.
(2) 40 Ind. Cas. 128.
(3) 24 C 98; 12 Ind. Dec. (N.S) 780.

As regards the second point, it is pointed out that under section 41 (3) of the Punjab Courts Act no appeal lies to the High Court from a decree passed in appeal by any Court subordinate to the High Court regarding the validity or the existence of any custom or usage unless the Judge of the lower Appellate Court has certified that the custom or usage is of sufficient importance, and the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal. It is urged that the finding on the 3rd issue sent down should be considered as part of the original judgment of the lower Appellate Court and that, therefore, it can not be challenged without a certificate. It was argued on the other side that the appeal was rightly instituted without a certificate because, at that time, there was no contention regarding the validity or existence of any custom. What was urged at the original hearing was that the lower Appellate Court ought to have framed an issue upon a point of custom which it had not done and we were asked to frame such an issue and remand it for trial. In our opinion the same reasons which prevent a finding of fact by the lower Appellate Court on an issue remanded to it from being challenged in this Court, do not apply to a decision on a question of custom so remanded. All that is laid down in section 41 is that no appeal shall lie to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the lower Appellate Court. There is no provision that when once an appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing. The proviso to sub-section (3) lays down that an application under sub-section (3) shall not be received after the expiration of thirty days from the date on which the decree of the lower Appellate Court was passed and this proviso, in our opinion, clearly shows that the provision as to a certificate was only intended to apply as a condition precedent to the filing of an appeal and not as a condition precedent to the challenging of a finding on a question of custom remanded to the lower Appellate Court. Once an appeal has been legally instituted in this Court the appellant can contest at the hearing any findings of the lower Appellate Court which are against him, so long as he has taken exception to them in his grounds of appeal.

This is his right and we do not think that it should be taken away from him unless there is a clear provision of the law to this effect. We do not find anything in section 41 (3) which supports the position taken up by the respondent's Counsel and we hold that the findings on a question of custom now submitted to us can be challenged in this Court.

The finding on the first issue and on the fourth issue as to the value of the improvements cannot be challenged before us ; that on the second issue is not challenged. The finding on the third issue, however, is challenged by Counsel for the appellant who urges that it has not been proved that there is any special custom in this locality which renders ancestral property liable in the hands of an heir for payment of the debts of his predecessor. In our opinion the learned District Judge has arrived at his findings on this issue on insufficient materials. He says that 13 instances have been cited by the witnesses from the locality in question in which a decree has been obtained and either executed against the immoveable property of the judgment debtor after the death of the latter without objection by his heirs or in which the heirs had compromised. The Commissioner who made a local inquiry and recorded the evidence in which these instances were referred to has pointed out that the evidence in support of them is defective. The learned District Judge says that some of them are supported by documents but Counsel has not been able to point out to us which of them are so supported and, in our opinion, they have not been properly proved. The learned District Judge also admits that many of the instances are not indeed instances of execution of a decree against ancestral landed property after the death of the original judgment debtor. Under the circumstances, we are quite unable to regard this evidence as sufficient to prove that, in the locality where the parties reside, ancestral immoveable property is liable in the hands of the next holder for the just debts of his predecessor.

We held in our original order of remand that the prior mortgages on the properties A

(8) 24 C. 98 ; 12 Ind. Dec. (N.S.) 780

and B had not been proved while those on C and D had been proved. B was a vacant site when it was mortgaged to the respondent in 1915 and he built a *pucca* house on it since that date or it is possible that he began it just at the time of mortgage and completed it afterwards. He had no right under the terms of the mortgage to build a house at a cost of Rs. 2,500 on the property of a minor and make it difficult, if not impossible, to redeem it. As regards the property C, it is clear from the old mortgage-deeds that the materials belonged to Jai Ram and it was agreed that at the time of redemption he could either remove his materials or claim the value of them. It is also probable, having regard to the evidence of Sudan, that the building was constructed prior to the mortgage of Jai Ram. The property D had been in mortgage for a great many years and the improvements thereon were also made very long ago and in the life-time of the minor's father without any objection being made by him. In our opinion the mortgagee is entitled to the value of the improvements on these two properties.

We, therefore, accept both the appeals. In appeal No. 967 we decree the plaintiff's claim conditional on payment of the mortgage-money of Rs. 300 plus Rs. 821, the value of the improvements. In appeal No. 968 we decree the claim conditional on payment of Rs. 200 mortgage, money, plus Rs. 450 the value of the improvements. Under all the circumstances of the case, we direct that the parties shall bear their own costs throughout.

Harrison, J. -I agree with the conclusions and am of opinion that in this case the finding on the third issue can be impugned at this stage without a certificate. The remand is under O. XLI, r. 25 and whether objections be presented or not, it is our duty as an Appellate Court seized with the original appeal to proceed to determine that appeal after examining the correctness of the findings on the additional issues. To this rule there is the important exception that it is not within our province to examine such findings when they deal with facts. The contention of the respondents is that, in virtue of section 41 (3) of the Punjab Courts Act, questions of custom, if unsupported by a certificate, are or must be treated as questions of fact. In a sense this is true and, for practical purposes, in second appeals findings on custom unsupported by a certificate are treated as findings of fact. The wording of the section, however, makes it more correct to say that such questions are treated as questions of law subject to the proviso regarding the certificate, and, therefore, may be said to be penalised questions of law rather than privileged questions of fact. The difference is all important. Doubtless, questions of custom may be and often are questions of fact; oftener they are questions of law, sometimes mixed questions of law and fact. Whatever may be their nature, they are all classified under section 41 of the Courts Act with questions of law and usage, which may be agitated as a matter of right on second appeal. A penal condition is then added making the presentation of a certificate an indispensable preliminary. Had the contrary procedure been adopted and had such questions been classified with questions of fact subject to privileged treatment being accorded on the production of a certificate, the position would have been very different. The finding would then have been a finding of fact unassailable until certain conditions had been observed; now it is more akin to a question of law which can be agitated as a matter of right subject always to the disabling provisions of section 41(3) so far as they may be applicable. This sub-section penalises an appeal from a decree. Here we have no decree and no appeal except the original decree from which the appeal was presented and which dealt with no question of custom. No certificate is, therefore, required. The penal condition does not in terms apply and the question can be agitated in exactly the same manner as an ordinary question of law. This result may be due to a defect in the Act with which we are not concerned for the words are clear and, in applying a penal provision, the greatest strictness must be observed.

Z. K. *Appeals accepted.*

VISVANATHAN CHETTY *v.* SOMASUNDARAM CHETTY.

MADRAS HIGH COURT.

CIVIL REVISION NO. 582 OF 1923.

November 5, 1923.

Present: —Mr. Justice Krishnan.

VISVANATHAN CHETTY —PETITIONER

versus

SOMASUNDARAM CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 4 - Defendant residing beyond Court's jurisdiction, examination of—Refusal of Court to issue commission —High Court, whether can interfere—Revision.

In a suit brought in a Court at Ramnad, the defendant applied for a commission to examine himself as his own witness. It appeared that he had been residing in Rangoon with his family for many years and was served with summons there. It appeared, further, that the plaintiff himself was a resident of Rangoon and was examined on commission there. The Court having refused to issue the commission, the defendant applied to the High Court in revision,

***Held* (1) that in these circumstances the defendant should have been allowed to be examined on commission;**

(2) that in refusing to examine defendant on commission in the circumstances of this case the Court had acted with material irregularity and it was open to the High Court to interfere in revision.

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 60; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.), followed.

Petition against the order of the District Munsif of Devacottah, dated the 16th March 1923.

Messrs. *G. Krishnaswami Iyer* and *R. Swaminatha Iyer*, for the Petitioner.

Mr. *E. Doraisami Iyer*, for the Respondent.

JUDGMENT.—In this case the District Munsif has refused to issue a commission to examine the 2nd defendant as his own witness, and the revision is against that order. The learned Munsif dismissed the petitioner's petition rather summarily without noticing the importance of the fact that the defendant was the person applying and without his attention having been drawn to the cases which show in what manner a Court should deal with an application of a defendant to examine himself as a witness on commission as distinguished from an application by a plaintiff. A reference to the case *Ross* v. *Woolford* (1) and to the case *Sarat Kumar Roy* v. *Ram Chandra Chatterji* (2) will show how a defendant's application should be dealt with. In this case a defendant has been a resident of Rangoon with his family for many years. He was served with summons there. The plaintiff himself was a resident of Rangoon and was examined on commission himself there. In these circumstances, the defendant should have been allowed to be examined on commission. The watching of his demeanour which the lower Court refers to in support of its order is not a sufficiently strong ground to justify the dragging of the defendant all the way from Rangoon to Ramnad. I would, therefore, set aside the order of the Munsif and direct him to issue a commission to examine the defendant in Rangoon as prayed by him.

It was argued that this was not a proper case for intervention in revision and reliance was placed on the observations of their Lordships in *Bala Krishn Udayar* v. *Vasudeva Aiyar* (3).

Their Lordships recognise irregular exercise of jurisdiction as a ground for interference as the section also says. I think this is a case of such irregular exercise of the lower Court's powers in examining witnesses. In refusing to examine defendant on commission in the circumstance of this case, the Court is acting with material irregularity, as it might lead to his evidence being lost to the defendant altogether. The objection that it is not open to this Court to act in revision is, therefore, overruled.

The respondent will pay the costs of the petitioner in this Civil Revision Petition but I do not interfere with the order as to costs in the lower Court.

S. D. *Revision allowed.*

(1) (1894) 1 Ch. 88; 63 L. J. Ch. 191; 8 R. 20; 70 L. T. 22; 42 W. R. 188.

(2) 68 Ind. Cas. 9; 35 C. L. J. 78; (1922) A. I. R. (Cal.) 42

(3) 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 60; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 259 OF 1923.

February 20, 1924.

Present:—Mr. Justice Dass and Mr. Justice Ross.

RAGHUBAR CHOWDHURY—APPELLANT

versus

RAMASRAY PRASAD CHOWDHURY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Mortgage—Joint liability of defendants—Mortgage decree passed ex parte against some defendants, whether can be set aside against only some defendants.

The liability of the defendants in a mortgage suit being a joint liability a decree in such a suit, passed *ex parte* against some of the defendants and on contest against the rest, is of such a nature that, under the provisions of O. IX, r 13, Civil Procedure Code, it cannot be set aside against all the defendants and not only against any particular defendant.

Appeal from the order of the Subordinate Judge of Darbhanga, dated the 10th September 1923.

Mr. *S. C. Mitter*, for the Appellant.

Mr. *Lachmi Kant Jha*, for the Respondents.

JUDGMENT.—We are obliged to allow the appeal not because there is any merit in this appeal, but because the learned Subordinate Juge has set aside the mortgage decree as against defendant No. 9.

The facts are these. The suit was on a mortgage and on the 30th of January 1923, the Subordinate Judge passed an *ex parte* decree as against defendants Nos. 1, 2, 3 and 9, and a decree as against defendants Nos. 4 to 8 on contest. The petitioner, who was cited as defendant No. 1 in the action, and defendant No. 9 made separate applications for setting aside the decree under the provisions of O. IX, r. 13 of the Code of Civil Procedure. The application of defendant No. 9 succeeded, but the application of defendant No. 1 failed. Now, the Code provides that where the decree is of such a nature that it cannot be set aside against any particular defendant, it may be set aside against all or any of the other defendants also. As I have already stated, the suit was brought on a mortgage and the liability of the defendants was a joint liability. That being so, the learned Subordinate Judge in setting aside the decree as against defendant No. 9 should have set aside the decree as against all the defendants. Strictly speaking, this point really arises in the application which was made on behalf of defendant No. 9. But the position now is this, that, although the liability of the defendants is a joint liability, the decree has been set aside as against defendant No. 9 and maintained as against defendant No. 1. The position is an impossible one.

We must allow the appeal; but, as the appellant succeeds only by reason of the fact that the application of defendant No. 9 succeeded in the Court below, he must pay the costs of this appeal to the opposite party.

S. D. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1479 OF 1923.

January 23, 1924.

WISAHIU RAM—PLAINTIFF—APPELLANT

versus

ALWAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLIII, r. 1 (4)—Remand under inherent power of Court—Appeal—Revision.

There is no appeal provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by section 151 of the Civil Procedure Code, to remand a case for retrial.

The validity of such an order can, however, be impugned in a second appeal to the High Court against any decision which may subsequently be passed by the lower Appellate Court on appeal from the decree of the Court of first instance.

The High Court will not interfere in revision in a case where there is another remedy open to the aggrieved party.

Second appeal from the order of the Subordinate Judge, Mianwali, dated the 28th May 1923.

Lala *Nawal Kishore*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand made under section 151, Civil Procedure Code. A preliminary objection is taken that no appeal lies from such an

order and *Raghunandan Singh* v. *Jadunandan Singh* (1) and *Ramchandra* v. *Narayan Lal* (2) are relied on in support of this objection. An appeal from an order of remand of course lies under O. XLIII, r. 1 (*u*), Civil Procedure Code, but the remand according to that rule must be under O. XLI, r. 23, Civil Procedure Code. There is no appeal provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by section 151, Civil Procedure Code, to remand a case for retrial. The preliminary objection prevails, and the appeal must, therefore, be dismissed with costs.

Next, it is prayed that if no appeal lies, the petition of appeal may be treated as a petition for Revision. I am unable to accede to this prayer. The petitioner can impugn the validity of the order of remand when he comes up in second appeal to this Court against any decision which may subsequently be passed by the lower Appellate Court on appeal from the decree of the Court of first instance, and there is ample authority for holding that when an aggrieved party has another remedy open, this Court will not interfere in revision.

Z. K. *Appeal dismissed.*

(1) 43 Ind. Cas. 959; 3 P. L. J. 253; P. L. W. 50.
(2) 58 Ind. Cas. 909.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 306 OF 1920.

April 24, 1924.

Present:—Mr. Raymond, A. J. C.

GORDHANDAS KALIDAS AND ANOTHER—PLAINTIFFS

versus

FIRM OF GOKAL KHATAOO—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 60 (c), O XXI, r. 46—Breach of contract—Right to sue for damages, whether debt—Attachment, whether valid—Sale—Vendee, title of.

A right to sue for damages arising out of a breach of contract is not a debt within the meaning of O. XXI, r. 46, Civil Procedure Code and is not attachable; consequently, any sale thereof under an attachment is invalid and confers no title on the vendee. [p. 410, col. 2.]

Mr. *Dipchand Chandmal*, for the Plaintiffs.

Mr. *Fatechand Assudamal*, for the Defendant.

JUDGMENT.—On the 2nd September 1917 the defendant firm of Gokaldas Khataoo contracted to sell to the firm of Miyomal Jethanand, plaintiff No. 2, 200 candies of *bajri* at Rs. 26-9-0 per candy deliverable between the 22nd April and 11th May 1918. It is alleged that the defendants committed breach of the contract which resulted in damage to the extent of Rs. 4,420-3-0 to Miyomal Jethanand. The firm of Hiranand Versimal had obtained a decree in suit No. 893 of 1918 against the firm of Miyomal Jethanand and in execution of it they attached, under O. XXI, r. 46, Civil Procedure Code, the sum due to Miyomal Jethanand by Gokaldas Khataoo. A garnishee notice was issued to the latter but they stated that there was nothing due by them to Miyomal Jethanand Hiranand Versimal proceeded to sale of the claim of Miyomal Jethanand against Gokaldas Khataoo and at the sale held by the Nazir of this Court the claim was purchased by the plaintiff No. 1 who called upon the defendants to pay up the amount due and as the latter failed to do so, this suit has been filed.

Amongst other defences to the action, the defendants urged that the right of Miyomal Jethanand to claim damages on an alleged breach of contract was not a debt within the meaning of O. XXI, r. 46, Civil Procedure Code and plaintiffs No. 1 acquired nothing by their purchase and the sale of a mere right to sue for damages is bad in law as opposed to section 60, Civil Procedure Code and conferred no right on the plaintiffs. Both the parties desired me to record my findings on the two first issues that have been raised before discussing the question as to the responsibility for the beach of the contract, and these issues are,—

(1) Has the plaintiff a right to sue?

(2) Is the sale bad as being against the provisions of section 60, clause (9), Civil Procedure Code?

Mr. Fateh Chand for the defendant contended that the claim of Miyomal Jethanand was a claim for damages arising out of a breach of contract and under section 60, clause (*c*), Civil Procedure Code "a mere right to sue for

damages " could not be attached, nor sold. He further argued that the order of the Court allowing the attachment under O. XXI, r. 46, Civil Procedure Code was a wrong order as the claim that was attached was not a debt and there being no valid attachment, the sale by the Court was infructuous and conferred no title on the purchaser.

Mr. Dipchand for the plaintiff argued that the attachment was perfectly valid as the claim was attached not as a debt under clause A of O. XXI, r. 46, Civil Procedure Code, but under clause C of the same rule as " other moveable property not in the possession of the judgment-debtor " and the sale being under an order of the Court, the Transfer of Property Act would have no application, as by the preamble and section 2 of the said Act it only relates to transfers by the act of parties as distinguished from transfers by operation of law, as, for instance, in cases of insolvency, forfeiture or sale in execution of a decree. I think Mr. Dipchand's argument is correct and the transfer in the present case cannot be impugned under the Transfer of Property Act. The point for consideration, however, remains whether the claim of Miyomal Jethanand against the defendants was not ' a mere right to sue for damages ' and thus exempted from attachment and sale by virtue of the provisions of section 60, Civil Procedure Code. Mr. Dipchand argues that a right to sue for damages arising out of a contract can be attached though it may not be assignable. There can be little doubt that the right of Miyomal Jethanand against the defendants was to sue them for damages arising out of a breach of contract. Defendants ascribe the breach of the contract to Miyomal Jethanand and allege that, owing to their embarrased circumstances, they were not in a position to fulfil the contract. And it was after the breach that the claim of Miyomal Jethanand has been attached and sold. Now the attachment of this claim as a debt under O. XXI, r. 46, clause A is certainly not justifiable for the clause refers to a debt, and, as remarked in Halsbury, Vol. 14, page 92, para. 168, " to be capable of attachment there must be in existence a debt on the date when the attachment becomes operative something which the law recognises as a debt and not merely something which may or may not become a debt", and, further, in para. 169 "the debt must be a sum certain and, therefore, a claim for unliquidated damages cannot be attached until the amount has been ascertained." Nor, in my opinion, can the attachment be validated under clause C of r. 46. O. XXI, r. 46 determines the mode in which a debt by a negotiable instrument or a share in the capital of a Corporation or other moveable property not in the possession of a judgment-debtor may be attached, and with regard to the last the attachment is to be made by a prohibitory order restraining the person in possession of the moveable property from giving it over to the judgment-debtor. Now, to describe a right to sue for damages as moveable property not in possession of the judgment-debtor and to direct its attachment would be to override the meaning of the plain words in clause E of section 60, Civil Procedure Code, exempting from attachment 'a mere right to sue for damages.' Mr. Dipchand relied on my judgment in Suit No. 931 of 1918, the *Official Assignee of the High Court of Judicature* v. *Chandumal Chimanlal* (1) as supporting his contention that the words, ' a mere right to sue for damages ' as used in section 60, Civil Procedure Code, ought to be interpreted as implying that a suit for damages arising out of a personal wrong or bodily or mental suffering cannot be attached but the right to sue for damages to the estate of a person is attachable. In this case the Official Assignee in whom the estate of an insolvent had vested filed a suit for the recovery of damages arising out of breach of contract between the insolvent and the defendant. It was argued that the right to claim damages after the breach of a contract did not vest in the Official Assignee and the suit was not maintainable. After discussing the relevant provisions of the English Bankruptcy Act and the Presidency Towns and Provincial Insolvency Acts and the authorities bearing thereon I came to the conclusion that 'all rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of debt pass to the trustee in bankruptcy, but where a cause of action arises from the bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation then the right of action remains

(1) 76 Ind. Cas. 657; 17 S. L. R. 52.

with the bankrupt.' And I consequently held that the right to claim damages arising out of the breach of contract passed to the Official Assignee on the vesting order being made. The *ratio decidendi* of this judgment was as to the property that vested in the Official Receiver on the adjudication of insolvency and not on what property is attachable. And the judgment is to be interpreted as a judgment on that point and that point alone. The question before me in the present case is, whether a right to sue for damages is attachable and to this my answer is in the negative ; and, there being no valid attachment, the sale becomes equally invalid.

My finding, therefore, on issue 1 is that the plaintiff No. 1 has no right to sue and on issue 2 that the sale is bad as being in violation of the provisions of section 60, clause E, Civil Procedure Code.

The result is that the suit stands dismissed with costs.

S. D. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 75 OF 1922.

October 22, 1923.

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

Raja MUHAMMAD SHER KHAN—PLAINTIFF—APPELLANT

versus

Raja SETH SWAMI DAYAL, AND OTHERS—DEFENDANTS—RESPONDENTS.

Practice—Appeal from preliminary decree pending—Final decree, appeal from, whether necessary.

Where an appeal from a preliminary decree is pending it is not necessary to file another appeal from the final decree. The result of the appeal in the preliminary decree would govern the final decree as well. [p. 418, col. 2.]

Appeal against the decree of the Subordinate Judge of Kheri, dated the 8th October 1922.

Mr. *Ghulam Hasan*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.—A preliminary and a final decree for redemption in a suit brought by Muhammad Sher Khan, mortgagor, are attacked in the three appeals which have been jointly heard. The litigation ending in these decrees has been long drawn out. On 9th June 1908, Muhammad Sher Khan executed a mortgage-deed of his property in favour of Raghubar Dayal, father of the defendant, Raja Seth Swami Dayal, who died during the pendency of the litigation. Under the terms of the deed, Seth Swami Dayal sued for possession of the property on 14th July 1913 ; it was decreed to him by the Subordinate Judge of Kheri and the decree upheld by this Court. He took possession on 14th February 1915. Special leave was obtained by the mortgagor, Muhammad Sher Khan, to appeal to the Privy Council against the decree of this Court. Soon after the decree of this Court was passed, Muhammad Sher Khan, mortgagor, brought a suit for redemption on 18th June 1915. This suit was dismissed as premature by the Subordinate Judge and the decree upheld by this Court on 19th June 1919. An appeal was taken to the Privy Council where both the appeals, one from the suit for possession and the other from the suit for redemption, were heard by their Lordships at the same time. It may be mentioned that when the mortgagee sued for possession the defendant-mortgagor offered to redeem the property.

It will be convenient at this stage to summarize the terms of the deed of mortgage. The mortgage at its inception was simple for a sum of Rs. 82,000 repayable at the end of 5 years. During that term interest at 9½ annas per cent. per mensem was to run with 6 monthly rests. It was stipulated in the first clause that if the interest be not paid on due date it would be added to the principal and interest at the above rate would run on the total amount of principal and interest. The second clause gave the mortgagor power to redeem the mortgaged property on payment of the entire principal, interest and compound interest after 5 years in the fallow season. The third clause gave the mortgagee option to take possession of the mortgaged property in lieu of the principal amount for a period of 12 years from the date of entering into possession in default of payment of four consecutive instalments of interest

or on the property not being redeemed at the end of 5 years, or to permit interest to run on the principal at the compound rate. Under the 5th clause the mortgagor declared that he will have no right of redemption during the period of 12 years if the mortgagee took possession. The 6th clause was as follows : — "That during the period of possession the mortgagee will appropriate in lieu of interest all the produce and profits of the mortgaged villages after payment of the Government revenue according to the present Settlement. During the period of possession, neither the mortgagee will have any claim to interest nor I, the mortgagor, to profits ; nor will there be any accounting as to shortage or surplusage of profits at the time of redemption." Clause 9 provides " that on the expiry of 12 years I shall redeem the mortgaged property on payment of principal, interest and compound interest " and other specified payments. Pending the payment of the entire demands due hereunder, the mortgagee will as usual remain in possession and occupation of the mortgaged property in accordance with the above mentioned conditions.

Interest fell into arrear and at the stipulated time the mortgage-money was not paid. This led to the institution of the suit for possession by Seth Swami Dayal referred to above.

Upon these facts, their Lordships held that the mortgagor had a right to redeem at any time on the expiry of the period of 5 years from the date of the mortgage because of the provisions of section 60 of the Transfer of Property Act. They set aside both the decrees of this Court and directed the preparation of a preliminary decree for redemption. It is important to remember that their Lordships did not merely decree the appeals but specifically indicated how the preliminary decree was to be prepared. The directions are, " there should then be one preliminary decree for redemption in both suits in accordance with O. XXXIV, r. 7, of the Code of Civil Procedure, 1908. But in taking accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 (that is, the suit for possession by the mortgagee) should be excluded for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat Section 60 of the Transferof Property Act, effect should be given tothem so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce *mal* and *sewai* and profits of the mortgaged villages after payment of the Government revenue. And so, during this period as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest."

On return of these directions of their Lordships, this Court remitted both the suits to the Court of the Subordinate Judge for the preparation of a preliminary decree for redemption. On 8th April 1922 that Court put the mortgagor in possession before passing a decree for redemption but on appeal here the order of the Subordinate Judge was set aside and the mortgagee took over possession again on 27th May 1922. On 9th October 1922 a preliminary decree for redemption was passed by the lower Court and a final decree on 2nd November 1922.

The decree-holder has been paid the principal sum secured by the mortgage and interest and compound interest as stipulated under the deed up to 14th February 1915 when he took possession of the property. He has also been paid the amount collected by the mortgagor during the interim dispossession of the mortgagee between the 8th April 1922 and the 27th of May 1922. The claim of the decree-holder here, as it was in the lower Court, is for a further payment of interest and compound interest on the sum which had accrued by way of interest up to 14th February 1915. The argument of the decree-holder's learned Counsel was that the mortgagee took possession in lieu of the principal sum of Rs. 82,000 only and it must be taken that interest and compound interest continued to run on the balance due on the date when the mortgagee took over possession. This claim is in conflict with the directions ladd down by ther Lordships in their judgment of 9th December 1921. It was definitely stated therein that during the period during which the mortgagee was in possession neither will the mortgagee be accountable for profits ncr the mortgagor for interest. These are clear directions and binding on this Court. Those directions do not permit of any interest being calculated on any portion of the mortgagee's claim during the period of his

possession. We may, however, say that even without these definite directions of their Lordships we would have arrived at the same conclusion under the terms of the mortgage. The mortgagee's claim for interest on the sum due on 14th February 1915, the date of his possession, in excess of the principal is based only on the wording of clause (3) of the deed that the mortgagee was to take possession in lieu of the principal. It is obvious, however, that principal there meant the full amount due at the time. According to the terms of clause (1) interest if not paid was to be added to the principal. Such a condition would turn the interest into principal and the word 'principal' in clause (3) is used to indicate the original sum of Rs. 82,000 together with every sum of interest which may have been added to the principal and so turned into principal at the time of the mortgagee entering into possession. This is made clear by the express terms of clause (6) that during the period of possession the mortgagee will have no claim to interest. If the intention had been to permit the running of interest on the sum which was payable in excess of Rs. 82,000 at the time of the mortgagee's possession, such an intention would have been incorporated in clause (6.) The mortgaged property is of considerable value with constant increase of profits year by year. Statements prepared by the mortgagee himself show large increase in profits between 1908 and 1922. During his possession the mortgagee recovered in profits, a rate of interest in excess of the stipulated 7-1/8 per cent. on the entire sum due to him at the time of taking over possession. The claim for interest during his possession is entirely untenable.

The other ground of appeal related to costs. The lower Court directed the parties to bear their own costs and we consider that order to be just. Their Lordships allowed the mortgagee a larger amount than was really due to him. Under these circumstances, the mortgagee was rightly disallowed his costs subsequent to the decree of the Privy Council.

The appeal by the plaintiff-mortgagor has no force. He objects to the payment ordered by the lower Court of profits recovered by him during the period from 8th April 1922 to 27th May 1922. There is no dispute as to the amount actually recovered by him out of the property. His learned Counsel argued that during that period the mortgagee can only recover interest at 7-1/8 per cent. Such an argument overlooks the effect of the decree of this Court setting aside the order of the Subordinate Judge putting the mortgagor in possession. That order was discharged, so the mortgagee must be restored to the same position as if the mortgagor had never been put into possession. (Section 144, Civil Procedure Code.) This can only be done by the mortgagor refunding all the advantage he derived derived during that period from the possession of the property. The mortgagor has already paid that amount and no question arises as to the manner of its recovery as a money decree or a sach argo on the property. The mortgagee was entitled to the restitution and that is all that has been ordered by the lower Court.

In the result, we dismiss all the three appeals with costs in appeals Nos. 68 and 75. In appeal No. 9 of 23 we pass no order as to costs. The Counsel of the mortgagee-appellant prayed that the Court-fee paid by him on the petition in that appeal may be refunded. We are of opinion that the mortgagee is entitled to such refund. When an appeal was pendin, from the preliminary decree it was not necessary for the mortgagee to file another appeal from the final decree. The result of the appeal in the preliminary decree would have governed the final decree as well. This was the view taken in *Kanhaiya Lal* v. *Tirbeni Sahai* (1) and the opinion has been subsequently followed other High Courts.

S. D. *Appeals dismissed.*

(1) 24 Ind. Cas. 847 ; 86 A. 532 ; 12 A.L. J. 876.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 912 OF 1923.

January 15, 1923.

Present :—Mr. Justice Suhrawardy.

EAST INDIAN RAILWAY CO.—PETITIONER

versus

KUSHABRAM GOPIRAM—OPPOSITE PARTY.

Carriage of goods—Risk note B—Railway Company, liability of—Damage to goods.

SUBBAYYA CHAKILIYAN *v* MANIAM MUTTIAH GOUNDAN

Under the Risk Note B, a Railway Company is liable only for the loss of a complete consignment or of one or more complete packages, and is not liable for damage done to the goods, for instance, by being exposed to rain in transit.

Rule against the order of the Subordinate Judge of Assansole.

Babus *Mohendra Nath Roy* and *Ambicapada Choudhury*, for the Petitioner.

Babu *Bhagirath Ch. Das*, for the Opposite Party.

JUDGMENT.—In this case the claim was for damages caused to 24 bags of flour consigned by the opposite party through the Railway Company. There is no case of total loss of any complete consignment or a complete package. The consignment was covered by a Risk Note known as Risk Note B, under which the company is liable only for the loss of a complete consignment or of one or more complete packages. The plaintiff's case was that they got the bags but that they were damaged by being exposed to rain in transit. This point came up for decision before this Court on many occasions and it was decided that, having regard to the Risk Note, the company is liable only for the loss of a complete consignment or of one or more complete packages. There being no such case in this case the decree passed by the Small Cause Court Judge must be held to be wrong. The rule is, therefore, made absolute, the order passed by the Small Cause Court Judge set aside and the plaintiff's suit dismissed with costs. The petitioner is entitled to the costs of this Rule. I assess the hearing fee one gold mohur.

Z. K. *Rule made absolute.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1587 of 1922.

November 22, 1923.

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

SUBBAYYA CHAKILIYAN—APPELLANT

versus

MANIAM MUTTIAH GOUNDAN AND ANOTHER—RESPONDENTS.

Construction of document—Sale of land with definite boundaries—Sale-deed mentioning smaller area—Rule of interpretation.

Ordinarily, when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements.

Second Appeal against the decree of the District Court of Coimbatore.

Messrs. *K. V. Sesha Aiyangar* and *T. Sundara Rao*, for the Appellant.

Mr. *S. Ranganatha Ayyar*, for the Respondents.

JUDGMENT.—The question that has been raised before us is what exactly is the land that was purchased in Court-auction under Exhibit II, the Court sale certificate. This certificate describes the land in the following terms :—

"In Coimbatore District, Ganapathi Sub-District, Coimbatore Taluk, Annaparapalayam village, situate to the north of the east to west main road, west of Venkataswami Goundan's house, south of the temple and east of Kaliannan's land ; lying within these and belonging to the defendant, measuring 12 cubits east to west and 24 cubits north to south, together with one thatched shed herein." It was contended before the lower Appellate Court and that Court has given effect to that contention, that what was sold was only the *extent* mentioned in the land falling within the boundaries given and not the whole of the land within those boundaries. It is not pretended that the whole of the land within the boundaries mentioned did not belong to the judgment-debtor ; but, because the measurements given are smaller than the measurements as taken now, it is claimed by the plaintiff's temple that all the land within the four boundaries mentioned in the above description over and above 12 cubits east to west, and 24 cubits north to south still belong to them and not to the 1st defendant who claims under the auction-purchaser. We are unable to agree with the construction put upon this sale certificate by the learned District Judge.

It seems to us to be quite clear that what was actually sold was the whole of the land within the boundaries and that the measurements were not accurately given, the mistake being in the measurements alone. Ordinarily, when a piece of land is sold with definite

boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. There is no reason to suppose that, when the judgment-debtor was putting up the property for sale in execution of his money decree, he was reserving any portion of the property to be left to his judgment-debtor and settling only a portion of the property belonging to him. The property is a single property forming one block on the Avanasi road. We think that all the circumstances point to the whole of the property within the boundaries having been sold. We agree with the District Munsif in his construction of the sale certificate and set aside the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

S. D.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 140 OF 1924.

February 21, 1924.

Present :—Mr. Justice Das, and Mr. Justice Ross.

EAST INDIAN RAILWAY CO.—APPELLANT

versus

AHMADI KHAN—RESPONDENT.

Court-Fees Act (VII of 1870), s. 17—"Subject," meaning of—"Cause of action," meaning of—Railways Act (IX of 1890), s 77—Consignments lost on different dates—One notice served on Railway for all lost consignments—One suit instituted about all—Court-fee.

The word "subject" in s. 17 of the Court-Fees Act means "cause of action", and cause of action means "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." [p. 416, col. 1.]

The question whether a suit does or does not embrace two or more distinct causes of action must be decided on the terms of the plaint. [p. 416, col. 1.]

It is open to a plaintiff, who has sustained losses in respect of different consignments of different dates by reason of the negligence of a Railway Administration, to consolidate his claim and to serve the Railway with one notice, under s. 77 of the Railways Act, in respect of all the losses. Where one notice is served in such a case it is a part of the "cause of action" of the plaintiff and it is impossible for him to maintain separate suits in respect of the separate losses or causes of action. Consequently, the Court-fee in such a case is chargeable on the consolidated sum of money and not the aggregate amount of fees calculated separately on the amount of each distinct loss. [p. 416, col. 1.]

Mr. *N. C. Sinha*, for the Appellant.

The *Government Advocate*, for the Respondent.

JUDGMENT.

Das, J.—This is a Court-fee matter. The suit was to recover a sum of money for losses in respect of 38 consignments of mangoes of different dates between the 21st of May and the 18th of August 1920. Before the suit was instituted, the plaintiff, who is the respondent here, served a notice on the defendant under section 77 of the Indian Railways Act claiming a consolidated sum of money in respect of the losses sustained by him by reason of the negligence of the Railway Administration. A Court fee of Rs. 130 was paid by him on the consolidated sum of Rs. 2,012-14 6 claimed by him. The plaintiff's suit succeeded in the Court of first instance. Thereupon the East Indian Railway Company appealed to the Court below, and, on their memorandum of appeal, they paid a Court fee of Rs. 130. The Stamp Reporter has taken the view that as each consignment was a distinct subject within the meaning of section 17 of the Court-Fees Act, the plaintiff was chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable under the Act. According to him, the memorandum of appeal in the Court below was insufficiently stamped for the same reason.

The schedule annexed to the plaint shows that there were 38 different consignments of different dates, and it is this circumstance which encouraged the Stamp Reporter to say that it was open to the plaintiff to file separate suits in respect of these different consignments. The learned Government Advocate, supporting the report of the Stamp Reporter, has contended before us that though it is open to a plaintiff to combine separate causes of action in a single suit, the position

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from the point of view of the Court-Fees Act must be exactly the same as if he had brought separate suits on his separate causes of action. It has been held in this Court and in the Calcutta High Court that the word "subject" in section 17 of the Court-Fees Act means "cause of action." But the validity of the argument of the Government Advocate must depend on the question whether the plaintiff's suit did embrace thirty-eight distinct causes of action.

Under section 77 of the Indian Railways Act, it is necessary for the plaintiff to give notice of his claim to the Railway Administration before proceeding to a suit In his notice to the Railway Administration, the plaintiff claimed a consolidated sum of money in respect of the losses sustained by him by reason of the negligence of the Railway Administration. It is not disputed that it was open to the plaintiff to bring one suit in respect of his losses and to claim a consolidated sum of money. This is exactly what the plaintiff did, and he expressly mentioned the 19th November 1920, the date on which notice was given, as one of the dates on which cause of action accrued to him. Now, "cause of action" means "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." Mr. Naresh Chandra Sinha has contended before us that, after the notice of the 19th November 1920, it was impossible for the plaintiff to maintain separate suits in respect of his separate causes of action. It seems to me that the notice of the 19th November 1920 is part of the cause of action of the plaintiff, for it is one of those facts which it was necessary for the plaintiff to prove in order to support his right to the judgment of the Court. The question whether a suit does or does not embrace two or more distinct causes of action must be decided on the terms of the plaint, and I find it impossible to hold, on a perusal of the plaint, that the suit embraced 38 distinct causes of action. As I have said before, the notice was part of the cause of action of the plaintiff, and it was impossible for the plaintiff to maintain separate suits after the notice of the 19th November 1920.

I hold that the memorandum of appeal in the Court below was sufficiently stamped.

Ross, J.—I agree.

S. D

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 66 OF 1923.

November 27, 1923.

Present:—Mr. Justice Stuart.

JOSHI SHIB PRAKASH AND OTHERS—PETITIONERS

versus.

JHINGURIA AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 17, 19—Appeal—Dismissal for default—Restoration—Remedy - Inherent power of Court, when to be exercised.

Section 151 of the Civil Procedure Code cannot be applied where the rule of procedure applicable to the case has been expressly laid down in the Code.

Where an appeal is dismissed for the appellant's default under O. XLI, r. 17 of the Civil Procedure Code, the remedy of the appellant is by way of an application for restoration under rule 19 of the Order. Section 151 of the Code has no application to such a case.

Civil Revision against the order of the Additional Subordinate Judge, Agra, dated the 17th March 1923.

Mr. *N. P. Asthana*, for the Petitioners.

Mr. *A. Sanyal*, for the Opposite Parties.

JUDGMENT—Jhinguria and others were appellants in a civil appeal which was transferred to the Court of the Additional Subordinate Judge at Agra for disposal. On the date fixed for hearing, as they were absent and unrepresented, the appeal was dismissed for default. It was dismissed on the 25th April 1922 under the provisions of O. XLI, r. 17. There is a specific remedy in the Code of Civil Procedure to cover the case where an appellant has been prevented by sufficient cause from appearing and his appeal has been dismissed under this rule. That remedy is given in O. XLI, r. 19. Under that rule the applicants could have applied for a restoration of their appeal. It appears that they have never so far adopted that remedy. On the

6th July 1922 when an application under O. XLI, r. 19 would ordinarily have been beyond time they applied for a restoration under O. IX, r. 8, a rule which had no application. Their application was dismissed. They then applied on the 19th August 1922 for a review of the original order of the 25th April 1922 dismissing their appeal for default. That application was dismissed. They then applied on the 11th November under section 151 of the Code. That application was dismissed. They then applied on 15th December 1922 under section 151 of the Code and on that occasion the presiding officer restored the r appeal for hearing. His order is questioned in revision on the ground that he had no jurisdiction to pass it. The plea must prevail. Section 151 is as follows :—

> " Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be nece=sary for the ends of justice or to prevent abuse of the process of the Court."

The enactment of this section declared the existence of an inherent jurisdiction in all Courts to go beyond the law of procedure in the ends of justice. But section 151 does not lay down that a Court may act in defiance of the law of procedure. A Judge is bound by the Code of Procedure and the Law of Limitation. Where the Code of Civil Procedure is silent, it is possible, and frequently desirable, to apply theprovisions of section 151. But the following qualification should be always applied. Section 151 cannot be applied where the rule of procedure is already laid down, and here the case is clear. The remedy lay under O. XLI, r. 19. Owing to the appellants' laxity they waited until it was too late to apply under that rule and have since endeavoured to obtain the relief they desired by ignoring the provisions of the law. I agree that the learned Additional Subordinate Judge had no jurisdiction to pass his order of the 17th March 1923. He passed that order by assuming an authority which he did not possess. He had no jurisdiction to take up the matter at all. It had been finally decided before. I, therefore, allow this application and set aside that order. The opposite party will pay their own costs and those of the petitioners.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 730 OF 1923.

February 25, 1924.

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

GOKAL CHAND—PETITIONER

versus

SANWAL DAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 110—Leave to appeal to His Majesty in Council—Substantial question of law, what is.

In order to justify the grant of a certificate for leave to appeal to His Majesty in Council under the latter portion of section 110 of the Civil Procedure Code, the High Court must be satisfied that a substantial question of law is involved in the case ; that is to say, a question of law in respect of which there may be a difference of opinion

Parshotam Sarvan **v.** *Hargu Lal*, 63 Ind. Cas. 887 ; 19 A. L. J. 462 ; 42 A. 513, relied on.

Application under O. XLV, r. 2, and sections 109 and 110, Civil Procedure Code, for leave to appeal to His Majesty in Council.

Mr. *Shamair Chand*, for the Petitioner.

Lala Sardha Ram, for the Respondents.

JUDGMENT.—This is an application under O. XLV, r. 2, and sections 109 and 110 of the Civil Procedure Code for leave to appeal to His Majesty in Council, and we are asked to grant a certificate to the effect that the case fulfils all the requirements of section 110 of the Code and is fit for appeal to His Majesty in Council. The decree of the lower Court decreeing the suit has been affirmed be this Court. The last paragraph of section 110 provides that, "where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law." We have, therefore, to see whether this requirement is fulfilled in the present case.

The suit was one for pre-emption, and was based on an alleged custom prevailing in the locality in which the property claimed was situated. The lower Court held that the alleged custom of pre-emption existed in the entire city of Delhi. A large number of instances were cited affirming the alleged custom. The defendant-vendee was not able to cite any single instance in which a claim for

pre-emption was ever disallowed on the ground that a custom of pre-emption did not prevail in Delhi. This Court, after an examination of the evidence on the record, agreed with the trial Court as to the effect of the evidence in support of the alleged custom and held that the custom set up had been established by overwhelming evidence.

Against this decision the petitioner proposes to appeal. On the face of it, no substantial question of law arises. The proposed appeal really questions the finding of fact relating to the existence of custom ; but it is contended by Mr. Shamair Chand, the learned Counsel for the applicant, that the question whether the evidence produced to establish a certain custom is sufficient is a question of law. Technically it is so ; but can it be said to be a substantial question of law ? We are clearly of opinion that it cannot be said to be so. What is a substantial question of law has been often considered by the various High Courts in reference to such petitions. In a recent case *Parshotam Saran* v. *Hargu Lal* (1) decided by a Division Bench of the Allahabad High Court the following opinion was expressed : –

> " In order to justify the grant of a certificate for leave to appeal to His Majesty in Council, the High Court must be satisfied that a substantial question of law is involved in the case ; that is to say, a question of law in respect of which there may be a difference of opinion."

This gives an indication as to the nature of the question to be raised.

In our opinion no substantial question of law arises in this case. Accordingly, we dismiss the application with costs.

Z. K. *Application dismissed.*

(1) 63 Ind. Cas. 837 ; 19 A. L. J. 462 ; 43 A. 513.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 54 OF 1922.

October 2, 1923.

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

RAM SINGH—APPELLANT

versus

IBRAHIM—RESPONDENT.

Evidence Act (I of 1872), s. 92—Oral agreement varying terms of written contract when admissible—Agreement re set off, whether can be proved—Interest, rate of—Court, when can give relief.

When, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, oral evidence of such agreement is admissible to show that the condition has not been performed and, consequently, that the written agreement has not become binding. [p. 420, col. 2.]

But when a promissory-note expressly provides that amount due therein is payable on demand with interest at a specified rate, an oral agreement between the parties that the said amount was to be set-off against the amount due to the executant of the promissory-note on some other account is not a condition precedent to the enforcement of liability under the promissory-note and such agreement is not admissible in evidence [p. 420, col. 2.]

Kooverbhan Sakhanand v. *Madandas Siroomal*, 49 Ind. Cas. 193 ; 12 S. L. R. 70, and *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, 29 Ind. Cas. 223 ; 89 B. 339 ; 28 M. L. J. 589 ; 17 M. L. T. 402 ; (1915) M. W. N. 522 ; 19 C. W. N. 718 ; 21 C. L. J. 507; 17 Bom. L. R. 460 ; 13 A. L. J. 529 ; 2 L. W. 524 ; 42 I. A. 103 (P. C.), distinguished.

Two per cent. per mensemis not an unusual rate of interest in India and may be allowed. [p. 422, col. 2.]

The Court should not give relief as to rate of interest on simple ground of hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of the position of the debtor even when the transaction appears to be undoubtedly improvident. [p. 422, col. 2.]

Appeal from the judgment of Mr. Madgowkar, A. J. C., dated the 27th September 1922.

Mr. *Dirgomal Naraindas*, for the Appellant.

Mr. *Chabildas Rochiram*, for the Respondent

JUDGMENT.

Raymond, A. J. C.—This is an appeal against the judgment of Madgavkar, A. J. C. Ibrahim and his son Adam, whom I shall

refer to as the contractors, by a written agreement contracted with the firm of Ramsing Kundansing and Sons, whom I shall describe as the firm, to construct certain buildings for the latter at Malir. The agreement is dated the 27th August 1916 but the work actually commenced in October 1916 and proceeded till January 1917 when it had to be stopped at the instance of the Collector of Karachi as it was under consideration to apply the Town Planning Scheme to Malir and a part of the land on which the buildings were to be erected would be possibly affected by it. On the 30th August 1919 the parties entered into a second written agreement for the further prosecution of the same work which till then, it may be observed, had been constructed up to the plinth, and the work was proceeded with till January 1920 when it was again stopped owing to certain disputes between the contracting partners. For the second agreement the rates for the building construction were somewhat higher than those mentioned in the first agreement. During the period the work was under progress the firm advanced moneys to the contractors but the parties are not agreed whether the advances amounted to 90 per cent. of the value of the work done in terms of the agreements or whether it was less. Substantially, during the same period, the firm granted loans to the contractors and took promissory-notes from them payable on demand.

The contractors filed a suit against the firm for settling accounts of the value of the work done by them at Malir, the advances made towards it and the amount remaining payable. The firm retorted by filing a suit against the contractors to recover the amount due on the promissory-notes with interest. With the consent of the parties both the suits were heard together and have been disposed by one judgment. In the suit of the contractors the learned Judge awarded them a sum of Rs. 158-11-0 with costs and dismissed the suit of the firm against the contractors. The appeal before us is confined to the dismissal of the latter suit.

The substantial point on which the learned Judge dismissed the suit of the firm was that, in his view, there was an understanding between the parties at the time the promissory-notes were taken in respect of the loans that the amounts covered by them would be set off against the value of the work done He, therefore, refused to recognise the loans as independent transactions and appropriated the amount due on them towards the value of the work done which necessarily involved the firm being disallowed the interest claimed on the amount of the pro-notes.

The appeal before us is against this finding of the learned Judge which, it is contended, is erroneous both in law and on the facts.

I shall first discuss the legal aspect of the case. All the promissory notes are in the same form except in respect of the amount advanced and the interest payable which in some is 2 per cent. and in others 3 per cent. I reproduce the wording of one of them.

"On demand we promise to pay Messrs, Ramsing Kundansing and Sons and Dayalsing Jethsing or their manager Jethsing Ramsing or order the sum of Rs. for value received by cheque no: on the Karachi Bank, Limited, Karachi, bearing interest at the rate of from this day." The promissory-notes are signed by both Ibrahim and his son Adam.

In para 13 of their plaint the contractors state as follows: 'That according to an understanding between the parties the amount of the pro-notes was to be set-off against the amount due to the plaintiffs on work done but the defendants fraudulently, in order to have the benefit of the high interest mentioned therein, have filed in the Small Causes Court, Karachi, suits on some of them and threaten to file on others as well'. In para 7 of the written statement filed by the contractors in answer to the suit by the firm they stated as follows: 'The pro-notes are voidable at the option of the defendants and unenforceable inasmuch as they have been executed under undue influence and on fraudulent representation made by plaintiff's manager that the interest would not be charged and the amount of them would be set-off against the amount due to the defendants.'

The only witness examined on behalf of the contractors was the contractor Ibrahim and there is not a word in his evidence hinting even remotely at any undue influence or fraud being practiced upon him at the time of the execution of any of the promissory-notes. The utmost that he does say is that there was an oral understanding that the amount due on

the promissory-notes was to be set-off against the value of the work done. Now, the promissory-notes expressly provide that the amounts due thereon are payable on demand and they carry interest. There is an unconditional promise to pay contained therein, and no reference to any such understanding as is set up by the contractors. The contractors, therefore, were attempting to set up a case at variance with the written agreement between the parties. In *Sri Ram* v. *Firm Sobha Ram Gopal Rai* (1) it was held that the executant of a promissory-note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties. In *Vishnu Ramchandra* v. *Ganesh Krishna* (2) it was held that in a suit on a promissory-note payable on demand it is not open to the defendant to plead by way of defence a contemporaneous oral agreement whereby the plaintiff had agreed that he will not present the note although it is payable on demand until he has discharged certain incumbrances in the property he has sold to a stranger. Provisos. 1 and 2 to section 92, Indian Evidence Act have clearly no application on the pleadings in the present case, and unless it were shown that the case was one which came within the purview of proviso 3 to the same section, evidence as to the oral agreement was inadmissible. Now proviso 3 states that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property may be proved." What is the position of the contractors in the present case? They say that the promissory notes though payable on demand are, as a matter of fact, not payable on demand in fact they have no force or effect as the amounts mentioned therein are to be set off against the value of the work done by them. Now it is to be observed that, concurrently with the loans to the contractors on the promissory-notes, there were money advances made to them periodically in respect of the work done for which only receipts were taken from them without any obligation as to payment of interest. As pointed out in Amir Ali's Evidence Act, p. 597, " with proviso 3 should be read illustration (J) to section 92 and it is intended to introduce the rule that when at the time of the written contract being entered into it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such agreement is admissible to show that the condition has not been performed and, consequently that the written contract has not become binding. But in the present case the agreement sought to be introduced by extraneous evidence is not a condition precedent to the enforcement of any liability under the promissory-notes. It is open contradiction of the terms of the written document for whereas the latter expressly provides that the amount shall be payable on demand with interest, it is urged that it can only be set-off against the value of the work done. Such a defence is inconsistent with the terms of the promissory-notes which contain an unconditional undertaking for the payment of the amount mentioned, full consideration for which has admittedly been received: Cf. *Kooverbhan Sukhanand* v. *Madandas Sivoomal* (3). The present case is not even one where it is urged that the obligation under the promissory-notes would arise only on the happening of a certain event, the oral agreement, according to the contractors, was that no obligation whatever was to arise under the promissory-notes and that they were to have no force and effect. Such an agreement, in my opinon which distinctly contradicts the terms of the written document is not admissible in evidence. Pleader for the contractors relied on *Badal Ram* v. *Jhulai* (4) in support of his argument that the oral agreement was admissible in evidence under proviso (3) to section 92 Indian Evidence Act, but it will be observed that in this case there were reciprocal promises forming the consideration for each other. In the Privy Council case *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (5) evidence as to

(1) 67 Ind. Cas. 513 ; 44 A. 521 ; 20 A. L. J. 315 ; (1922) A. I. R. (A) 213 ; 44 U P. L. R. (A) 158.

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

(3) 49 Ind. Cas. 193 ; 12 S. L. R. 70.

(4) 63 Ind. Cas. 861; 44 A. 58; 19 A. L. J. 816 ; (1922) A. I. R. (A) 165.

(5) 29 Ind Cas. 228; 39 B. 399 ; 28 M. L. J. 589 ; 17 M. L. T. 404; (1915) M. W. N. 522 ; 19 C. W. N. 718; 21 C. L. J. 507 ; 17 Bom. L. R. 460 ; 13 A. L. J. 529; 2 L. W. 524; 42 I. A. 103 (P. C.).

an oral agreement was admitted under proviso (2) to section 92 as to which the promissory note was silent and which was not inconsistent with its terms.'

The learned Judge of the Court below has not dealt with the legal question as to the admissibility in evidence of the parol agreement though it is asserted, and not denied, that the point was taken before him.

We are of opinion that the *oral agreement was not admissible* in evidence. This would conclude the case, but out of deference to the learned Judge we may briefly state our reasons which are not in accord with those of the learned Judge on the question of the oral agreement having been proved. As stated by the Privy Council in *Motabhoy Mulla Essabhoy* v. *Mulji Haridss* (5) above referred to, an oral agreement must be clearly proved and the onus of doing it is on him who sets it up. In the present case we have the bare evidence of Ibrahim, one of the contractors, on the point stripped of all corroboration.

It is established that advances were made by the firm to the contractors from time to time during the progress of the work and these payments were evidenced by receipts taken from the contractors. Now, if the amounts covered by the promissory-notes were also to be regarded and were meant as advances towards the work done, I find it difficult to understand why only in some instances promissory-notes were taken from the contractors. I placed this difficulty more than once before the pleader for the contractors but I must confess I received no satisfactory explanation from him. Besides, all the promissory-notes provided for the payment of interest, some 2 per cent. and others 3 per cent. per mensem, and it is very improbable that if the loans were intended to be appropriated towards, the value of the work done they would not be on the same basis as the other advances.

On two of the promissory-notes thus executed the firm had filed a suit against the contractors in the Small Cause Court and in both of them a consent decree was passed in favour of the plaintiff-firm. The defence as to the oral agreement that the amounts due on the promissory-notes were to be set off against the value of the work done was admittedly not taken up in this Court. This is an important piece of evidence against the present contention of the contractors. To save the bar of limitation Jethsing, the manager of the firm states that a sum of Rs. 10 0-0 was paid to him as interest on each of the promissory-notes sued upon and the fact of the payment is endorsed on promissory-notes over the thumb-mark of Ibrahim and the signature of his son Adam. Ibrahim, no doubt, denies that he ever paid any interest on any of the promissory notes though he does not deny his thumb-mark and admits he affixed it as Jethsing told him that it was necessary to save limitation. His son Adam has not even ventured into the witness-box to deny his signature. I am quite prepared to make allowances for the illiteracy of the contractors but it was for them to discharge the onus as to their signatures having been taken under false pretences and we have only the evidence of Ibrahim on this point which, in view of various circumstances in this case, we are not prepared to accept unhesitatingly. Jethsing states positively that the interest was paid to him on the date mentioned in the endorsements on the promissory-notes.

In the first written agreement executed between the parties there is a clear stipulation 'that the owner is at liberty to appropriate the money for the work done towards the payment of any loan that I may from time to time take from him'. In the second written agreement it was provided 'that if the owner appropriates any moneys towards the amount that we may take from him as a loan, he can do so and we shall have no objection. Both these clauses seems clearly to differentiate the money loans from the advances in respect of the work done and shows that the intention of the parties was that the loans were not intended as advances towards the work done. All that the contractors can urge in respect of these stipulations in the written agreements is that, in consequence of their illiteracy and ignorance, they were not aware of the contents of these documents.

On the 9th April 1919, that is, before the second written agreement between the parties, the firm by a written notice informed the contractors that they had borrowed from them a sum of Rs. 2,000 on various promissory-notes executed by them and unless this sum were repaid with interest within the

time specified a suit would be filed against them. To this, admittedly, there was no reply nor any repudiation of the demand.

It was argued on behalf of the contractors that, though, in terms of the written agreements between the parties, the firm had to pay to them 90 per cent. of the value of the work done yet much less had been paid in actual advances and, therefore the promissory-notes were executed but if this argument be correct then it is difficult to understand why interest should be charged in the promissory-notes if they were payments towards the work done. It was also argued that, in view of the value of the work done exceeding the advances made, the contractors would not have permitted the heavy interest on the promissory-notes to accumulate and would have liquidated them as there was money still due to them. The answer to this argument is that the contractors were under obligation to the firm inasmuch as without any security they secured loans from the firm. It is not shown that the building work was the only concern on which they were engaged at the time and even if some money remained due to them they calculated on the possibility of receiving further loans from the firm which in all probability they may not have received if the accounts had been squared. It has been established that some of the loans on the pronotes had been made before the commence ment of the building operation and the contractors contend that they were made for the purchase of building materials. This may be perfectly true but this circumstance does not imply that the loan amounts of the promissory-notes were intended in payment of the word done. Taking all the circumstances into consideration, we are of opinion that the contractors have not discharaged the onus that lay upon them that the amounts advanced on the promissory-notes were intended to cover the value of the work done ; in all probability the firm may not have granted these loans if the contractors had not undertaken their building work, but the promissory-notes are independent contracts for the discharge of which the contractors are liable irrespective of any amount that may be due to them of the building work. The only question that remains is whether the contractors are liable for the amount of interest which the notes carry amounting to Rs. 24 and 30 per cent. per annum. The transactions between the parties were not, on the face of them, unconsionable within the meaning of section 16 of the Indian Contract Act, all that is alleged on behalf of the contractors is their illiteracy, but this is not inconsistent with wisdom or prudence. Even if the firm was in a position to dominate the will of the contractors there is nothing to show that any undue influence had been exercised upon them in respect of any of the promissory-notes : C., Privy Council ludgment in *Lalla Balla Mal* v. *Ahad Shah*. (6) Admittedly the contractors were not men in affluent circumstances and no security for the loans was forthcoming or furnished. The firm naturally ran some risk in advancing sums of moneys exceeding Rs. 2,000 to men of their financial position.

In the Privy Council case above cited it was observed that two rupees per mensem is by no means an unusual rate of interest in cases from India coming before this Board. In another Privy Council case of *Aziz Khan* v. *Dum Chand* (7) it was observed that " it is difficult for a Court of Justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of the position of the debtor even when the transaction appeared to be undoubtedly improvident." The mortgagor's contract to pay 25 per cent. compound interest was upheld. It is not proved that the firm does money-lending business and the transaction cannot by any means be regarded as improvident for it is highly doubtful whether the contractors could raise money in the market at this rate of interest without any security.

We do not tnink that the amount of interest payable by thepromissory-notes is exhorbitant and it is certainly not penal, the firm is, therefore, entitled to it.

We reverse the decree of the lower Court and allow the plaintiffs firm the sum of Rs. 1,358-13-4 with costs throughout in proportion.

Rupchand, A. J. C.—I concur.

S. D. *Appeal allowed.*

(6) 48 Ind. Cas. 1 ; 28 C. W. N. 288 ; 35 M. L. J. 614 ; 16 A. L. J. 905; 124 P. R. 1918 ; 25 M. L. T. 55; 180 P. W. R. 1918 ; 29 C. L. J. 165 ; 1 U. P. L. R. 25 ; 21 Bom. L. R. 558 (P. C.).

(7) 48 Ind. Cas. 933 ; 23 C W. N. 180 ; 101 P. R. 1918 ; 165 P. W. R. 1918 (P. C.).

MIAN FEROZE SHAH *v.* SOHBAT KHAN

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE NO. 152 OF 1923.

October 22, 1923.

Present :—Mr. Pipon, J. C.

K. S. MIAN FEROZE SHAH—PLAINTIFF

versus

SOHBAT KHAN—DEFENDANT.

Punjab Tenancy Act (XVI of 1887), ss. 77 (3) (e), proviso, 98—Jurisdiction of Civil and Revenue Courts —Mortgage—Mortgagor retaining possession as tenant —Ejectment, suit for—Landlord and tenant, relationship of—Presumption—Procedure.

The general rule is that jurisdiction is governed by the allegations made in the plaint and not by the defence set up. [p. 424, col. 1.]

The proviso to section 77 of the Punjab Tenancy Act is mandatory and has the effect of transferring to a Revenue Court exclusive jurisdiction to decide a case which, nevertheless, so far as the allegations of the plaintiff alone are concerned, may have been rightly instituted in a Civil Court. [p. 424, col. 2]

The jurisdiction of a Revenue Court, however, is not ousted by a pleading raised in defence. [p. 425, col. 1.]

Where a Revenue Court is confronted with a suit by a mortgagee who seeks to eject his mortgagor in the capacity of his tenant, it is for the Court to see from the plaint, the mortgage-deed, and the plaintiff's own explanation of his case, whether he is actually the landlord, that is, whether the mortgagee is actually holding under him as tenant, and to proceed with the case if it considers that this is *prima facie* established, but to decline jurisdiction if it is not If it does not decline jurisdiction on this ground, and if the defendant's pleas raise an issue which it is necessary to determine for the decision of the whole suit and which strikes at the question of the status of landlord and tenant, the Revenue Court can always find on that issue itself and dismiss the suit if the defendant succeeds. Such dismissal does not, however, in any way, bar the plaintiff from suing in a Civil Court on his mortgage. The finding of the Revenue Court on this issue does not constitute *res judicata* against the Civil Court. [p 425, col. 2.]

Case-law discussed.

Where there is not only a deed describing a mortgage as one with possession, but also a practically simultaneous deed of lease by which the mortgagor retains possession of the mortaged land, paying what is described in the deed as rent to the mortgagee, there is a presumption that the latter is entitled to assume the capacity of landlord. [p. 426, col. 1.]

ORDER.—The question before this Court is one which concerns the jurisdiction of Civil and Revenue Courts. The facts of the present case are that on the 12th of March 1917 Sohbat Khan executed a deed by which he mortgaged an area of 1,011 *ks.* 8 *mls.* to K. B. Mian Musharrif Shah and others. The deed recited that the mortgage was with possession and for a period of 10 years in consideration of a sum of Rs. 44,233. On the same day both parties to the mortgage executed a deed of lease. Under the terms of these deeds the mortgagor was to retain cultivation paying Rs. 1,224 annually to the mortgagee as "*munafa*", the mortgagee in case of default being entitled to take possession from the mortgagor and to recover the whole of the produce of the land. On the 4th of October 1922 the mortgagee lodged in a Revenue Court a suit to eject the mortgagor as his tenant and to recover a sum of Rs. 16,224 as the value of the two harvests succeeding the date of the mortgagor's alleged default in payment. The suit was resisted by the defendant on various grounds. One was that the Revenue Court had no jurisdiction to hear the case, and another was that certain *Hundis* executed by the defendant were payments towards the sum due annually to the mortgagee. The Revenue Court held that the suit was cognizable by a Revenue Court, and passed a decree for Rs. 2,448 representing two years of the lease-money and also for ejectment of the defendant. Both sides lodged appeals in the Court of a Collector. The Collector considered that the suit was one triable exclusively by a Civil Court, and referred the case to this Court under section 100 (*b*) of the Tenancy Act. In coming to the conclusion that the suit was one triable by a Civil Court, the Collector quoted a judgment of this Court dated the 31st of October 1913 in the case *Sewa Singh* v. *Sanabgul.*

The question which is raised is of considerable importance, as there appears to be a prevalent doubt in this Province on the question of jurisdiction in suits of this nature We are only here concerned with two main types of agricultural mortgage, (1) without possession by the mortgagee, (2) with possession by the mortgagee. The second of these types is ordinarily what is defined in the Transfer of Property Act and the Punjab Land Alienation Act as a "usufructuary mortgage", though the definitions in question cover three sub-classes of usufructuary mortgage. For the purpose of this reference, the only class with which I am concerned is that where the profits of land are appropriated by the mortgagee in lieu of interest only. It may be remarked, however, that in these cases there is often an absence of any direct or expressed relation between the

value of such profits and the interest which a mortgagee would otherwise expect upon his loan. If a mortgage were contracted between the parties unequivocally in form (1), (a mortgage without possession), the mortgagee would necessarily be driven to a Civil Court to recover interest, or to enforce a lien by way of possession. But these two main kinds of agricultural mortgage tend, for obvious reasons, to assume, in actual practice, an identical form. Largely in order to protect the mortgagee from being driven to sue for possession in a Civil Court, it is not unusual for the parties, while retaining the *status quo* of the mortgagor as actual occupier, to declare in a mortgage-deed that the mortgagee has assumed proprietary possession and either in the same deed or in a separate document, that the mortgagor now holds under him as lessee or tenant paying what is described as rent, but what may also be regarded as interest on the loan. If there is a default under the terms of the mortgage the mortgagee has, by this system, the advantage of being able to describe himself as landlord and the mortgagor as holding under him as a tenant. He may then apply to a Revenue Officer under the provisions of the Land Tenancy Act to eject the said tenant or, if the application is refused, (as it probably would be, in the event of a dispute upon the conditions of the tenancy), the mortgagee can at least go to a Revenue Court with a simple suit for ejectment. By this means he escapes a heavy Court-fee upon a Civil suit for possession. In cases of this nature we find that the mortgagor almost invariably sets up the defence that the Revenue Court has no jurisdiction, pleading that the mortgagee, by taking the capacity of landlord *versus* tenant has begged the question at issue, that he is not in actual possession as landlord, and that he must go to a Civil Court not as landlord, but as mortgagee to claim possession.

The question of jurisdiction in these cases has never been free from difficulty. In the first place, it has long been a general principle of Law that jurisdiction is governed by the allegations made in the plaint and not by the defence set up. For this view there are innumerable precedents At the same time, the peculiar conditions of the Tenancy Law have compelled certain modifications in this extreme view. For instance, it was laid down in the well known ruling of the Punjab Chief Court in the case of *Buta Shah* v. *Kalu* (1) that when there is a written instrument on which the claim is based, or to which the plaint refers, the instrument will have to be construed to discover the express intention of the parties as to their consequent mutual position in respect of the possession of the mortgaged land. It was further laid down in that judgment that the Court must consider not only the formal plaint, but the description of the nature of the suit given by the plaintiff in his examination. There is also authority for the view that the *ratio decidendi* as to whether a mortgagee is or is not an actual landlord is to be found in the intention of the parties. This was the view taken in the ruling quoted above, and it is also that taken by my learned predecessor, Mr. Barton, in his unpublished ruling in the case of *Sewa Singh* v. *Sanalgul*, Civil Reference No. 4 of 1913. Now, it is clear that many cases arise in which the intention of the parties can only be ascertained if the Court travels beyond the allegations made in the plaint, the deeds and the plaintiff's initial deposition. Further, the analogy of the proviso to section 77 of the Tenancy Act introduced by Act III of 1912 may be adduced as an argument to support the view that jurisdiction can be affected by a question arising for the first time from the Defendant's pleadings. That proviso is mandatory and has the effect of transferring to a Revenue Court exclusive jurisdiction to decide a case which, nevertheless, so far as the allegations of the plaintiff alone are concerned, may have been rightly instituted in a Civil Court. This analogy, however, hardly holds good. It was clearly the object of the Legislature simply to get over the expense and delay entailed upon the public by the result of a series of rulings of the Punjab Chief Court laying down that the plea of a defendant must be ignored, and that a Civil Court must decide the suit as instituted, and that the defendant had, nevertheless, a separate relief in a Revenue Court if the finding was against him. Whether or not it would have been simpler to have given a Civil Court power to refer an issue to a Revenue Court on the lines of section 98 of the Land Tenancy Act, is not a fit subject for discussion here. It is sufficient to say that, as

(1) 46 P. R. 1894 (F. B.).

the law now stands, a Civil Court has no such power. There is, therefore, no complete parallel between the procedure governing the two classes of Courts. A plea set up in a Civil Court may, under the proviso to section 77, override the general principle that jurisdiction is determined solely by the allegations made in the plaint, and may cause the Civil Court to lose jurisdiction by reason of a contention set up by the defendant. But when a plea of a civil nature is set up in a Revenue Court, the latter does not lose jurisdiction. It has, instead, a power under section 98 of the Tenancy Act to refer a party to a Civil Court and to base its decision of the suit on the Civil Court's finding on a particular issue. The analogy referred to above, therefore, is no real argument for overriding the general principle that the jurisdiction of a Revenue Court (unlike that of a Civil Court in this respect) is not ousted by a pleading raised in defence. I do not think indeed that the ruling of Mr. Barton quoted above is really an authority for the view that the jurisdiction of a Revenue Court is ousted by its coming to a finding that the intention of the parties was otherwise than that disclosed by the plaint, the deeds executed between the parties, and the deposition of the plaintiff. It dealt with a case where there was a great deal to show from the terms of the deed of mortgage and the deed of lease that "the two transactions had a single aim, *viz.* to ensure the due payment of interest and of the mortgage-debt, and that it was not intended that the mortgagee should take the place of landlord of the mortgagor, the lease being merely a devise to recover interest in the easiest possible way." But if the jurisdiction of the Revenue Court to entertain and dispose of the case is to be ousted altogether, it must be because the allegations, as elucidated by the deeds and statement of the plaintiff, show in themselves that the plaintiff has not the position of a landlord. If a Court has to go beyond this to ascertain the real position of the parties, it does not lose its jurisdiction. It may exercise the option of referring a party to a civil suit on a particular issue under section 98 of the Land Tenancy Act, or it may have to dismiss the suit on the ground that the relationship of landlord and tenant has not been proved. In the latter case it is still open to the plaintiff to seek his relief to enforce the mortgage in a Civil Court. The plaintiff cannot claim the same protection from delay and expense as has been given to a defendant by the proviso to section 77 of the Tenancy Act. He has only himself to thank if, by choosing the wrong forum and lodging a suit for simple ejectment, he fails to establish his position as landlord and has to start litigation afresh. In following, as in the present case, Mr. Barton's ruling of 1913, Courts have, I think, confused the question of jurisdiction with that of a finding which would operate as *res judicata*. A Revenue Court, in dismissing a suit on the ground that the mortgagee has not the position of a landlord, does not, in any way, bar the plaintiff from suing in a Civil Court on his mortgage. The finding of the Reveuue Court on this issue does not constitute a *res judicata* as against the Civil Court. The Punjab rulings, *Parman* v. *Lhanu* (2) and *Kharku* v. *Dirth* (3) show this point very clearly. They deal with cases where a tenant in his capacity of tenant had failed in a Revenue Court to establish occupancy rights, but where, nevertheless, after being dispossessed and ceasing to be a tenant, he was able to sue for the same occupancy rights in a Civil Court.

It appears to me that in all these cases where a Revenue Court is confronted with a suit by a mortgagee who seeks to eject his mortgagor in the capacity of his tenant, it is for the Court to see from the plaint, the deed and plaintiff's own explanation of his case whether he is actually a landlord, *i.e.*, whether the mortgagor is actually holding under him as tenant, and to proceed with the case if it considers that this is *prima facie* established, but to decline jurisdiction if it is not If it has not declined jurisdiction on these grounds, and if the defendant's pleas raise an issue which it is necessary to determine for the decision of the whole suit and which strikes at the question of the status of landlord and tenant, the Revenue Court can always find on that issue itself and dismiss the suit if the defendant succeeds. This is exactly the view taken in *Allah Din* v. *Allah Baksh* (4) one of the most recent Punjab rulings on the question.

It may be objected, however, with some reason that the above view does not lay down a suffiiciently clear guide for Courts in this

(2) 51 Ind Cas. 448 ; 49 P. R. 1919.
(3) 70 P. R. 1893
(4) 41 Ind. Cas. 130 ; 43 P. R. 1917 ; 110 P. W. R. 1917

Province to determine the question of jurisdiction. It may be added, therefore, that where there is not only a deed describing a mortgage as one with possession, but also a practically simultaneous deed of lease by which the mortgagor retains possession, paying what is described in the deed as rent to the plaintiff, there is always a presumption that the mortgagee is entitled to assume the capacity of landlord. As against this view a ruling published as *Shahdi Beg* v. *Ahmed Khan* (5) has been quoted. The head-note to that ruling is, in the Punjab Weekly Reporter, to the following effect:—" The mere fact that the land is mortgaged with possession and the mortgagor holds it under the mortgagee does not create the relationship of landlord and tenant". It appears to me, however, that this head-note is most misleading. There is nothing really in the judgment to support such an extreme view which is entirely in conflict with other rulings of the same Court. The judgment in question, which is an extremely short one, disallows the contention that a suit was cognizable by a Revenue Court mainly on the ground that the plea set up was a belated one and was an attempt to escape from proved liability on a technical point not raised at any earlier stage. The presumption which I have referred to above, may be rebutted in two ways, (1) by the very nature of the deed and the plaintiff's explanation of it, and (2) by the pleadings and evidence of the defendant. In the first case it is for the Revenue Court to decline jurisdiction, and in the second to continue the hearing and itself to find upon the pleas. In the second case, if the finding goes against the plaintiff, he has still his remedy in a Civil Court and, as I have said above, he has only himself to thank if litigation is thereby protracted.

It remains to apply the above principles to the present case. It appears to me that the presumption referred to above is, in this case, particularly clear. The parties would seem to have taken particular precautions to show that the mortgagee should actually be recognized as landlord and the mortgagor as a tenant holding under him. I do not think that the word "munafa" as opposed to such a word as "malikana" can be insisted upon as showing that the actual sum to be paid by the defendant was interest and not rent. We have contemporaneous deeds of mortgage and lease. I am not concerned with the defendant's pleadings. The suit for ejectment falls under Section 77 (3) (e) of the Land Tenancy Act, and the suit to recover the value of produce under sub clause (i) of the same. The suit was, therefore, rightly decided in the Court of an Assistant Collector of the 1st grade, and the appeal lies to the Collector. I, therefore, return the appeals to the Court of the Collector of Charsadda, holding that the suit is a revenue suit, and that appeals from the decree were rightly instituted in that Court.

Z. K. *Appeals returned.*

(5) 27 Ind. Cas. 446; 168 P. W. R. (1914; P. 211 L. R. 1915.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 334 OF 1922.

February 12, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

MAHABIR, DECEASED, BY SARJA PRASAD, AND ANOTHER -APPELLANT

versus

BHARATH BIHARI AND ANOTHER -RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Mortgage by conditional sale—Transfer—Agreement to reconvey—Construction of deeds.

Plaintiff executed a deed of transfer of certain land in favour of the defendant. On the same date the latter executed a document called *ikrarnama taidi*, which provided that, on repayment being made by the seller at a time when the land was free from crops, the buyer would reconvey the property to the seller. It was further provided that in the event of the buyer refusing to transfer the property to the seller the latter may deposit the money in Court:

***Held*, that the deed of transfer and the agreement taken together constituted a mortgage by conditional sale within the meaning of section 58 (c) of the Transfer of Property Act.**

Appeal against the decree of the Sub-Judge Fyzabad, dated the 14th October 19:2.

Messrs. *Niamatallah* and *Ali Zaheer*, for the Appellants.

Mr *M. Wasim*, for the Respondens.

JUDGMENT.—This is the defendants' appeal in a suit for redemption of a mortgage

brought by the plaintiff-respondent Bharat Bihari. The suit has succeeded in both the Courts. On the 1st November 1894, the plaintiff-respondent and his deceased brother, Madan Bihari, executed a deed of transfer in favour of the predecessor in interest of the defendants to the present suit in consideration of a sum of Rs. 600. On the same date the transferee executed a document bearing the name *iqrarnama taidi* in relation to the deed of transfer mentioned above. The plaintiff's case is that the two documents taken together constitute a transaction of a mortgage by conditional sale. The defence to this case is, that the transaction is one of an out and out sale with an agreement to resell, and that the said agreement is not binding on the defendants who are transferees for valuable consideration from the original transferee. Both the Courts below have held that, the two documents evidence a mortgage by conditional sale and have given a decree for redemption to the plaintiff as already mentioned. That finding is impugned in appeal before me.

I have come to the conclusion that the finding and the decree of the Courts below should be maintained. There is no doubt that the first deed established an out and out sale of the property mentioned therein but that is the first element of a mortgage by conditional sale also as would appear from the definition given in sub-section (c) of section 58 of the Transfer of Property Act (IV of 1882). That definition may be quoted here :—

" Where the mortgagor ostensibly sells the mortgaged property

"On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

"On condition that on such payment being made the sale shall become void, or

"On condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale."

The deed of agreement is merely an embodiment of the condition, that on repayment being made the buyer shall transfer the property to the seller and this is the second element of a mortgage by conditional sale. The date of repayment is mentioned in the agreement under consideration as *ayyam khali fasl yani mah Aghan ya Baisakh.* This, to my mind, is a certain date and fulfils the requirements of the definition given above. That date is generally a date more appropriate to redemption of a mortgage than to a reconveyance by way of sale. The conclusion is strongly fortified by the provision contained in the agreement empowering the seller to deposit the money in Court in the event of the buyer refusing to transfer the property to him. Such a deposit is a step for redemption of a mortgage under section 83 of the Transfer of Property Act, 1882.

In this view of the case, the question as to whether the agreement is binding on the present defendants or not does not arise.

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

Z. K *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1098 OF 1923.

January 31, 1924.

Present :—Mr. Justice Suhrawardy.

ICHHAMOYI PAL—PETITIONER

versus

PEARYMOHAN SHAH AND OTHERS—
—RESPONDENTS.

Decree against minor, set aside—Revival of original suit—Procedure.

Where a decree passed against a minor is set aside on the ground that he was not properly represented in the suit, the parties are restored to the position which they occupied on the date of the decree, and the plaintiff is entitled to apply to the Court to proceed with the hearing of the original suit.

Rule against the order of the Munsif, First Court, Bajitpore, dated the 3rd August 1923.

Babu *Prokash Chandra Pakrashi*, for the Petitioner.

Babu *Gopal Chandra Das*, for the Respondents.

JUDGMENT.—The facts of this case are rather complicated and the parties have been fighting over this matter for over 12 years; but they may be shortly stated in order to

ICHHAMOYI PAL *v.* PEARYMOHAN SHAH

understand the position of the parties to this Rule. The plaintiff brought a suit against a 21 defendants for recovery of possession of a certain property on the allegation that they had joined in dispossessing him. He got a decree in the first Court against all the defendants. Two of them (defendant Nos. 2 and 4) preferred an appeal to the lower Appellate Court making the plaintiff as the only respondent and it was dismissed. A second appeal was filed in this Court which was allowed and the case was sent back to the lower Appellate Court to be reheard after receiving some additional evidence. In the mean time, the opposite parties (defendants No. 9, 10, 12 and 13) brought a suit for setting aside the decree passed against them in the original suit by the Munsif. Their suit was decreed and the decree of the first Court. in so far as it stood against them, was set aside on the ground that they were minors at the time and were not properly represented in the first suit. The appeal before the lower Appellate Court by the defendants Nos. 2 and 4 came on for hearing after remand after the decision of the opposite parties' suit. The appeal was partially allowed and the plaintiff preferred a second appeal to this Court against the appellate decree and made all the defendants in the suit respondents to the appeal. A preliminary objection was taken at the hearing of the second appeal that it could not proceed as there was no decree existing against the opposite party. This contention was given effect to and the plaintiffs' appeal was found to be incorporated. The learned Judges held that the decree in the original suit having been set aside as against defendants Nos. 9, 10, 12 and 13 they could not be considered as proper parties to the appeal; but as the plaintiffs' cause of action against all the defendants was joint; the appeal against the other defendants also could not proceed in the absence of those defendants, Nos. 9, 10, 12 and 13. This decision was passed on the 7th July 1922. The suit that was brought by the opposite party to have the decree in the original suit set aside was decreed on the 31st July 1916 and the appeal against that decree was dismissed on the 17th July 1917. On the 20th September 1917 the plaintiff applied for a rehearing of the original suit against the opposite party on the ground that as the decree against them had been set aside the effect of it was to *revive* the suit against them and prayed for re-hearing of that suit. No order was passed on this application. After the decision of the appeal by the High Court, namely, on the 3rd August 1922 the plaintiff made another application inviting the Court to re-hear the original suit against the opposite party. That application was dismissed by the Munsif against whose order this Rule has been issued. It is now firmly settled that the effect of an order under O. IX of the Code is to *revive* the original suit namely, to leave the parties *in status quo* on the date of the decree in the original suit. The plaintiff was, therefore, left to apply to the Court to re-hear the suit as against the opposite party after the decree against them had been set aside. The learned Munsif, however, has dismissed the plaintiffs' application to re-hear the suit. I am of opinion that the plaintiffs' application was not to ask from the Court an order which was in the discretion of the Court to grant but it was to bring to the notice of the Court that circumstances had happened since the decree was passed—which were calculated to revive the suit and invited the Court to consider it as a pending suit. The Court was bound to go on with the suit and if at the hearing of the suit it was found that it could not go on on account of some legal defect he might dismiss the suit. But it was not justified in dismissing the plaintiffs' application for treating the suit as pending in his Court but it was bound to proceed with the hearing of it. The order which the Munsif has passed on the plaintiff's application is thus worded: "My conclusion is that the petition is not maintainable. It is dismissed with costs." The apparent result of this order is that the prayer of the plaintiff for the re-hearing of the suit has been rejected. This the learned Munsif had no jurisdiction to order. It is a matter of grave consequence to the petitioner as he has thus been deprived of his right of appeal and of second appeal to this Court. I, therefore, hold that the order of the Munsif dated the 3rd August 1923 dismissing the plaintiff's petition should be set aside and I order accordingly. The Rule is, therefore, made absolute. The petitioner is entitled to his costs of this Rule. I assess the hearing fee at one gold mohur.

Let the record be sent down to the Court

below as early as possible so that it may proceed to hear the suit according to law.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 873 OF 1923.

January 7, 1924.

Present :—Mr. Justice Stuart and Mr. Justice Mukerji.

Sheikh ABDUL SHAKUR—DECREE-HOLDER—APPELLANT

versus

Syed MUHAMMAD MATIN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 68, Sch. III, paras. 1, 7—Mortgage-decrees—Earlier decree paid off by subsequent decree-holder, effect of—Sale—Purchase-money, how to be employed—Collector, jurisdiction of, extent of.

Two mortgage-decrees were passed in respect of the same property and were put in execution and were sent to the Collector for execution. The decree-holder under the subsequent mortgage paid off the decree on the earlier mortgage and the property was sold free from incumbrances and was purchased by the decree-holder under the subsequent mortgage. He then applied to the Collector for an order declaring that the purchase-money should be paid first towards the satisfaction of the earlier decree and the balance towards his own decree and that the property should be deemed to have been sold free from incumbrances. This application was refused:

Held, (1) that the duty of the Collector was to find out the best method of raising the money for the satisfaction of the decree passed by the Civil Court and he had no jurisdiction to decide as to how the purchase-money was to be employed;

(2) that the consent of the decree-holder did not confer any such jurisdiction on the Collector and the decree-holder was not, therefore, bound by the order of the Collector refusing his application;

(3) that the only way of dealing with the matter was to declare that the property had been sold free from incumbrances and that the purchase-money was to be employed first towards the satisfaction of the earlier decree and the balance towards part-payment of the subsequent decree.

Second appeal from the decree of the District Judge of Allahabad, dated the 22nd February 1923.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *Zafar Mehdi*, for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are these. There were two decrees one No. 15 of 1912 in favour of one Parsidh Narain and against the judgment-debtor Muhammad Matin. There was another decree, No. 95 of 1912, in favour of Abdul Shakur against the same judgment-debtor Muhammad Matin. The decree No. 95 of 1912 ordered the sale of some property which was included in the decree No. 15 of 1912. In fact, the decree No. 15 of 1912 was passed on an earlier mortgage. The two decrees were put into execution and, the property involved being ancestral, they were sent to the Collector for execution. The subsequent mortgagee, Abdul Shakur, satisfied the earlier decree, No. 15 of 1912, on 18th of September 1914. He then asked the Subordinate Judge that the amount of the prior decree should be added to the amount due under his own decree, namely, decree No. 95 of 1912. The learned Subordinate Judge by order dated 3rd July 1915 found that this could not be done but he suggested that Abdul Shakur might proceed under the provisions of the Code of Civil Procedure, Schedule I, O. XXXIV, rr. 12 and 13. Thereafter, the decree No. 95 of 1912 was again sent to the Collector for execution by order dated 22nd June 1916. When execution was proceeding before the Collector Abdul Shakur made an application to the Subordinate Judge on 30th January 1917 asking that the Collector might be informed that the sum of Rs 2,075 which had been paid by him to Parsidh Narain for the satisfaction of decree No. 15 of 1912 should also be realised and the property sold, not subject to the mortgage created in favour of Parsidh Narain, but free from incumbrance. This application he was competent to make under the provisions of law already quoted, namely, O. XXXIV, rr. 12 and 13 of the Code of Civil Procedure. The learned Subordinate Judge acceded to this request and ordered that the application of Abdul Shakur might be sent to the Collector for his information. The property was sold on 20th August 1918 and was purchased by Abdul Shakur. He gave a receipt, a copy of which is on the record. He thought that the point should be made clear that the property had been sold free from incumbrance and that the amount of money for which he had purchased was to

be credited first towards the decretal amount due under the decree No. 15 of 1912 and the balance should go to satisfy his own decree. His application to the Collector and his appeal to the Commissioner were unsuccessful. Subsequently, he made an application before the Subordinate Judge for recovery of what was due to him under his decree. He gave credit for the money realised by the Collector towards the satisfaction of the prior decree and the balance he applied towards part-payment of his own decree. Objections were raised as to his execution with the result that this second appeal comes before us.

The learned District Judge held that the orders of the Collector and the Commissioner stood in the way of the decree-holder getting his money. He found that the Collector and the Commissioner were the executing Courts and that, they having decided that the only decree that was executed was the decree No 95 of 1912, nothing further could be done in the matter.

The contention that has been raised by the learned Counsel for the decree-holder before us is th s The Collector was to find out the best method of raising money in order to satisfy the decree passed by the Civil Court. He had absolute jurisdiction to choose the best method allowed to him by the law but beyond that it was not within his province to decide how much money was due to the decree-holder and how much of the decree had been satisfied. In support of this proposition of law, the learned counsel has quoted two cases, namely, *Tapesri Lal* v. *Deokinandan Rai* (1), and *Bhurchand Hansraj Doshi* v. *Vira Champa Khechar* (2). Both these cases support his contention. Any consent of the decree-holder could not give the Collector any jurisdiction which he did not possess under the law. One important fact which must not be lost sight of is this. No rights of any third party are involved. It was the decree-holder who was prepared to forego his rights as a prior mortgagee which he acquired by payment of the decree passed in favour of Parsidh Narain. He unequivocally declared that he was not going to rely on any prior mortgage. The judgment-debtor was there and orders were passed in the case and it must be taken that he was all along aware of the same. No attempt has been made to show that the procedure of the learned Subordinate Judge has in any way prejudiced him. In the circumstances, it appears to us to be clear that the three properties which were sold on 20th August 1918 were sold free from the incumbrance created in favour of Parsidh Narain and the money that was realised must be credited first towards the satisfaction of Parsidh Narain's decree and the balance should go towards the part-payment of the decree No. 95 of 1912.

It remains to notice the receipt which was given by Abdul Shakur on his purchase. As the learned District Judge has remarked that receipt does not say that Abdul Shakur bought the property in full satisfaction of his decree No. 95 of 1912. The properties were sold, as the receipt indicates, in execution of decree No. 95 of 1912 and in execution of no other decree. The property that was sold could be sold free from incumbrance with the consent of Abdul Shakur. The receipt does not say that Abdul Shakur purchased the property subject to the mortgage in his own favour.

The result is, that we allow the appeal, set aside the decree of the Court below and remand the execution case through the lower Appellate Court to the first Court for disposal according to law. Costs of this appeal and the appeal in the Court below must be paid by the judgment-debtor respondent Costs in this Court will include fees on the higher scale.

Z. K.

Appeal allowed.

(1) 16 A. 1 ; A. W. N. (1893) 180 ; 8 Ind. Dec. (N. S.) 1.

(2) 17 Ind. Cas. 142 ; 37 B. 32 ; 14 Bom. L. R. 787.

BANSIDHAR *v.* PANDURANG

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 86 OF 1922.

November 26, 1923.

Present :—Mr. Baker, J. C.

BANSIDHAR—APPELLANT

versus

PANDURANG AND OTHERS—RESPONDENTS.

Hindu law—Joint family—Alienation by father—Enquiry by alienee—Application of money—Antecedent debt—Carelessness and extravagance, effect of.

Where a mortgagee from the manager of a joint Hindu family is reasonably satisfied after sufficient enquiry that the money he is going to advance is required for the benefit of the joint family, he is not bound to see that it is applied for the purpose for which it is advanced and is not diverted to other purposes.

Where an antecedent debt incurred by a Hindu father is not shown to have been in any way immoral, the mere fact that it arose out of extravagance or carelessness will not make it any the less binding on the sons.

An estate is equally in need of money for its preservation, whether the need arises from a lack of proper management in the past or in spite of it.

Appeal from the decree of the Additional District Judge, Nagpur, dated the 6th June in Civil Suit No. 1 of 1920.

Mr. *M. Gupta*, for the Appellant.

Dr. *H. S. Gour*, and *V. R. Pandit*, *R. B.* for the Respondents.

JUDGMENT.—The appeal of Jageshwar Pant, the first defendant in the case (F. A. No. 88 of 1922), has this day been dismissed. This is an appeal by the fifth defendant Bansidhar, a mortgagee of a part of the property of which partition has been decreed. It is directed against the declaration in the decree that his three mortgages are binding only on the quarter share in the property allotted to Jageshwar Pant, and so far as it is based on the same grounds as that of the first defendant it must fail. On the other grounds taken it is, however, equally bound to succeed.

The principal sums secured by the three mortgages were Rs. 2,000 Rs. 9,000 and Rs. 5,000 or Rs. 16,000 in all. With the exception of an item of Rs. 316-14-0 in the first mortgage and one of Rs. 1,348 in the third, it is quite clear, and it is not now denied, that all the money advanced on all of them was taken and used for the payment of antecedent debts of Jageshwar Pant of such a nature that he was entitled to alienate the shares of his sons in the joint family property in order to pay them. It is necessary then to examine the binding nature of the consideration only in respect of the two sums that have been mentioned.

The first mortgage was executed in July 1918 for Rs. 2,000 which included the sum of Rs. 316-14-0 paid in cash for the expenses of sowing and weeding. Jageshwar Pant was at the time in chronic need of cash, and the mortgagee was well aware of this and of the fact that sowing and weeding was then going on. The sum of Rs. 1,348 was borrowed on the third mortgage in 1919 for the purpose of making repairs to the family house, which is proved to have been in need of repairs costing more than double that amount to the knowledge of the mortgagee and it is also proved that some at least of the money was spent on it.

It must be held, therefore, that in each of these two cases the mortgagee was reasonably satisfied after sufficient enquiry that the money he advanced to Jagesewar Pant was required for the benefit of the joint family he represented, as indeed it was. He was neither bound nor able to see that it was applied to the purposes for which he advanced it and was not diverted subsequently to others by Jageshwar Pant. The main reason for the view of the learned Additional District Judge that none of the three mortgages could affect any share in the propepty but Jageshwar Pant's own appears to be the fact that he has always been a particularly thriftless and extravagant person and had wasted a fine estate. But there is not even a suggestion that any of the antecedent debts were in any way immoral or arose out of anything but extravagance and carelessness, and an estate is equally in need of money for its preservation whether the need arises from a lack of proper management in the past or in spite of it.

The decree of the lower Court will accordingly be modified by the excision of the declaration that the three mortgages of the fifth defendant do not bind the shares of the plaintiff and the second and third defendants, and the substitution for it of a declaration that those three mortgages are binding on all the property to be partitioned. The costs of

the appellant in both Courts will be paid by the respondent Pandurang and he and the remaining three respondents will pay their own costs.

In both schedules of costs, however, the pleader's fee payable to the present appellant will be calculated on Rs. 10,000 and not on Rs. 24,029 8 which is the amount stated in the petition of appeal as the value of the relief sought. That is the value of the third share in the property originally claimed by the plaintiff, who has given only a quarter share, worth Rs. 18,022-2. But the present appellant Bansidhar is concerned here only with having his three mortgages, of July and November 1918 and August 1919, with a total consideration of Rs. 16,000, declared effective against the other three-quarters shares in the property as well as against Jageshwer Pant's quarter share. In the lower Court, the effectiveness of his mortgages against two-thirds of the property was never denied though the decree declares them ineffective against three quarters. For the calculation of the pleader's fee a fairly liberal valuation of this relief, in the absence of any definite basis, seems to be Rs. 10,000.

Z. K. *Decree modified.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 27 OF 1923.

January 29, 1924.

Present :—Mr. E. Raymond, A. J. C., and Mr. B. C. Kennedy, A. J. C.

FIRM OF NARUMAL BHAGCHAND—PLAINTIFFS—APPLICANTS

versus

THE SEHWAN MUNICIPALITY—DEFENDANTS—OPPONENTS.

Bombay District Municipal Act (III of 1901), *s.* 48 (j)—*Bye-laws for refund of Octroi duty—Goods imported duty free but retained within Municipal limits beyond prescribed period - Liability of Municipality to refund Octroi duty subsequently levied—Compliance with bye-laws essential even though rendered impossible owing to Municipal action*

If a person imports goods on a *Rahdari* pass under which no Octroi duty is payable at the time of the import, on the stipulation that the goods will be detained in the Municipal limits for 48 hours only, but retains the goods for more than the stipulated period and subsequently pays Octroi duty in respect of the goods, he cannot obtain a refund of the duty so paid unless he makes an application for it within the time prescribed by Bye-laws of the Municipality for the purpose, even though his inability to do so arises from the fact that the Municipality recovered the Octroi duty at a time when the claim for refund was, under the Bye-laws, time barred.

Application to revise the order of Mr. Shamdas Maniram, Sub-Judge, Sehwan, dated the 27th January 1923.

Mr. *Dipchand T. Ojha*, for the Applicants.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMENT.—In this case, the firm of Narumal Bhagchand brought an action against the Sehwan Municipality claiming refund of a certain sum of money levied from him in respect of Octroi due by him to the Municipality and alleging that the tax is illegal. The Judge of the Small Cause Court, Sehwan, dismissed the suit. Narumal comes here in revision.

It appears that the plaintiff imported certain goods into Sehwan on a *Rahdari* pass. Under that pass no Octroi is payable at the time of import and, therefore, Narumal did not pay any Octroi at the time when the goods entered Sehwan. But, subsequently, however, the Municipality imagining that Narumal was liable to pay Octroi on the segoods exacted Rs. 103 odd from him. And inasmuch as he alleged (apparently with truth) that he had exported the goods he applied for refund, which refund however, was refused.

Under the ordinary procedure as regards the levy of Octori the rules suppose that the amount due as Octori will be calculated at the Octroi station on the goods and the goods while still in the possession of the person who brings into the City will be taken to the Recovery Office and the dues paid there. (Vide rule 6 of the Rules of the Sehwan Municipality, Chapter VII). The Municipality has also framed rules (Vide rule 8 of Chapter VII) providing for refund, and there is a further rule which is not numbered framed under section 48 (j) of the Bombay District Municipal Act as to these *Rahdari* passes. Section 59 (iv) of the Bombay District Municipal Act allows to the Municipality to levy an Octroi on animals or goods

or both, brought within the Octroi limits for consumption or use therein. Had that section stood by itself, it would have obviously been impossible to levy any Octroi at all because it will be easy for any person who brings in goods into the City to say that he did not intend to consume or use them in the municipal limits of the City and then according to the strict rules of construction of a bye-law or statute, it would be necessary for the Municipality to prove what the intention of the person who brings goods in the Municipal limits is, which is obviously impossible to do. Section 48 (*j*), therefore, throws upon the Municipality some duties and confers upon them the privilege of framing rules as to Octroi, regulating the system in which refund should be made on account of Octroi when animals and goods are brought into the City in transit and are not intended for use or consumption in the municipal limits and prescribing a period of limitation after which no claim for refund of Octroi is to be entertained Now, these rules that I have referred to, namely, r. 8 and the unnumbered rule of 31st of December 1920 seem to me to have been framed by the Municipality in accordance with the powers given by section 48 (j) Rule 8 provides that there shall be refund of the Octroi paid on imported goods which again are exported and even assuming have broken bulk or changed hands subject to certain exceptions, the two material exceptions being that the goods have been exported within twelve months next after the date of import and that the claim has been put in within seven days next after the export thereof. This rule rather covers the case where the importer has (as he is normally supposed) to pay the import duty on the delivery of the goods on introduction of them into the municipal limits. The rule of 31st of December 1920 postulates the case where there is no intention of keeping them for any long period in the City and allows in such a case a merchant to keep them in his own custody but there is the stipulation that the period for such detention of the goods is not to exceed 48 hours. These rules do not seem to me *ultra vires* or unreasonable.

In the present case trouble has arisen because the merchant took the pass under the rule dated the 31st of December 1920 but failed to export the goods within 48 hours, keeping them apparently for 72 hours. The Municipality subsequently levied a sum from him equal to the Octroi which should have been paid and he sought a refund of this sum from the Municipality on the ground that he had, as a matter of fact, exported the goods, within 12 months under rule 8. As, however, the money was levied from him more than 12 months after the export of the goods he was unable to comply with the qualification introduced by sub-section (3) of rule 8, namely, that the claim must be made within 7 days after the export of the goods. Therefore, his claim was refused.

It is no doubt unfortunate for the plaintiff but, after all, he has himself to blame. It is obvious that *Rahdari* passes are not to be granted except to persons who can be relied on to export the goods immediately merely keeping them for a few hours in transit, and it would introduce an intolerable method of procedure, opening the door to most serious frauds if the persons obtaining these *Rahdari* passes were permitted to retain these goods at their own pleasure free within the municipal limits for more than 48 hours. The merchant therefore, who takes the benefit of the clause of 31st of December 1920 cannot complain if he is exposed to certain restrictions and obstructions in case he does not comply with the terms thereof. It would seem, therefore, that the Municipality was strictly within its rights in abiding by the clause 3 of rule 8 and in refusing to make this refund.

Exactly what powers the Municipality had to levy this sum due as Octroi, is not at present clear to us. We do not know whether the plaintiff falls under the category of merchants under section 80 of the Bombay District Municipal Act, and if he does not, Chapter VIII apparently has no application, and it is difficult to see by what power the Municipality collected this arrear of Octroi from the plaintiff. But that is not the question which arises directly in the present case because the plaintiff is not objecting to the levy of the sum due as Octroi but is objecting to the failure of the Municipality to give a refund. The whole suit would be on a different basis and the whole pleadings and evidence also would necessarily have been different, had the plaintiff refused to pay and the matter for

decision would have been whether the Municipality is justified in summarily exacting this Octroi is a matter on which we express no opinion and we must dispose of the case on the ground that the octroi was properly levied and that the only remedy of the plaintiff against the Municipality was to ask for refund. Ina smuch as, therefore, the refund is asked for considerably later than seven days after the export of the goods on which Octroi had been paid, it would appear clear that the plaintiff is not entitled to any refund and, therefore, the finding of the learned Judge of the Small Cause Court is correct.

Therefore, we dismiss this application with costs.

S. D. *Application dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 164 OF 1923.

Present:—Mr. Justice Sulaiman.

LALA MUTHURA PRASAD AND OTHERS—PLAINTIFFS

versus

BOMBAY BARODA & CENTRAL INDIA RAILWAY COMPANY—DEFENDANT.

Civil Procedure Code (Act V of 1908), s 115—Provincial Small Cause Courts Act (IX of 1887), s. 25—Error of law—Revision—Small Cause suit tried by Munsif—Appeal heard by District Judge—Second appeal—Under which section revision lies.

The scope of s. 25 of the Provincial Small Cause Courts Act is very wide and gross errors of law come within it. But an error of judgment on questions of law does not come under s. 115 of the Civil Procedure Code.

Where a suit of a Small Cause nature is tried by a Munsif and an appeal against the decree is heard by a District Judge, no second appeal lies, nor does a revision lie under s. 25 of the Small Cause Courts Act.

Civil Revision against the order of Additional Judge of Aligarh, dated the 6th of September 1923.

Mr. *G. Agarwala*, for the Appellants

Mr. *Ladli Prasad Zutshi*, for the Respondent.

JUDGMENT.—This is an application in revision from a decree of the District Judge of Aligarh setting aside the decree of the Munsif of Kasgunj.

Six bales of yarn had been booked to the plaintiff's address but only five were delivered by the defendant Railway Company. The plaintiffs brought a suit for damages in respect of the loss of one bale. The goods had been sent under a Risk Note form B. The learned Munsif came to the conclusion that there was no theft from a running train and also that the defendant Company's servants were guilty of wilful neglect inasmuch as they had left the waggon unlocked, which was only bolted and sealed. On appeal the learned District Judge came to the conclusion that there was a theft from a running train though he was not prepared to find definitely that there was a robbery in the strict sense of that word. He, however, relying on certain observations contained in a judgment of this Court, Civil Revision No. 164 of 1923, even though opposed to the view of the Oudh Court, held that 'theft' had the same meaning as 'robbery'. He has also expressed some doubt as to the correctness of the finding of the Munsif that there was a wilful neglect on the part of the Railway Company. He accordingly dismissed the suit *in toto*

The plaintiffs have come up in revision and have taken three grounds in their petition. These grounds raise questions of law and attack the judgment of the Court below on the ground that the learned Judge's view was entirely erroneous.

A preliminary objection is, however, taken on behalf of the respondent Company that no such ground can be raised in this revision. In my opinion this objection is quite correct.

In a case which is disposed of by a Court of Small Causes the High Court, under section 25 of the Provincial Small Cause Courts Act, has power to call for the record of the case and pass such order with respect thereto as it thinks fit. The scope of section 25 is very wide indeed and gross errors of law may very well come within it. The present, however, is not such a case. Here, though the suit was of a Small Cause Court nature it was tried by the Munsif of Kasgunj. An appeal lay from the decree of the learned Munsif to the Court of the District Judge which was heard and disposed of. It is under section 102 of the Code of Civil

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Procedure that a second appeal is prohibited. It follows, therefore, that the present application cannot be entertained as being one under section 25 of the Provincial Small Cause Courts Act. It can only be considered as an application under section 115 of the Code of Civil Procedure. It is well settled that the scope of that section is very much limited. Unless the lower Appellate court can be said to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested in it, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, this Court has no power to interfere in revision. It is manifest that an error of judgment on questions of law does not come under either of these three categories. The learned District Judge had jurisdiction to hear the appeal. He has not refused to exercise his jurisdiction at all He has committed no irregularity of procedure in the exercise of his jurisdiction. The utmost that can be said is that he has committed an error of judgment or has committed an error of law in the exercise of his jurisdiction. This cannot be a good ground for entertaining the application in revision. The application is dismissed with costs.

S. D. *Application dismssed.*

MADRAS HIGH COURT.

STAMP REFERENCE No. 9324 OF 1923.

November 8, 1923.

Present :—Sir Walter S. Schawbe, K. C., Chief Justice.

ASSISTANT COMMISSIONER OF LABOUR—APPELLANT.

Court-Fees Act (VII of 1870), s. 8, Sch. I, Art 1, Sch. II, Art. 17 (A) (ii)—Award by Land Acquisition Officer—Reference to Court—Amount increased—Appeal—Court-fee payable.

Where in a proceeding under the Land Acquisition Act, the Court increases the amount of the award originally made by the Land Acquisition Officer, the stamp fee payable on an appeal by the Crown against such increase is governed by Art. (i) of Sch. I of the Court Fees Act. Neither s. 8, nor Art. 17 (A) ii of Sch. II of the Act is applicable to such a case.

Reference under section 5 of the Court-Fees Act.

The Government Pleader, for the Appellant.

The Advocate-General, for the Government.

ORDER.—This is a Stamp Reference on the following facts. An award has been made under the Land Acquisition Act with which the party entitled to compensation was not satisfied, and under that Act the matter was referred to the Chief Judge of the Court of Small Causes for disposal, and he increased the award by an amount of Rs. 42,763. Being dissatisfied with that award, the department of Government interested, prefers an appeal to this Court, and the question is what stamp that appeal has got to bear.

By section 8 of the Court-Fees Act the amount of the fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.' Now it is argued for the appellant, that is to say, the department interested, that that has no application where the Crown is the appellant because there is no difference between the amount awarded and the amount claimed by the appellant, the appellant in that case not being a claimant at all; and the learned Advocate-General, who appears to represent the Crown, as distinguished from the department interested, as the matter is of general importance, agrees with that argument. It is certainly contrary to the dictum on the subject in *Kasturi Chetti* v. *Deputy Collector, Bellary* (1) in which it was said that section 8 was a special provision applicable to appeals against all orders, including awards relating to compensation for lands under the Land Acquisition Act. But I think on the proper construction of the section it has no application where the Crown is the appellant and that the dictum is too wide.

Then it remains for me to consider whether the Article applicable is Article (1) of Schedule I or Art. 17 (A) ii of schedule II of the Court-Fees Act. By the Land Acquisition Act, XIX of 1921, a decision of the Court in a case like the present is to be deemed to be a decree

(1) 21 M. 269 ; 7 Ind. Dec. (N. S.) 546.

under the Code of Civil Procedure of 1908. Schedule I, Art. 1 of the Court-Fees Act provides the *ad valorem* fee payable on any memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court... except those mentioned in section 3, which has no application here. There is no doubt that this is a memorandum of appeal and, therefore, unless it is provided for elsewhere, it comes under that Article. Turning to Art. 17 (A) ii of schedule II a memorandum of appeal in a suit to set aside an award is provided for, and it was held by the Punjab Chief Court in *Secretary of State* v. *Basawa Singh* (2) which was tried in 1912, that article 17 (4) of the then Court-Fees Act which corresponds, except in a matter which I will refer to in a moment, with Article 17 (A) (ii) of the present Act, applied to a case similar to the present. I very much doubt whether that was a correct decision under that Act as it stood, because it involves the inclusion of a reference to a Court under the Land Acquisition Act in the words, "a suit to set aside an award," which is certainly not giving the ordinary meaning to those words, because the proceedings before the Small Cause Court or the District Court do not seem to be a suit to set aside an award. It has been held by the Privy Council in *Secretary of State for India* v. *Chelli Kani Rama Rao* (3) that the Court is itself in those cases sitting as an arbitrator and not as an appellate tribunal, though it is true that, in a sense, proceedings before the Court are to set aside the award, for if those proceedings were not taken, there is an antecedent award of the officer which would be binding. But it is not necessary to give any decision on that point, because the words of the present schedule Art. 17 (A) (ii) provide a proper fee on a memorandum of appeal in a suit from a District Munsif's Court or a City Civil Court and another fee on a similar suit from a District Court or Sub-Court. It so happens in this case that the Court which has made the award, the Small Cause Court is not one of those enumerated Courts,—whether it is by accident or design is immaterial and, therefore, I consider that Art. 17 (A) (ii) does not provide for a fee to be paid on this appeal even if it is looked upon as an appeal from a suit to set aside an award.

That being so, we are thrown back on Art. I of Schedule I and the fee must be paid in accordance with the provisions of that Article. The costs of this reference will be paid by the department interested as appellant in the appeal to the Crown.

The two appeals not having been consolidated, must be treated as separate appeals. Three weeks for payment of the additional Court-fee.

S. D.

(2) 17 Ind. Cas. 764; 19 P. W. R. 1913; 57 P. R. 1913; 17 P. L. R. 1912, Sup.

(3) 85 Ind. Cas. 903; 39 M. 617 at p. 624 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 244; 14 A. L. J. 1114; 30 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 61; 43 I. A. 192 (P. C.)

PATNA HIGH COURT.

CIVIL REVISION NO. 444 OF 1923.

February 28, 1924.

Present :—Mr. Justice Adami, and Mr. Justice Bucknill.

GOBIND SAHU—PETITIONER

versus

ZAFAR KARIM—RESPONDENT.

Civil Procedure Code (Act V of 1893), O. XXII r. 3—Interlocutory order—Appeal—Names substituted in appeal from interlocutory order effect of.

The introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages even if it be made in appeal from a mere interlocutory order.

Revision against the order of the Munsif of Patna, dated the 28th August 1923.

Mr. *Rai Guru Saran Prasad*, for the Petitioner.

Mr. *Syed Jaffar Imam*, for the Respondent.

JUDGMENT.

Adami, J.—The facts of this case are simple. One Bibi Kulsum instituted a suit for a declaration that the decree obtained against her husband's father, Habibuddin, upon a mortgage was fraudulent; at the same time, she applied for an injunction against the proceedings taken in execution of the decree. The injunction was issued and thereupon the defendant in the suit appealed to the District

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Judge against this interlocutory order. Whilst the appeal was pending before the District Judge, Bibi Kulsum died, on the 25th of October 1921, and the defendant-appellant then applied to the District Judge on the 7th of January 1922 for substitution of the husband and three children of Bibi Kulsum as respondents to the appeal. The defendant-appellant succeeded in his appeal and the District Judge's order was upheld by this Court. An application was thereafter made to the Munsif asking for substitution in respect of one of the children of Bibi Kulsum, but no application was then made before the Munsif for substitution in the place of the deceased Bibi Kulsum, though on the 22nd November 1921 the plaintiff's pleader informed the Munsif that Bibi Kulsm had died. On the 18th August 1923, the Munsif directed that a subsequent application for substitution in the place of Bibi Kulsum and also an application for substitution in the place of Mussammat Sazda should be heard together on the 28th August. On the 28th August the Munsif considered the objection that the application for substitution of the heirs of Bibi Kulsum was made out of time and that the suit, therefore, had abated, and he held that as the substitution had been made in the Appellate Court the present petition for amendment was merely a formal one and was not out of time.

This application is now made against the order of the Munsif, and it is argued that no steps having been taken within time to substitute the legal representatives of Bibi Kulsum in the Munsif's Court the suit was barred. The point taken in this case has been that the appeal was not an appeal arising out of the suit but out of the injunction in connection with that suit, and therefore the action taken before the District Judge would not satisfy the requirement to make such substitution within time before the Munsif. The case, however, is governed by the decision of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram* (1). There it was held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages even if it be made on appeal from a mere interlocutory order. The decision of their Lordships of the Privy Council meets the contention of the petitioner and it is clear therefore that the application must be rejected with costs: hearing fee two gold mohurs.

Bucknill, J.—I agree.

S. D. *Application rejected.*

(1) 45 C. 94.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 113 OF 1923.

November 22, 1923.

Present :—Mr. Hallifax, A. J. C.

MAHADEO GANESH SOHNI—APPLICANT

versus

SADASHIV AND MAHADEO—NON-APPLICANTS.

Court-Fees Act (*VII* of 1870), *Sch. II*, *Art.* 17 (vi)—*Suit for cancellation of decree—Value of subject-matter—Court-fee payable.*

Where the relief claimed in a suit is the cancellation of a mortgage-decree, which leaves the defendant with the right and the opportunity to obtain another similar decree on the same mortgage in a properly framed suit, the value of the subject-matter of the suit is not capable of ascertainment and the suit falls within Article 17 (VI) of Schedule II to the Court-Fees Act.

Application for revision of the order of the Additional District Judge, Nagpur, dated the 22nd March 1923.

Mr. *S. R. Mangrulkar*, for the Applicant.

Mr. *M. N. Jog*, for the Non-applicant.

The facts of the case are that the applicant brought a suit for a declaration that the mortgage-decree for sale obtained by defendant's father against the applicant in Civil Suit No. 79 of 1918 and First Appeal No. 18 of 1920 and made final on 17th November 1922, was null and void as the applicant was sued as a major though minor, and for an injunction to restrain the defendants from executing the decree by a sale of the property mortgaged. The relief for declaration was valued at Rs. 15 for purposes of Court-fee and the relief for injunction was valued at Rs. 10 for purpose of court-fee. The claim was valued at Rs. 13,700-10-0 for purposes of jurisdiction.

The learned Additional District Judge held that the plaint was insufficiently stamped and

that the proper valuation with respect to the relief for injunction asked for was Rs. 13,700-10-0. The learned Judge has, therefore, ordered the applicant to supply the deficient Court-fee stamp on or before 18th instant. The applicant has, therefore, filed this application for revision.

ORDER.—Mr. Mangrulkar has been heard for the applicant, and Mr. M. N. Jog for himself and the other opponent. The relief asked is the cancellation of a decree obtained on a mortgage and the principles set out in *Devidas* v. *Ramlal* (1) would apply if cancellation of the decree meant practically cancellation of the mortgage, but it does not. Cancellation of the decree here leaves the defendants with the right and the opportunity to obtain another similar decree on the same mortgage in another properly framed suit. The value of the claim is, therefore, the value of the decree, which can easily be ascertained, *minus* the value of the chance the defendants have of obtaining another decree on the same mortgage, which cannot possibly be ascertained. The value of the claim cannot, therefore, be ascertained, being the difference between two quantities of which one is unknown, and the amount of Court-fees already paid is sufficient. The order of the lower Court is accordingly set aside, and the case will proceed. The costs of this application, in which the pleader's fee will be fifteen rupees, will be paid by the defendants, who apparently thought it their duty to risk considerable monetary loss themselves for the protecting of the fiscal interests of the Government by opposing it.

Z. K. *Application allowed.*

(1) 13 Ind. Cas. 864 ; 7 N. L. R. 190.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 16 OF 1923.

January 29, 1924.

Present :—E. Raymond, A. J. C., and Mr. B. C. Kennedy, A. J. C.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

SETH KHEMCHAND THAOOMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Income Tax Act (I of 1886), s. 39—Super Tax Act (VIII of 1917), ss 3 and 8—Super Tax neither "Charged, paid or recovered" in the assessment year—Suit for refund—Jurisdiction of Civil Court—Interpretation of Statutes.

It is only when the Super Tax has been charged, paid or recovered in the assessment year, that the jurisdiction of the Civil Court to entertain a suit in respect of the same is barred under section 8 of Super Tax Act, VIII of 1917, read with section 39 of Income Tax Act II of 1886. [p. 439, col. 1.]

Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. [p. 439, col. 1.]

Appeal against the decree of the District Judge, Sukkur, dated the 4th December 1922.

Mr. *T. G. Elphinston, Government Pleader*, for the Appellants.

Mr. *Srikishenlas H. Lulla*, for the Respondents.

JUDGMENT.—This appeal relates to an assessment of Super Tax under Act VIII of 1917.

Plaintiff-respondent filed a suit against the Secretary of State for India defendant-appellant for a declaration that the assessment of Super Tax of Rs. 2,500 for the year 1918-19 (from 1st April 1918 to 31st March 1919) was illegal and as made without jurisdiction and prayed for a decree for the refund of this amount with interest and costs.

The District Judge, Sukkur, granted the plaintiff a decree for the recovery of Rs. 2,500. The Secretary of State for India appeals against this judgment.

The first point taken on appeal is that the lower Court was in error in not holding the

suit barred under section 39 of the Income-tax Act II of 1886 read with section 8 of the Super Tax Act VIII of 1917.

Section 39 of Act II of 1886 is as follows: "No suit shall lie in any Court to set aside or modify any assessment made under this Act," and section 8 of Act VIII of 1917 applies the provisions of section 39 *inter alia* in the case of super tax as if that tax were income-tax chargeable under Act II of 1886.

The main point for consideration is whether the assessment of the super tax was an assessment under the Act, for it is only in that event the jurisdiction of the Civil Court is barred. Now section 3 of Act VIII of 1917 enacts that in addition to the tax imposed by the principal Act (Act II of 1886) there shall be " charged, recovered and paid in the year " a super tax upon a taxable income of a person or company computed at the rate specified in the schedule. Respondents contend that their assessment to payment of super tax in the sum of Rs. 2,500 was neither charged, paid or recovered in the year 1918-19, therefore, the assessment is not under the Act.

As observed in Maxwell on the Interpretation of Statutes, 4th Ed., page 429 " Statutes which impose pecuniary burden are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambigous language because in some degree they operate as penalties." There appears to us no ambiguity whatever in section 3 for the words are clear and specific, " there shall be charged, recovered and paid in the year beginning with the first day of April 1917." The Legislature has apparently detected the anomalous situation created by the words " in the year for in Act II of 1922 which consolidates and amends the law relating to both Income Tax and Super tax the words now are " for any year."

We have, however, to consider the interpretation to be placed on section 3 of Act VIII of 1917 and it seems to us abundantly clear that its provisions were not complied with in the assessment of the respondents to Super Tax. Between the period of the 1st April 1918 and 31st March 1919 he was neither charged any super tax not did he pay it nor was it recovered from him.

Section 6 of Act VIII of 1918 provides that when in the Collector's opinion a person is chargeable with super tax a notice shall be served upon him calling upon him to pay the amount specified therein or to apply to have the assessment reduced or cancelled. The only way that an assessee could be said to be charged is by a demand notice issued by the Income-tax officials for till then it can not be argued that he has been charged with the payment of any tax. But the respondents admittedly received notice of demand only on May 1919, that is, after the year 1918-19 was over and even if he was chargeable with super tax he ceased to be so after the expiry of the year. The demand notice, therefore, having been issued after the year was over there was neither payment nor recovery of the super tax within the year 1918-19.

The Income-tax Collector had himself realised that super tax is to be recovered within the year to which it relates for in a memo. marked urgent addressed to the *Mukhtiarkar* with reference to the super tax for 1919-20 and dated the 23rd March 1920 he gave him strict injunctions to recover it promptly before the close of the "present month" and to adopt co-ercive measures if necessary. He interpreted the section 3 as it stood in the only manner that it could be interpreted that the tax should be charged paid and recovered within the year to which it relates.

Mr. Elphinston attempted to invoke the the aid of a confidential note date the 23rd March 1919 wherein in *Mukhtiarkar* had made a calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. It is unarguable that the contents of a confidential document were communicated to the assessee nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super tax.

Mr. Elphinston pressed upon us the serious prejudice to the Crown if section 3 were interpreted literally, but in a fiscal statute we must look to the letter of the law and cannot introduce equitable considerations.

There is a patent error of law in the assessment of the super tax and, therefore, the assessment was not one under the Act the suit, therefore, is not barred.

The second point taken on appeal is with regard to estoppel but this needs the exposition of a few facts to consider its applicability.

On the 27th June 1919 the respondent appealed against the super tax assessment to the Income-tax Collector. The order on it is dated the 28th March 1920 dismissing the appeal "in view of the settlement arrived at to day with regard to the Income-tax and super tax for the years 1919-20. respondent withdraws his appeal."

On the 5th February 1920 respondent appealed against his super tax for the year 1919-20 but he was informed on the 15th March that this appeal could not be entertained as it was not duly stamped and was time barred. On the 18th March the respondent addressed the Income Tax Collector pointing out that his appeal was within time and enclosing the requisite stamps. The Collector was further informed that the appeal against the income tax was still pending. On the 25th March the Collector directed the respondents to appear before him on the 28th March with regard to his super tax and income tax appeals. On this day a settlement was arrived at whereby the respondents agreed to pay the super tax of Rs. 2,500 as also the income tax for the years 1918-19 and 1919-20 based on an agreed income. By his order dated the 28th March 1920. the Collector says that "in view of the settlement arrived at to-day by which the assessee agrees to pay even the super tax for 1918-19 amounting to Rs. 2,500 " though not legally due " the question of the super tax to be levied upon him for the year 1919-20 is reopened.

Mr. Elphinston contends that as the respondents paid the sum of Rs 2,500 in terms of the settlement arrived at and the Collector in consideration of this payment reduced considerably the income tax payable for the year 1919-20 the respondents cannot now be permitted to recover the sum of Rs. 2,500. Apart from the question of the probability of the respondent agreeing to pay the super tax in order that his appeal against the income ta may be reopened it is difficult to understand how the estoppel operates. The opening words of the written terms of the settlement are "To avoid trouble and litigation I agree." Whilst' paying the super tax the respondent had protested that was not legally due. It is not alleged that the respondent by his declaration act or or conduct intentionally caused the Income tax Collector to believe a thing to be true and to act upon such belief. He promised to pay Rs. 2,500 and he paid it. It is obvious that the respondent never admitted that the imposition of the super tax was just and legal as just shown above nor did he ever agree not to question its legality. It may have been inferred by the Collector that the respondent would not go to law about it, but his doing so does not operate as an estoppel.

The third point raised in appeal is that the lower Court was in error in holding that the accounts which were settled for a lump sum could be reopened by the respondents and if the respondents are permitted to do so, the appellants should equally be permitted to assess the respondents afresh. But this is not a case of an account stated nor could it be really described as a settlement of account for the most that can be said is that because the respondents agreed to pay the super tax of Rs. 2,500 the Collector of Income Tax reduced the income tax and super tax for the years 1919-20. The contention that there was an implied agreement by the respondents not to resort to legal proceedings for the recovery of the Rs. 2,500 super tax that he had paid is unsupportable for this would be a void promise. Mr. Elphinston pointed out to us that the Collecsor of Income Tax is empowered to enter into composition with assessees subject to certain condition and there being a valid compromise in this case, it ought not to be disturbed. It must be, however, observed that in the written statement of the appellant in the lower Court, though the plea of estoppel had been taken there was no reference to this compromise ; all that was urged was that the respondents had agreed to pay the super tax of Rs. 2,500 before the 31st March 1920. Nor does the question of compromise find any place in the issues, framed by the lower Court.

Issue 2 in the lower Court was, " Is the amount of the tax fixed on the plaintiffs own

admission, if so, is he not estopped from contesting its legality and validity and issue 3 has the payment been voluntary, if so can it be received from defendants." Even in the grounds of appeal in this Court, there is no reference to the compromise, but what is urged is that the respondent was barred from opening an account that had been settled. We cannot, therefore, permit the question as to a compromise being raised at this stage for it is a mixed question of law and fact.

It was lastly urged that as the payment was voluntary it can not be recovered. Under what circumstances was this payment made? Respondent never admitted that it was a just and legal payment for, as the order of the Collector itself shows, he protested as to its being legally due. It further seems fairly clear that his principal object in making the payment of Rs. 2,500-0-0 was to secure the hearing of his appeals against his income tax and super tax for the years 1919-20 and, lastly, there can be little doubt that the Collector was eager to receive payment of the Rs. 2,500-0-0 which otherwise under the law he was aware that he could not recover. We are of the opinion that the respondent is entitled to recover a payment made under these circumstances.

The appeal is dismissed with costs.

P. B. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 21 of 1921.

February 14, 1924.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

MOTIRAM —DEFENDANT—APPELLANT

versus

KUNWAR MUHAMMAD ABDUL JALIL KHAN—PLAINTIFF—RESPONDENT.

Companies Act (VI of 1882), s. 4—'Person', meaning of.

The word "person" in s 4 of the Companies Act can be used to include a collection of people, *e g.*, an association of individuals known as a joint Hindu family or beneficiaries interested beneficially in property vested in a trustee. Therefore, a person who holds shares in a Company personally as well as a trustee for a number of beneficiaries or as a guardian for a minor is to be counted as one individual person. [p. 441, col 2]

First appeal from the decree of the Subordinate Judge of Aligarh, dated the 25th October 1920.

Messrs. *P. L. Banerji* and *Panna Lal*, for the Appellant.

Messrs. *S. Abu Ali* and *Iqbal Ahmad*, for the Respondent.

JUDGMENT—This is an appeal from a preliminary decree in which the defendants were held liable to account to the plaintiff for the profits in a Cotton Ginning Factory which had accrued on the shares originally held by one Kunwar Muhammad Abdul Ghafur Khan, a deceased ancestor of the plaintiff. The original defendants were Moti Ram and Lala Har Prasad. The latter died during the pendency of the suit and his heirs have been duly brought on the record. They have not appealed from the preliminary decree. Moti Ram, the present appellant, was sued in the character of an agent who had received moneys as and for the use of the plaintiff. He was alleged to be withholding a sum which, with interest, amounted to over Rs. 35,000. He admitted that there was a considerable sum of undistributed profit. The principal point upon which he relied as enabling him to retain this money was that the Company was an illegal association inasmuch as it consisted of more than 20 persons and, therefore, violated the conditions of section 4 of the Indian Companies Act of 1882 which prohibits the formation of an unregistered Company in excess of that number. If, in our opinion, the appellant is wrong in that contention, then the appeal must fail. The Companies Act of 1882 nowhere defines 'person'. We are, therefore, thrown back upon the General Clauses Act (No. X of 1897). Person' is there defined to include any Company or Association or body of individuals whether incorporated or not. It is, therefore, obvious that 'person' can be used to include a collection of people and an appropriate illustration which will at once occur to Indian lawyers is that association of individuals known as a joint Hindu family. Analogous thereto are the varying number of beneficiaries who are, from time to time, interested beneficially in property vested

in a trustee or trustees. The obligations of the appellant and the representatives of Har Prasad as agents are contained in an agreement which is one of partnership and also one of agency—it is dated the 20th of August 1910 and, omitting for a moment the consideration of the legality or otherwise of the inception of the contract, the liability to account was in that agreement clearly provided for, nor is there any dispute as to the actual failure to deliver accounts throughout the period as to which default is alleged.

The appellant takes his stand as we have said on the illegality of the above-mentioned agreement. He contends that on an investigation and enumeration of the persons beneficially interested in the partnership their number amounts to more than 20. The number of the various members of the partnership enumerated as they themselves thought correct, amount exactly to 20. Mr. Peary Lal Banerji, however, contends that, inasmuch as Moti Ram is scheduled as holding shares on behalf of his two grandsons, his name should be cut out and the beneficiaries, his two grandsons, substituted in it. It may be noticed that Moti Ram is himself beneficially interested in another block of shares. No. 12 is given as

"*Musammat* Mohani.....for self and guardian of Moti Lal, minor, adopted son of Ganeshi Lal".

The appellant's contention as regards this lady is that she must be counted as one person in respect of her own personal interest in that block of shares and a second person by reason of her holding of an interest in the Company as the guardian of Moti Lal. If both these points were conceded, namely, the cutting out of Moti Ram's name at No. 4 and the substitution of his two grandsons and if the name of Moti Lal, the adopted son of Ganeshi Lal, had also to be added at No. 12 in addition to the name of *Musammat* Mohani then the number of persons would undoubtedly be over the prescribed limit of 20. We, however, do not agree with the view put forward by the appellant and it is to be noticed that at p. 25 where the agreement is set out Moti Ram is in fact counted as two persons; that is to say, he is counted in respect of the block of shares of which he should receive the profit to his own use and benefit and also of the shares which he holds as trustee for his two grandsons, even on that assumption the number of persons do not exceed 20. We do not agree with the view that the name of Moti Ram must give place to that of his two grandsons, nor do we agree that it is necessary to indicate as regards *Musammat* Mohani and Moti Lal that both of their names should be reckoned in the constitution of this Company. In fact, there were, as the appellant would wish us to delete or to accept, two Moti Rams. There was throughout the whole transaction one Moti Ram to whom the Company was accountable. In the same way the Company was accountable only to the one lady *Musammat* Mohani independently of the circumstance that she in her turn would be accountable to Moti Lal, the adopted son of Ganeshi Lal, in respect of whatever interest he happened to hold in the Company through her as trustee. Again, as regards Moti Ram it is to be noted that the contracting person in the first instance was the same Moti Ram who had a personal interest in the Company and the appellant and Har Prasad were bound to account to him and to him alone both for the shares in which he had his own beneficial interest and the shares which he held as a trustee for his grandsons. A similiar consideration applies to the case of No. 8 Bithal Das who, as guardian of his minor son Kishen Gopal, also figures with another man as a proprietor having a direct beneficial interest in the partnership. But the accountability of the Company to Bithal Das was an accountability to him alone both as regards his beneficial interest and as regards the shares which he held in a representative capacity for other persons. The number, however, would exceed 20 if certain persons, presumably members of a joint Hindu family and so found by the Judge, were in fact separate and thus capable of being regarded as separate contracting parties. The learned Subordinate Judge considered all the arguments put forward and came to the conclusion that the persons alleged to be joint were in truth joint and could be represented by one member of the joint family and that as regards the others, specially Moti Ram and *Musammat* Mohani and Bithal Das, that in truth they had been accurately described in the agreement. When these principles are applied to the document in question it becomes clear that the partnership certainly did not exceed 20

and probably did not exceed 18 persons. Agreeing with the learned Subordinate Judge, we hold that the partnership was not invalid in its inception and that the appellant and the representatives of Har Prasad are accountable to the plaintiff for his share in the profits for the period claimed. We also agree with the lower Court that the plaintiff having procured a succession certificate for the shares in the Factory can maintain the action for profits. We, therefore, dismiss the appeal with costs and fees on the higher scale.

S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 7 OF 1923.

November 6, 1923.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Le Rossignol.

GOPI MAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUHAMMAD YASIN—PLAINTIFF, BAKHTAWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 8 (1)—Agricultural land, what is—Land not used for agricultural purposes for several years.

The question whether, on the facts found, the property in dispute is to be classed as agricultural land or as village immoveable property within the meaning of section 8 (1) and (3) of the Punjab Pre-emption Act is a question of law.

The test for determining whether a piece of land is or is not agricultural land is the use to which the land is put at the time of sale, and each case must be decided on its own facts.

It is not a necessary implication that land is not agricultural land merely because at the time of sale it bears no crop. Agricultural land often lies fallow in the ordinary course of agriculture, and often remains unsown by reason of paucity or excess of moisture.

Land which has not been used as agricultural land for a period of six years and has been proposed for sale as a building site cannot be regarded as agricultural land within the meaning of section 8 (1) of the Punjab Pre-emption Act.

Appeal, under section 10 of the Letters Patent, from the decree of Mr. Justice Martinedu, passed in Civil Appeal No. 2428 of 1921, on 15th November 1922, affirming that of the District Judge, Ambala, dated the 3rd August 1921, decreeing the plaintiff's suit.

Mr. *Sundar Das*, for the Appellants.

Mr. *M. Obedulla*, for the Respondents.

JUDGMENT—In this pre-emption suit the matter for decision is whether the land sold is agricultural land or urban immoveable property.

Now, the facts found by the District Judge may not be challenged in second appeal, but the question whether on those facts so found, the land is to be classed as agricultural land is a question of law.

Agricultural land, as the term is used in the Pre-emption Act, means land as defind in the Punjab Alienation of Land Act, 1900, as amended by Act I of 1907, and is, therefore, 'land which is not occupied as the site of any building in a town and is occupied or let for agricultural purposes, etc.'

It is to be observed, then, that the test is the use to which the land is put at the time of the sale.

From this it is not a necessary implication that land is not agricultural land, merely because at the time of sale, it bears no crop; agricultural land often lies fallow in the ordinary course of agriculture and in this country often remains unsown by reason of paucity or excess of moisture, but each case must be decided on its own facts.

On the findings in this case that the land had not been used for agricultural purposes for the 6 years preceding the sale and in 1913 was proposed for sale as a building site, we hold that the land is not agricultural land and accepting the appeal we dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

IDA *v.* MUHAMMAD DIN

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1232 OF 1923.

November 9, 1923.

Present :—Mr. Justice Moti Sagar.

IDA—DEFENDANT—APPELLANT

versus

MUHAMMAD DIN—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (4)—Agreement to transfer land, whether requires registration.

Plaintiff and defendant were plaintiffs in two rival pre-emption suits Plaintiff withdrew his suit on the defendant executing an agreement that he would transfer a certain area of land in favour of the plaintiff without charging any price therefor if he succeeded in obtaining a decree in the pre-emption suit instituted by him. In a suit to enforce the agreement:

Held, that as the agreement purported to make the plaintiff owner of the area of land specified therein from the date on which the defendant's suit was decreed, it fell within the purview of section 17 (1)(4) of the Registration Act and required registration, and being unregistered was inadmissable in evidence.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 26th April 1922.

Mr. *Gullu Ram*, for the Appellant.

JUDGMENT.— This appeal arises out of a suit to enforce a certain agreement executed by the defendant in favour of the plaintiff under the following circumstances :

The plaintiff and the defendant brought two separate suits for pre-emption in respect of the sale of certain land made by the plaintiff's father and two uncles in favour of Khair-ud-din and Muhammad Bakhsh. The plaintiff withdrew the suit on the defendant's executing an agreement to the effect that he (the defendant) would transfer 41 *kanals* 15 *marlas* of land along with a 1|12th share in a certain well in his (the plaintiff's) favour without charging any price therefor if he succeeded in obtaining a decree in the pre-emption suit instituted by him. It appears that the defendant obtained a decree in the pre-emption suit but refused to abide by this agreement and to transfer the land in favour of the plaintiff. Thereupon the plaintiff brought the present suit to have the agreement enforced. The suit was resisted on the grounds that the agreement was without consideration and that it was not admissible in evidence for want of registration. Both the Courts below have concurrently found that the agreement was for consideration and that it did not require registration, inasmuch as the document itself did not create or declare any rights in immovable property of the value of more than Rs. 100, but gave plaintiff only a right to obtain a transfer in future, and was, therefore, not compulsorily registrable under sub-section 2 (v) of section 17 of Act XVI of 1908. The suit having been decreed the defendant has now come up in second appeal to this Court, and it has been urged on his behalf that the finding of the learned Additional Judge on the question of the admissibility of the document is not correct and that the suit ought to have been dismissed on the ground that the document on which it was based was compulsorily registrable and, therefore, not admissible in evidence.

In my opinion, this contention is right and must prevail. The document relied on is clearly a document of title and makes the plaintiff an owner to the extent of 41 *kanals* 15 *marlas* of land from the date on which the defendant-appellant obtains a decree in his pre-emption suit. The document clearly falls within the purview of clause (b) of sub-section (1) of section 17 of the Registration Act, and requires registration before it can be admitted into evidence.

I accept the appeal and, setting aside the order of the Court below, dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

IMAM DIN *v.* DITTU

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 520 OF 1923.

November 14, 1923.

Present :—Mr. Justice Martineau.

IMAM DIN—PLAINTIFF--PETITIONER

versus

DITTU—DEFENDANT—RESPONDENT.

Mortgage—Mortgagor, whether can sue to recover unpaid balance of mortgage-money Implied contract—Civil Procedure Code (Act V of 1908), s. 115—Order dismissing suit as not maintainable—Refusal to exercise jurisdiction—Revision.

An implied contract gives a cause of action no less than an express contract. There is an implied contract in the case of a mortgage that the mortgagee is to pay the whole of the amount for which the land is mortgaged.

A suit is, therefore, maintainable by the mortgagor to recover the unpaid balance of the mortgage-money from the mortgagee.

Where an Appellate Court throws out a suit on the erroneous ground that it is not maintainable, it declines to give a decision on the merits and its action amounts to a refusal to exercise a jurisdiction vested in it by law, within the meaning of section 115 of the Civil Procedure Code.

Petition under section 44 of Act IX of 1919 for revision of the decree of the District Judge, Gurdaspur, dated the 16th March 1923, reversing that of the Munsif, 1st class, Shakargarh, dated the 30th November 1922.

Lala *Mehr Chand Mahajan*, for the Petitioner.

JUDGMENT--The plaintiff mortgaged land to the defendant for Rs. 602. He alleges that the defendant paid only Rs. 492 out of that amount and sues to recover the balance of Rs. 110. The first Court passed a decree in his favour, but the District Judge on appeal has dismissed the suit on the ground that, in the absence of a contract, a suit for the recovery of the unpaid balance of the mortgage-money does not lie. The plaintiff has applied for revision.

The learned District Judge, in holding that such a suit is not maintainable unless there was a contract that the balance of the mortgage-money was to be paid, appears to mean

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that the contract must be an express one and here I cannot agree with him. An implied contract gives a cause of action no less than an express contract, and it seems to me obvious that there must have been an implied contract in the present case that the defendant was to pay the whole of the amount for which the land was mortgaged. I hold, therefore, that the suit is maintainable.

The application for revision lies, as the District Judge, in declining to give a decision on the merits and throwing out the case on the erroneous ground that the plaintiff cannot sue for the recovery of the unpaid balance of the mortgage-money, has failed to exercise a jurisdiction vested in him by law.

I accept the application, set aside the decree of the lower Appellate Court, and remand the case to that Court for decision on the merits. The Court-fee on the application will be refunded and other costs will be costs in the case.

Z. K. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 416-B OF 1922.

January 29, 1924.

Present : —Mr. Kotwal, A. J. C.

SAIK KASAM--DEFENDANT—APPELLANT

versus

HAJI YUSUF KARIM ABU--PLAINTIFF—RESPONDENT.

Transfer of Property Act IV of 1882), s. 106, applicability of—Contract to the contrary—Notice to quit—One month's notice—Notice, whether must expire with month of tenancy.

Section 106 of the Transfer of Property Act applies only when there is no contract to the contrary.

The rule as to notice contained in section 106 of the Transfer of Property Act is applicable or inapplicable as a whole.

A contract stipulating for a month's notice without any specification of the time when the notice is to expire, is a contract to the contrary within the meaning of section 106 of the Transfer of Property Act and in such a case it is not necessary that the notice should expire with the month of the tenancy.

DINA SINGH *v.* JAMAL SINGH

Appeal against the decree of the Additional District Judge, Amraoti, dated the 16th June 1922, in Civil Appeal No. 53 of 1922.

Mr. *R. R. Jaywant*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT—This appeal is not pressed so far as the decree for possession of the house is concerned. It is contended that as the last notice, dated the 18th December 1920, did not expire at the end of a month of the tenancy as required by section 106 of the Transfer of Property Act it was invalid and the tenancy not having terminated the plaintiff could not ask for an enhanced rent. As at present advised, I am inclined to hold that section 106 has no application to this case for it applies only where there is no contract to the contrary. In this case there is a contract to the contrary for the lease provides for a month's notice being given before the defendant could be asked to vacate. It is contended that the contract modifies the rule in section 106 only as regards the length of the notice and not as regards the provision that the notice should expire with the month of the tenancy. In my opinion, this provision is an indivisible part of a single rule embodied in section 106 and the rule must be applicable or inapplicable as a whole where there is any contract to the contrary. A contract for a month's notice without any specification of the time when the notice is to expire is a contract to the contrary of the rule in section 106. The notice here was in accordance with the terms of the contract and was valid. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 4 OF 1923.

January 26, 1924.

Present:—Mr. Hallifax, A. J. C.

DINA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAMALSINGH—PLAINTIFF—RESPONDENT.

Adverse possession—Invalid title, effect of—Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Agreement to vacate at specified time—Notice to quit, whether necessary—Tenant holding over, who is—Dissent of landlord.

Possession for twelve years or any other period prescribed by the law on an invalid title cannot perfect anything but that title.

Where a tenant agrees to give up possession at a particular time, he is not entitled to a notice to quit under section 106 of the Transfer of Property Act, as that section has no applicability to such a case.

There must be absence of both assent and dissent on the part of the landlord to constitute a tenant, a tenant on sufferance or as one holding over. Where there is express dissent by the landlord, for instance, by refusal to accept rent, the tenant cannot claim to be holding over.

Appeal against the decree of the District Judge, Bhandara, dated the 6th October 1922, in Civil Appeal No. 36 of 1922.

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

Mr. *P. A. Pandit*, for the Respondent

JUDGMENT—The deed of lease which has been excluded from evidence because it was unregistered had in any case to be excluded for the still more cogent reason that it did not bear upon any matter in issue. The plaintiff alleged that the defendants had held two villages of his on a lease executed in 1903 of which the term expired in June 1910. The defendants not only failed to deny this, but put forward many pleas each of which is an assertion of its truth. The fact stated by the plaintiff was, therefore, not in issue at all, and we are no more concerned with the question of whether the lease-deed was registered or not, or whether the lease was invalid for any other reason or not, than we are with the validity of some other transaction outside the case.

That alone would defeat the contention raised in this Court for the first time, that the suit was barred by time. But the contention is itself entirely without substance in spite of its false appearance of ingenuity. Possession for twelve years or any other period prescribed by the law on an invalid title cannot perfect anything but that title. Here the defendants not only never asserted at any time that they were perpetual lessees, but have steadily asserted all through this suit and in all their applications to be made something of the sort by the Deputy Commissioner that they were not.

The only other contention urged in appeal is that the defendants were lessees from year to year under section 106 of the Transfer of Property Act, and could not, therefore, be evicted without the formal notice prescribed by that section. There is, however, in this case, as they have admitted, a very distinct contract to the contrary in the lease, in which they agreed to give up possession in June 1910. There is no question here of their being "tenants holding over" or tenants on sufferance. That requires the absence of both assent and dissent on the part of the landlord, and he has proved his express dissent from the beginning very clearly by the fact that he has refused to accept any lease-money since 1910. The appeal will be dismissed and the appellants must pay all the costs throughout.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 861 OF 1923.

November 19, 1923.

Present :—Mr. Justice Moti Sagar.

DHARAM SINGH, SURETY—APPELLANT
versus
NAND SINGH, DECREE-HOLDER, AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 55, 145—Execution of decree—Arrest of judgment-debtor—Surety, extent of liability of—Notice to surety, whether necessary.

A judgment-debtor who was arrested in execution of a decree was produced before the Court and was released on giving security. The surety undertook to pay the decretal amount if the judgment-debtor failed to make an application for insolvency within one month, or if the surety failed to produce him in Court when called upon to do so ;

***Held* (1) that the surety was not released from liability merely on the judgment-debtor filing an application for insolvency within time and that he was also bound to produce the judgment-debtor in Court when called upon to do so ;**

(2) that before the decree could be ordered to be executed against the surety, the latter must be called upon to produce the judgment-debtor in Court, and it was only on his default that the surety would become liable under the bond.

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 4th March 1923, affirming that of the Subordinate Judge, 1st class, Amritsar, dated the 13th January 1923, setting aside the order passed by the Subordinate Judge, 1st class, Amritsar, on the 25th August 1922.

Mr. *Jai Gopal Sethi*, for the Appellant.

Lala *Badri Das*, *R. B.*, for the Respondents.

JUDGMENT.—The following are the circumstances of this case. One Jawahar Singh was arrested in execution of a decree for money. He was brought before the Court under section 55 of the Civil Procedure Code, and expressed an intention that he would apply to be declared an insolvent. The appellant Dharm Singh offered to stand surety, and on the 10th of April 1922 filed a security-bond to the effect that the judgment-debtor would apply within one month to be declared an insolvent, or that he would settle up with the decree-holder within this period. This security-bond was considered insufficient by the presiding Judge as being not in accordance with the provisions of section 55 of the Civil Procedure Code, and the statement of the surety was recorded. In this statement the surety gave an undertaking that the judgment-debtor would make the necessary application within one month, or that he would come to a settlement with the decree-holder, and that, if neither of these two things was done, he (the surety) would be liable for the whole of the decretal amount. He further stated that he would produce the judgment-debtor in Court and that if he would not do so, he would then also be liable to pay the whole of the decretal money to the decree-holder. On the 10th of May 1922 the judgment-debtor did make an application to be declared an insolvent. This was fixed for a hearing for the 6th of June 1922. On that day the insolvent was present in Court, and it was ordered that notices should issue to the creditors for the 11th of July 1922. On the 11th of July 1922 the insolvent was absent, and on the 25th of August 1922 the decree-holder applied to the executing Court that the decree be executed against the surety. This application was rejected by the executing Court in

the first instance, but the order was set aside on review and the decree ordered to be executed against the surety. An appeal against this order was preferred to the District Judge but dismissed on the 14th of March 1923. It is against this order that a second appeal has been preferred to this Court.

Three contentions have been raised by Mr. Sethi on behalf of the appellant. First, it is contended that no undertaking had been given by the surety that he would produce the judgment-debtor in Court after the latter had filed his application to be declared an insolvent. It is argued that the application for insolvency was filed within time and that the surety was consequently released from his liability. I am unable to agree in this contention. There is no doubt that in the security-bond there was no condition to the effect that the surety would also produce the judgment-debtor in Court when called upon to do so, but this security was considered insufficient probably because it did not comply with the provisions of section 55 of the Civil Procedure Code, and fresh security was, therefore, demanded. From the statement which the surety gave before the Court immediately after the rejection of the security-bond, it is clear that he made himself liable, for two things (1) that the judgment-debtor would file a petition in insolvency within thirty days or that he would come to a settlement with the decree-holder, and (2) that he would also produce the judgment-debtor in Court when called upon to do so. This undertaking was strictly in compliance with the provisions of section 55 of the Civil Procedure Code, and I do not, therefore, see how it can be argued that the surety was released from his liability merely because an application for insolvency was filed within time. Under the law as it now stands and, according to the undertaking given by the surety, he was bound to produce the judgment-debtor when called upon by the Court to do so, and he is not released from his liability by the mere filing by the judgment-debtor of a petition in insolvency.

The next point argued was, that there was nothing on the record to show that the surety was ever called upon to produce the judgment-debtor in Court after the latter had failed to appear on the 11th of July 1922. This contention, in my opinion, has force and must be allowed. Section 55 (4) of the Civil Procedure Code provides that the judgment-debtor may furnish security for his appearance in Court when called upon to do so. In the present case there is no order by the Court that the judgment-debtor should be produced. In these circumstances, I do not think that the Court was justified in ordering the decree to be executed against the surety. Even under section 145 of the Civil Procedure Code, under which action was now sought to be taken against the surety, it is necessary that notice should have been given by the Court to the surety why the decree should not be executed against him. No such notice appears to have been given and the order, therefore, cannot be sustained.

Lastly, it was argued that the decree-holder was not entitled to proceed both against the surety as well as against the judgment-debtor and that now, as the judgment-debtor has also been re-arrested in execution of the decree, the surety should be considered to have been discharged. It is unnecessary to give any finding upon this point as I am clearly of opinion that the appeal should succeed in view of my finding on the second question, namely, that the surety was never called upon to produce the judgment-debtor in Court and that no notice was given to him as required by section 145 of the Civil Procedure Code.

I accordingly accept the appeal and, setting aside the order of the learned District Judge, remand the case under Order XLI, rule 23, Civil Procedure Code, to be decided in accordance with law.

Z. K. *Appeal accepted.*

EAST INDIAN RAILWAY CO. *v.* SIB PROSAD DUTT RAI

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1083 OF 1923.

January 30, 1924.

Present :—Mr. Justice Suhrawardy.

EAST INDIAN RAILWAY, CO.—PETITIONER

versus

SIB PROSAD DUTT RAI—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 72, 76—Risk Note Form B—Consignment of goods for carriage—Loss of goods—Suit to recover value—Burden of proof.

Section 76 of the Railways Act does not apply to contracts limiting the liability of a Railway Company under section 72 of the Act. [p. 449, cols. 1 & 2.]

In a suit against a Railway Company to recover the value of goods consigned to the Company for carriage under Risk Note Form B, the plaintiff must prove that the loss of the goods was due to the wilful negligence of the Company. [p. 449, col. 2.]

Sheo Barat Ram v. *The Bengal North Western Railway Co.* 15 Ind Cas. 56 ; 16 C. W. N. 766 ; *The East Indian Railway Co.* v. *Kanak Behary Haldar*, 44 Ind. Cas. 691 ; 22 C. W. N. 622 ; *Smith Ltd.* v. *Great Western Railway* (1922) 1 A. C. 178 ; 91 L. J. K. B. 428 ; 27 Com. Cas. 247 ; 38 T. L. R. 359, followed.

Revision against the order of the Munsif, Asansol, dated the 4th August 1923, in S. C. C. Suit No. 786.

Babu *Mahendranath Roy*, for the Petitioner.

Babu *Hemendranath Sen*, for the Opposite Party.

JUDGMENT.—In this case the suit was brought by the plaintiff against the East Indian Railway Company, for damages for loss of two tins of ghee and for shortage in weight of other two tins. The latter part of the claim was dismissed by the Court below. With regard to the claim for loss of two tins the Court below has given a decree to the plaintiff for Rs. 71-14-0 and costs. The goods were consigned under Risk Note in form B. The learned Small Cause Court Judge had held that, under section 76 of the Railways Act, 1890, the burden of proof as to whether the loss was not due to wilful negligence and how the loss occurred, was upon the Railway Company ; and as it did not adduce any evidence on the point he decreed the plaintiff's suit. This is clearly wrong. Section 76 of the Railways Act does not apply to contracts limiting the liability of the Railway Company under section 72 of the Act. According to the Risk Note B, the plaintiff has to prove that the loss was due to wilful negligence of the defendant Company. This view of the law has been considered as hard ; but the consignor has entered into this bargain with his eyes open and for a clear advantage to himself, namely, much less freight. The wording of the Risk Note form B. as it stands, clearly throws the onus on the plaintiff; but if any authority is needed for this view it may be found in a number of cases two of which may be mentioned, here, *viz.*, the cases of *Sheo Barat Ram* v. *The Bengal North Western Railway Co.* (1), and *The East I. Ry. Co.* v. *Kanak Behary Haldar* (2). The view taken by the Court below is undoubtedly wrong and cannot be supported.

It is argued by Mr. Sen who appears for the plaintiff opposite party that it the duty of the defendant Company to prove how the loss was occasioned and whether it was due to any cause other than their negligence or the negligence of their servants. Reliance was placed for this contention on the cases of *The Central Indian Spinning & Weaving Co.* v. *G. I. P. Railway Co.* (3), and *Ghelabhai Punsi* v. *The East Indian Railway Co.* (4). There are some expressions in those judgments no doubt which lend support to this contention. But so far as this Court is concerned, the matter has been set at rest by the decision which I have referred to above. After the pronouncement of the judgment by the Bombay High Court, which seems to have taken a different view on this question, the House of Lords had occasion to consider this point in the case of *Smith Ltd.* v. *Great Western Railway* (5). There the note under which the goods were forwarded was similary worded as Risk Note B in this case. At page 183 of the report Lord Buckmaster expresses himself in these words: " It is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the Company's servants. It is

(1) 15 Ind. Cas. 56 ; 16 C. W. N. 766.
(2) 44 Ind. Cas. 691 ; 22 C. W N. 622.
(3) 67 Ind. Cas. 162 ; 47 B. 155 ; 24 Bom. L. R. 272 ; (1942) A. I. R (B.) 46.
(4) 68 Ind. Cas. 241 ; 23 Bom. L. R. 525 ; 45 B. 1201.
(5) (1922) 1 A. C. 178 ; 91 L. J. K. B. 428, 27 Com. Cas. 247 ; 38 T L. R. 359.

perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory, i t practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the Railway Company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the Railway Company and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the Railway Company's servants, is to call upon him to establish something which it may almost be impossible for him to prove. Nonetheless, that is the burden that he has undertaken and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the Railway Company." In that case the plaintiffs only proved that they delivered certain goods to the Railway Company for carriage; and he further put in the correspondence between himself and the Railway Company refusing to give any information regarding the circumstances within their knowledge associated with the loss of those goods. In those circumstances, their Lordships of the House of Lords held that the plaintiff had completely failed to prove his case. I think that, under this authority, the question should be considered to have been finally set at rest.

I have been asked by the learned Vakil for the opposite party to send the case back to the trial Court in order to enable him to adduce evidence for the discharge of the onus that lies upon him. I do not think that I am entitled to adopt that course. It does not appear that the plaintiff was prevented from adducing any evidence. No doubt, the view taken by the lower Court was in his favour but that is no ground for entitling a party at a subsequent stage when that view is found to be wrong, to adduce evidence in a accordance with the view held by a higher Court. I do not, therefore, think that I should accede to his request.

The result is that this Rule is, made absolute, the decree of the Court below set aside and the plaintiff's suit dismissed with costs. As the petitioner has succeeded in this Court he is entitled to costs of this Court. I assess the hearing fee at one gold mohur.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1998 of 1920.

January 16, 1924.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

POHLO RAM AND OTHERS—PLAINTIFFS —APPELLANTS

versus

SURJAN AND OTHERS—DEFENDANTS —RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 59—Occupancy tenancy—Succession—Collaterals inter se rule applicable to whole blood whether excludes half blood.

While succession to an occupancy tenancy is governed by section 59 of the Tenancy Act the rights of the collaterals *inter se* would be governed by the relevant tribal or village custom, so that among themselves those related to the deceased in the whole blood may exclude those who are only related to him in half blood. [p 451, col. 1]

Mohru v. *Mutsaddi*, 109 P. R. 1894 (F. B.), followed.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 1st June 1920, reversing that of the Munsif, 2nd class, Hoshiarpur, dated the 9th April 1920.

Lala *Fakir Chand*, for the Appellants.

Mr. *C. L. Mathur*, for Lala *Badri Das*, R.B., for the Respondents.

JUDGMENT—This is a second appeal in which the point for determination is whether, in the succession to an occupancy tenancy when the dispute is between collaterals, the whole blood excludes the half blood. It has been found by the learned District Judge that Jaishi, through whom the plaintiffs' claim, was the son of Har Bhaj by one wife and Dasaundhi, Ganesha and Buddhu were the sons of Har Bhaj by another wife. It has also been found that, on the death of Har Bhaj, Jaishi succeeded to a larger share of the estate on the ground that the succession was then governed by the rule of *Chundawand*. Buddhu's line has died out and his widow, *Musammat*

Sawarno, having died in 1916 succession to his share has opened out and the descendants of Dasaundhi and Ganesha claim to exclude the descendants of Jaishi on the ground that they, the plaintiffs, although collaterals, are more remotely related to Buddhu and his sons, owing to their being of the half blood, than are the defendants who are descended from Buddhu's full borthers.

Mr. Fakir Chand on behalf of the appellants has urged that section 59 of the Tenancy Act governs the succession and that, under that section, there is no difference such as is claimed in the present case. Section 59 of the Tenancy Act lays down the rule of succession and under it, admittedly, the plaintiffs and defendants, as collaterals, are entitled to succeed. In support of his contention he referred us to *Wali Muhammad* v. *Mariam Bi* (1) *Aisha Bibi* v. *Aziz ud din* (2). *In Wali Muhammad* v. *Mariam Bi* (1) the sister of a deceased male owner claimed to be the heir under Muhammadan Law. It was held that succession to the occupancy tenancy was governed by section 59 and was in no way controlled by Muhammadan Law and, therefore, it was the deceased's widow who should succeed. In *Aisba Bibi* v. *Aziz ud-din* (2) it was held that succession to occupancy land is governed by the provisions of section 59 of the Punjab Tenancy Act and not by custom applicable to the parties or by their personal law. In the view promulgated by these two decisions we concur. At the same time, we are in agreement with the remarks made in a Full Bench decision reported as *Mohru* v. *Mutsaddi* (3), where it was remarked that while succession to an occupancy tenancy was governed by section 59 of the Tenancy Act the rights of the collaterals *inter se* would be governed by the relevant tribal or village custom. In other words, while the succession is regulated by section 59, it is clear, and indeed Mr. Fakir Chand admits, that the more remote collaterals would be excluded by the nearer ones.

In the present case we see no reason to differ from the Court below in thinking that the whole blood are more nearly related to Buddhu and his deceased sons than are the descendants of Jaishi who belong to the half blood. The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal Dismissed.*

(1) 52 P. R. 1903 ; 102 P. L. R. 1906 ; 80 P. W. R. 1906.
(2) 6 Ind Cas 946 ; 50 P. R. 1910 ; 131 P. L. R. 1910 ; 74 P. W. R. 1910.
(3) 109 P. R. 1894 (F. B.).

LAHORE HIGH COURT.

CIVIL APPEAL NO. 426 OF 1920.
December 13, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

Malik SHER MUHAMMAD KHAN—PLAINTIFF—APPELLANT
versus
Malik DOST MUHAMMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Tiwanas of Shahpur District—Unrestricted powers—Wajib-ul-arz, *entry in, value of—Evidence Act (I of 1872) s. 65 (g)—Abstract from register of mutations to prove custom, admissibility of.*

Tiwanas of the Shahpur District have an unrestricted right of alienating their ancestral property.

The record of a custom in a *wajib ul-arz* entry is the most valuable evidence in support of the custom recorded. [p. 452, col 2; p. 453, col. 1.]

An abstract from mutation records showing the number of alienations of land which have taken place in a particular tribe is admissible in evidence under s. 65 (g) of the Evidence Act in order to prove that members of that tribe have unrestricted powers of alienation. [p. 453, col 1.]

Balgobind v. *Badri Prasad*, 74 Ind. Cas. 449 ; 45 A. 413 ; 21 A. L. J. 508 ; (1923) A. I. R. (P. C.) 70 ; 9 O. & A. L. R. (P. C.) 591 ; 26 O. C. 217 ; 45 M. L. J. 289 ; 38 C. L. J. 302 ; (1923) M. W. N. 799 ; 33 M. L. T. 317 ; 10 O. L. J. 368 (P. C.), followed.

Appeal from the decree of the Senior Subordinate Judge, Shahpur, dated the 3rd December 1919.

Mr. *M. L. Puri*, for the Appellant.

Mr. *Kanwar Dalip Singh*, for *Mahtab Singh*, Respondent.

JUDGMENT—*Malik* Dost Muhammad Khan, a *Tiwana*, sold on the 29th August 1916 some agricultural land and a *kachcha* house with an open site attached to it to Mehtab Singh, an *Arora* by caste. The land is situated in *Mauza* Nurpur and the house with the site attached to it is situated in the village of Mitha Tiwana. The property is admittedly ancestral in its character. The present suit was instituted by Sher Muhammad Khan, minor son of *Malik* Dost Muhammad Khan, through *Malik* Muhammad Muzaffar Khan

his grandfather, for a declaration that the alienation would have no effect on his reversionary rights after the death of the alienor because there was no consideration and necessity for the alienation. The vendee and the vendor were impleaded as defendants in the suit. Both of them filed written statements resisting the suit on the main ground that the *Tiwanas* of the Shahpur District had an unrestricted right of alienating their property. They also pleaded that consideration had passed and that there was necessity. Upon this pleading the trial Court struck two issues, namely, (1) whether by the customary law of the *Tiwanas* generally or of the parties (plaintiff and his father) in particular an owner holding ancestral property has unrestricted power to alienate such property? and (2) whether the alienation in dispute was made for valid necessity and consideration?

The burden of proving the alleged special custom was rightly placed upon the defendants. It appears that beyond filing a *jawab dawa* the vendor Dost Muhammad Khan took no further interest in the defence of the suit. The vendee, however, produced evidence in support of the alleged special custom. The trial Court held that the vendee had satisfied the *onus* placed upon him and had proved the existence of a custom among the *Tiwanas* of the Shahpur District which entitled a *Tiwana* proprietor to alienate his property without any restriction or limit. The suit was necessarily dismissed.

The plaintiff has preferred this first appeal against the decision of the learned Senior Subordinate Judge, and we have been taken through the evidence by the Counsel on both sides. We have to decide whether, with reference to the evidence on the record, the decision of the Court below is correct.

In the arguments before the Court below Counsel for the defendant-vendee divided the evidence under three heads, namely (*a*) entries consisting of statements of the *maliks* of the villages Mitha Tiwana, Nurpur and Ukhil Mohla made in the *wajib-ul-arz* of 1863 to say that they had unrestricted power to alienate; (*b*) innumerable sales that have taken place in Mitha Tiwana itself since the advent of the British rule without any contest on the part of either sons or other collaterals; (*c*) a judicial decision by Mr. Martineau, District Judge, dated 10th April 1917, holding that *Sheikh Tiwanas* of the Ukhli Mohla village had unrestricted power of alienation.

Besides the above class of evidence, a number of witnesses were also called on behalf of the defendant-vendee to prove the alleged custom. The trial Court did not attach much importance to the statements of those witnesses and preferred to base its judgment on the consideration of the documentary evidence alone. In our opinion, the oral evidence on behalf of the defendant vendee, though not so precise and clear as it ought to have been, does go to prove that there have been many sales and mortgages by *Tiwanas*, and there has not been a single instance in which any of those alienations have been contested. It is true that the evidence of these witnesses is not specific on the point as to whether the property about which these alienations were made were ancestral or non-ancestral. Yet taking the oral evidence along with the *fard* prepared from mutation records in respect of a large number of sales and mortgages we can come to no other conclusion than that the properties dealt with must, to a large extent, have been ancestral.

Now, coming to the documentary evidence itself, there can be no possible doubt that the view taken by the learned Senior Subordinate Judge is strongly supported by it. The entry in the *wajib-ul-arz* of 1863 was criticised by Mr. Mukand Lal on the ground that it was not a record of a custom but a record of contract only and that it had ceased to have any effect after the Settlement during which the *wajib-ul-arz* was prepared, especially as the defendant had not produced copies of the *wajib ul-arz* of the later Settlements. In our opinion, there is no force in the criticism advanced by the learned Counsel. A careful perusal of the *wajib-ul-arz* of 1863 shows that the entry was intended to be a record of custom. That being so, a presumption of correctness exists in favour of this entry. Their Lordships of the Privy Council in the case of *Balgobind* v. *Badri Prasad* (1) observed " that the record in a *wajib-ul-arz* of a custom

(1) 74 Ind. Cas. 449 ; 45 A. 413 ; 21 A. L. J. 578 ; (1923) A. I. R. (P. C.) 70; 9 O. & A. L. R. (P.C.) 561 ; 26 O. C. 217 ; 45 M. L. J. 289 ; 38 C. L. J. 302 ; (1923) M.W.N. 799 ; 33 M.L.T 317 ; 10 O. L. J. 368 (P.C.). followed.

was the most valuable evidence of the custom." This being so, it rather lay upon the plaintiff to rebut the evidence of custom as contained in the *wajib-ul-arz*. If there was any variance in the entry in the *wajib-ul-arz* of subsequent Settlements, we have no doubt the plaintiff would have obtained copies and produced them. The natural conclusion is that *wajib-ul-arz* of subsequent Settlements did not contain anything in favour of the plaintiff or against the entry contained in the *wajib-ul-arz* of 1863.

The next piece of documentry evidence is the judgment of Mr. Martineau in the case of *Sher Bahadur* v. *Ghulam Muhammad* printed at page 4 of the supplementary paper book. The learned Judge in that case upon the evidence held that the *Sheikh Tiwans* appeared to be included in the category of miscellaneous *Musalman* tribes and thus not necessarily bound by the custom applicable to agriculturists. That case related to village Ukhli Mohla and the present suit relates to property situated in village Nurpur and Mitha Tiwana. But the parties in that suit as well as in this suit were *Tiwanas*, and it appears from the general trend of the evidence, both oral and documentary, that the *Tiwanas* of the District of Shahpur are governed by similar customs. An abstract from the mutation records was prepared by the Naib Sadr Kanungo and was produced before the Court below. In that abstract the total number of aljenations by sales and mortgages made by the *Tiwana* tribe were 354 out of which 84 were mortgages and 270 sales. Mr. Mukand Lal objected to this piace of evidence on two grounds (1) that the *fard* was not admissible in evidence and (2) that the entries contained in the *fard* could not be looked at as the copies of the mutation orders had not been produced. He relied on the provisions of sections 76 and 77 of the Evidence Act and contended that the entries of public documents could be proved only by the production of certified copies. In our opinion the *fard* produced appropriately comes under clause (*g*) of section 65 of the Evidence Act which provides that, when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection, secondary evidence may be given by producing an extract. This is what exactly happened in this case. An examination of the vernacular record shows that the original files of the mutation records were not sent by the revenue authorities on the ground that there was a specific rule on the subject which prohibited their transmission. The Court then directed the Naib Sadr Kanungo to prepare an extract and produce it before it. In our opinion the *fard* in this case is a very valuable piece of evidence. It was argued by Mr. Mukand Lal that no value can be attached to this list of alienations without showing that they were never challenged. The oral evidence of the witnesses clearly shows that no alienations either by way of sale or mortgage had ever been challenged. In our opinion the defendant has established the custom alleged. We accordingly affiirm the decision of the Court below and dismiss the appeal with costs.

Z. K. *Appeal dismissed*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 125 OF 1920.

November 29, 1923.

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

JHANDA SINGH AND OTHERS—PLAINTIFFS APPELLANTS

versus

SADIQ MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 99, O. XVII rr. 2, 3—Adjournment granted at request of plaintiff—Default on adjourned date—Procedure—Arguments, failure to hear—Irregularity.

Where an adjournment is granted at the request of the plaintiff and the plaintiff fails to appear on the adjourned date, the Court is entitled to proceed under O. XVII, r. 3 of the Civil Procedure Code and is not bound to proceed under r. 2 of the Order. [p. 455, col. 2.]

Case-law discussed.

After the evidence in a case had been recorded an adjournment was granted at the request of the plaintiff to enable his Counsel to appear and argue the case. At the adjourned hearing Counsel for the plaintiff did not appear and the Court proceeded to dispose of the suit under O. XVII, r. 3 of the Civil Procedure Code and eventually dismissed it;

***Held* (1) that the Court was entitled to proceed under O. XVII, r. 3 of the Code and was not bound to proceed under rule 2 of the Order. [p. 455, col. 2.]**

(2) that in any case, the mere omission to hear arguments amounted only to an irrigularity which was covered by section 99 of the Civil Procedure Code. [p. 456, col. 2.]

Sher Khan v. *Bahadur Shah*, 91 P. R. 1904; 5 P. L. R. 1905, distinguished.

Appeal from the decree of the Senior Subordinate Judge, Montgomery, dated the 26th May 1919.

Lala *Kanshi Ram*, for the Appellants.

Diwan *Mehr Chand* and Lala *Harcharan Das Kumar*, for the Respondents.

JUDGMENT

BAOADWAY, J.—The plaintiffs in this suit sought to obtain a decree for possession of certain properties which belonged to one Ganda Singh. It was alleged that Ganda Singh had died forty years previously and had been succeeded by his widows *Musammat* Sukhan and *Musammat* Budhan who had been alienating portions of the property. *Musammat* Sukhan had died 11 years before suit and had been succeeded by *Musammat* Budhan who had died some six months prior to the institution of these proceedings. The alienees of the two widows or their legal representatives were also impleaded. The defence set up was that the plaintiffs were not related to Ganda Singh and that even if they were related the property in question was not ancestral *qua* them. The necessary issues were struck and the parties proceeded to lead their evidence. The plaintiffs closed their case after which the defendants closed theirs and a date was fixed for arguments, the date being the 20th of May 1919. On that date Mr. Mohan, Lal one of the Vakils who had been conducting the case for the plaintiffs, appeared in Court with an application in which it was alleged that it was the intention of the plaintiffs to apply for a transfer of the case and asked for an adjournment. The Senior Subordinate Judge postponed the case for the 21st May 1919 directing the payment of certain costs to the Counsel for the other side. Mr. Mohan Lal then stated clearly that the senior Counsel was engaged in a case in the Sessions Court on that date and, therefore, the case could not be argued but they could argue the next day. Request also was made that the costs should not be awarded. The case was thereupon adjourned to 21st of May 1919 for arguments, the question of costs being left open for re-consideration. On the 21st of May 1919 an application for an adjournment was filed in Court by one of the plaintiffs who, however, failed to appear when the case itself was called on. Mr. Mohan Lal when asked to argue the case, declined to do so saying that he had not been engaged to argue the case. When the senior Counsel was specially sent for and asked to proceed with the arguments he said that he had withdrawn from the case a long time ago and did not wish to appear. The Court thereupon, after recording these facts, decided to act under O. XVII, r. 3 of the Civil Procedure Code and proceeded to judgment which was pronounced on the 26th of May 1919. The case was disposed of after an elaborate discussion of the merits and the plaintiffs' suit was dismissed.

The plaintiffs have now come up to this Court in appeal and on their behalf we have heard Mr Kanshi Ram. It has been argued before us that the Court's order under O. XVII, r. 3 of the Civil Procedure Code was illegal and that, therefore, the suit should be remanded in order that the Court should proceed in accordance with law. Under O. XVII, r. 3 where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default;, proceed to decide the suit forthwith. In the present case the adjournment from the 20th May to the 21st was made at the request of the plaintiffs acting through their Counsel. It is clear from the record that *Lala* Mohan Lal, Vakil for the plaintiffs, stated that the case could be argued on the next day, the senior Counsel being engaged on that day—the 20th of May 1919—in the Court of Session and the adjournment was specifically granted by the Court, the order being that "in any case the arguments shall be heard tomorrow." In these circumstances, I am of opinion that O. XVII, r. 3 of the Civil Procedure Code was applicable and empowered the Court to dispose of the case on the merits as has been done.

It has, however, been contended that, inasmuch as on the 21st of May 1919 there was a default on the part of the plaintiffs and as that default would have brought the case within the purview of r. 2 of O. XVII

the suit should have been dismissed in default undert hat rule and not under rule 3. Mr. Kanshi Ram referred to a case *Murli Dhar* v. *Duni Chand* (1) and to *Chandramathi Ammal* v. *Narayanasami Iyer* (2) and *Prativadi Bhayan Karan Pichamma* v. *Kamisetti Sreeramulu* (3). In reply to Mr. Mehr Chand's arguments he also referred to. *Phul Koer* v. *Hashmat Ullah Khan* (4). The position in Madras is somewhat peculiar. *Chandramathi Ammal* v. *Narayanasami Iyer* (2) does to some extent support Mr. Kanshi Ram's contention. It is, however, opposed to *Naganada Iyer* v. *Krishnamurti Aiyar* (5). In *Prativadi Bhayan Karan Pichamma* v. *Kamisetti Sreeramulu* (3) Wallis, C. J., differed from the view taken by his brother Judges and came to the conclusion that *Chandramathi Ammal* v. *Narayanasami Iyer* (2) went too far when it laid down that rules 2 and 3 must be read as mutually exclusive. This opinion is of considerable weight inasmuch as Wallis, C. J., was a party to *Chandramathi Ammal* v. *Narayanasami Iyer* (2). In the Lahore case Mr. Justice Abdul Raoof has clearly held that an order under O. XVII, r. 3 of the Civil Procedure Code can be made in the absence of the party to whom time has been given, a view in which I fully concur.

On the other hand, *Badam* v. *Nathu Singh* (6), *Mariaunissa* v. *Ram Kalpa Gorain* (7), and *Enatulla* v. *Jihan Mohan Roy* (8) were referred to by Mr. Mehr Chand. In *Mariaurissa* v. *Ram Kalpa Gorain* (7) it was held that the scope of section 157 (now r. 2, O. XVII was distinct from that of section 158 (now r. 3, O. XVII) but that the Court could act under section 158 even though the parties were absent if the requirements of that section were otherwise fulfilled and there were materials on the record on which the Court could pronounce judgment. The decision in *Enatulla* v. *Jihan Mohan Roy* (8) went a little further and it was there held that where an adjournment was granted at the instance of a party for the purposes stated in r. 3 and there were materials enabling the Court to decide the suit it must act under r. 3 and not under r. 2. *Badam* v. *Nathu Singh* (6) is to the same effect and *Phul Koer* v. *Hashmat ullah Khan* (4) does not in any way weaken the force of the earlier ruling inasmuch as the facts were different. In the latter case the adjournment had not been granted at the instance of one of the parties. I, therefore think that the Court could act under r. 3 but in any event it seems to me that the Court in disposing of the case acted perfectly rightly. The entire evidence in the case had been recorded and parties had closed their respective cases ; a date for arguments had been fixed; the time had been extended at the instance of one of the parties and on the failure of that party to put in an appearance, in my opinion, the Court was perfectly justified in proceeding to dispose of the case on the merits.

The only other question referred to at the bar was as to the relationship of the appellants to Ganda Singh. The evidence on this point consists of the testimony of three witnesses (P. W. 7) Kesar Singh, (P. W. 10) Labh Singh, and (P. W. 11.) Ladha Singh. The first two witnesses are related to each other and the statements of all clearly show that they know nothing personally about the relationship of the parties. Kesar Singh is unable to remember the names of persons actually living although he professes to be able to know the names of persons who must have died when he was a child. Labh Singh attributes his knowledge to Jhanda Singh, plaintiff, as also does Ladha Singh. In these circumstances, I agree with the view taken by the Court below and hold that the relationship has not been proved The suit has, therefore, been correctly decided and I would dismiss the appeal with costs.

Raoof, J.—I agree. The facts as disclosed in the case leave no doubt on the point that the Court below was justified in deciding the

(1) 69 Ind. Cas. 368; (1923) A. I. R. L. 281.
(2) 5 Ind. Cas 23; 33 M. 241; 19 M. L. J. 760 ; 7 M. L. T. 369.
(3) 43 Ind. Cas. 566 ; 41 M. 286 ; 34 M. L. J. 24 ; 23 M. L. T. 1 ; (1918) M. W. N. 92 (F. B.).
(4) 29 Ind, Cas. 553; 37 A. 460 at p. 462; 13 A. L. J. 679.
(5) 6 Ind. Cas. 233; 34 M. 97; (1910) M. W. N. 213; 20 M. L. J. 535; 8 M. L. T. 60.
(6) 25 A. 194.
(7) 34 C. 235; 5 C. L. J. 260.
(8) 23 Ind. Cas. 769 ; 41 C. 956 ; 18 C. W. N. 775; 19 C. L J. 585.

case ont he materials on the record. Look at the case from any point of view you like and you an come to no other conclusion If the decision be treated as coming under r. 3 of O. XVII of the Civil Procedure Code, then there can be no doubt that the Court was justified in proceeding to decide the suit forthwith. As pointed out by my learned brother, evidence on both sides had been completed and all that was necessary was to decide the case. The Court fixed the 20th of May 1919 for arguments. On that day a petition was presented on behalf of the plaintiffs for the adjournment of the hearing of the arguments on the ground that an application for the transfer of the suit from the Court of the learned Senior Subordinate Judge was to be made. In addition to this petition, *Lala* Mohan Lal, one of the learned Vakils who appeared for the plaintiffs, made the following statement:—

> "*Lala* Radha Kishen is engaged in a case in Sessions Court to-day. We cannot argue to-day. We can argue to-morrow, but I will request that no costs should be awarded, because the Counsel who is to argue is busy in the Sessions and cannot find it possible to come to-day."

I have referred to this statement of the learned Vakil especially for the reason that Mr. Kanshi Ram, the learned Vakil for the appellants, has contended that r. 3 of O. XVII of the Civil Procedure Code did not strictly apply to the facts of the present case inasmuch as time had not been granted to the plaintiffs at their request for the purpose of performing any act necessary for the further progress of the suit. In support of this contention he relied upon the statement in the petition of the 20th of May 1919 and argued that in that petition it was stated that the adjournment was required for the purpose of making an application for transfer. That was only one ground on which the adjournment was asked. The real object, however. was to get an adjournment for putting forward an argument on behalf of the plaintiffs. However, the statement of *Lala* Mohan Lal, the learned Vakil, removes all doubt on this point. He said "we can argue to-morrow." This clearly indicates that he requested the Court to grant time for arguments till "to-morrow." It, therefore, follows that time was granted to the plaintiffs at the request of their Vakil, *Lala* Mohan Lal, for the purpose o advancing arguments in favour of their case Thus, both the requirements of r. 3 were fulfilled, namely, the adjournment was granted at the request of a party and for the purpose of doing an act for the further progress of the suit. Now, r. 3 provides: "The Court may, notwithstanding such default, proceed to decide the suit forthwith." This is what the Court has done in this case. Although the plaintiffs did not appear the Court was not bound to dismiss the suit for default of appearance and could have proceeded to decide the suit forthwith. I entirely agree with my learned brother in holding that, even if the plaintiffs did not appear, the Court was not bound to act under r. 2 of O. XVII of the Civil Procedure Code. But leaving aside the question of the applicability of r. 3 of O XVIII am clearly of opinion that the evidence on behalf of both parties had been given and the case being complete the Court was not bound to hear a separate argument for the purpose of deciding the suit. Although the Court had fixed a date for arguments the Court was not bound to wait for an argument if the plaintiffs did not choose to appear. At the most it may amount to a mere irregularity which would be covered by the salutary provision of section 99 of the Code. The decision in the case of *Sher Khan* v. *Bahadur Shah* (9) was relied upon and it was contended that it was held in that case that the refusal to hear an argument in support of the case was not a mere irregularity. The reason given by the learned Judges was that evidence had been taken by one Judge and the decision in the case was given by another Judge. In those circumstances the learned Judges were rightly of opinion that the new Judge should have heard arguments in support of the case. In the present case the evidence was given before the very learned Judge who has decided the case. Therefore, that ruling has no manner of application to the facts of the present case.

I need not say anything about the arguments on the merits of the case because, as pointed out by my learned brother, the evidence produced on behalf of the plaintiffs to prove their relationship to Ganda Singh was extremely meagre.

I agree in dismissing the appeal with costs.

Z. K. *Appeal discussed.*

(9) 91 P. R. 1904; 5 P. L. R. 1908.

NAND LAL *v.* DHARAMDEO SINGH

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1445 OF 1921.

July 31, 1923.

Present :—Sir Dawson-Miller, Kt., Chief Justice, and Mr. Justice Kulwant Sahay.

NAND LAL—DEFENDANT—APPELLANT

versus

DHARAMDEO SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58—Mortgage—hypothecation to secure contingent liability, whether mortgage.

A mortgage can be created for the discharge of a contingent liability. [p. 459, col. 2.]

Imbichi v. *Achampat Amukoya Haji*, 39 Ind. Cas. 867 ; 38 M. L. J. 58 ; 6 L. W. 115 ; (1917) M. W. N. 533 ; *Maina* v. *Bachchi*, 28 A. 655 ; 4 W. N. (1906) 165 ; 3 A. L. J. 651, relied on

A present hypothecation of property to secure a future liability to repay the mortgage-money if the mortgagee should be deprived of possession of the mortgaged property amounts to a mortgage. [p. 459, col. 2.]

Second appeal from a decision of the officiating District Judge, Shahabad, dated the 2nd June 1921, confirming a decision of the Subordinate Judge, Shahabad, dated the 17th April 1920.

Mr. *Rai T. N. Sahai*, for the Appellant.

Mr. *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.

Dawson-Miller C. J.—This is an appeal on behalf of Nand Lal Mukhtar, the first defendant in the suit, against a decision of the officiating District Judge of Shahabad affirming a decree of the Subordinate Judge of Arrah.

The suit out of which the appeal arises was instituted before the Subordinate Judge in 1918 to enforce a mortgage of a 4-pies share in mauzas Dharauli and Gosainpur, which villages together constituted mahal Dharauli, executed by Rajaram Singh in favour of Jasodanand Singh in the year 1891 to secure a loan of Rs. 1,900 together with interest, advanced by the mortgagee.

The plaintiffs are the sons and other members of the family of Jasodanand, the mortgagee, who died before the suit was instituted. They are joint in estate and now represent the interest of Jasodanand. The defendants who are also members of a joint family are the successors in interest of Rajaram, the mortgagor, by purchase. The mortgaged property, by reason of a Collectorate partition effected in the year 1917, is now represented by the new estate then formed and entered in the roll of the Collector of Arrah under *tauzi* No. 11674, and it is against that estate that the plaintiffs seek to enforce their mortgage under the provisions of section 99 of the Estates Partition Act of 1897.

The defendants in their pleadings raised several pleas in defence to the suit. Some of these were subsequently abandoned and four issues were eventually framed for decision at the trial as follows :—

(1) Whether the plaintiffs are entitled to get a mortgage-decree or a simple money decree against the defendants?

(2) Is the suit bad for defect of parties?

(3) Is the plaintiffs, suit barred by limitation?

(4) What reliefs if any, are the plaintiffs entitled to ?

The Subordinate Judge decided all the issues in favour of the plaintiffs and granted them a mortgage-decree for sale of the property if the decretal amount should not be paid within six months.

The defendants appealed to the District Judge who dismissed the appeal with costs and affirmed the decision of the trial Court. From that decision the defendant No. 1 has appealed to this Court. The appellant contends, (1) that the instrument relied on as a mortgage created no valid mortgage over the property, and (2) that the suit is barred by limitation. Other points were raised during the argument dealing with the right of the plaintiffs to proceed against the substituted property but these were admitted to be without substance and were abandoned during the hearing.

The argument on the first point was the same as that urged before the District Judge in the lower Court, namely, that the deed created no present transfer of an interest in the mortgaged property at the time of execution but only a contingent interest which might not arise. The case of *Madho Misser* v. *Sidh Binaik Upadhya* (1) was relied on in support of the argument.

(1) 14 C. 687 ; 7 Ind. Dec. (N. S.) 456.

NAND LAL *v.* DHARAMDEO SINGH

Before considering the authority relied on it will be convenient to refer to the terms of the deed. It is of a somewhat unusual description and appears to be designed to comprise the features both of a usufructuary and a simple mortgage. It is dated the 18th Falgun 1298 F. (February 1891). It recites the mortgagor's need for raising money and the receipt of a loan of Rs 1,900 from the mortgagee bearing interest at the "usual rate" which is admitted to be one per cent. per mensem. The mortgagor then agrees to repay the principal sum and interest at the end of Jeyth of the current year, that is, about three months later when the next agricultural year begins. It then proceeds 'should the aforesaid due date expire I shall pay the interest for the period ending on the due date separately in exchange for the interest remaining on the principal, I give in writing and mortgage 4-pies (English) proprietary right inherited and purchased out of *patti* Cheharum out of 16-annas in mauza Dharauli, original with dependencies, appertaining to Mahal Dharauli, Pargana Bhojpur, proprietary interest with *zirait* rights together with sayer of mango and mahua trees, etc , etc , and all *zemindari* rights in the mortgaged property. The said creditor shall enter upon possession of the mortgaged property from the agricultural year 1299 F. He may either cultivate the same as his *zerait* or settle it with tenants. He shall after payment of the Goverment Revenue, Road Cess Public Works cesses appropriate the profit and produce thereof in lieu of interest. He shall continue in possession of the mortgaged property until repayment of the principal amount as specified above. I shall neither claim mesne profits nor shall he claim interest. When I shall pay the principal in one lump sum at the end of Jeyth of any year I shall take back the mortgaged property and this deed. Until repayment of the principal neither I nor my heirs shall directly or indirectly interfere with the mortgaged property." So far the instrument creates a usufructuary mortgage only. It then proceed as follows:—" f perchance he be thrown out of possession in any way, I also give in writing mortgage and hypothecate my property, namely, 4-pies share, proprietary interest in *mauza* Gosainpur and 4-pies share in *mauza* Dharauli in lieu of the principal and the produce and I do declare that until repayment of the money I shall not execute any deed of sale, *hiba*, *Bakshishnama*, or *rekan* in favour of any one. Should I do so the same shall be treated as null and void. Therefore I have executed this mortgage deed that it may be of use when required."

There can be little doubt as to the intention of the deed. The share in *mauza* Dharauli was to be mortgaged to secure payment of the interest accruing after H. Jeyth 1298 F. As to the interest for the short period between the 18th Falgun and the end of Jeth 1298 F. the mortgagor's liability was a personal one only and the property was not charged with that, nor is it claimed in the present suit. To secure the interest after that date the property was hypothecated and the mortgagee is to be put in possession and to appropriate the proceeds after paying the Government demands, and as long as he is in possession no interest is payable on the principal beyond the proceeds. In the second part of the deed the mortgagor hypothecates not only the share in *mauza* Dharauli but also the share in *mauza* Gosainpur, that is the whole of his 4-pies share in the mahal, which was comprised of these two villages, to secure repay ment of the principal as well as interest, or, as the deed put it, "in lieu of the principal and the produce" if the mortgagee should be dispossessed. The meaning of this clause appears to me to be that the property there mentioned is hypothecated to secure repayment of the principal together with interest in the event of the mortgagee being dispossessed and that the obligation to repay the principal shall only arise if and when the mortgagee shall be dispossessed. There is a present charge to meet a future contingency. What happened was that the debt remained unpaid at the due date and the mortgagee was put in possession under the terms of the deed and remained in possession receiving the proceeds in lieu of interest up to the year 1906 when he was for a time dispossessed by Nand Lal, the defendant No. 1, who had in the meantime purchased the mortgagor's interest in the mahal. Shortly afterwards, Nand Lal, by bringing about certain fraudulent and collusive certificate proceedings under the Public Demands Recovery Act, succeeded in bringing the plaintiffs interest also to sale and himself purchased it. The plaintiffs then instituted a suit, numbered 43 of 1907, against Nand Lal

and others to set aside the sale and recover possession. In that suit they were successful and recovered possession in 1908. In that suit the validity of the mortgage as a mortgage was in issue and was decided in favour of the plaintiffs The plaintiffs remained in possession until the year 1917. In that year there was a Collectorate partition of the *mahal* and the defendant's 4 pies share, the subject of the plaintiffs' mortgage, was formed into a separate estate bearing *tauzi* No. 11674. After partition and the formation of the new estates out of the old *mahal* the plaintiffs were deprived of their possession as the old *mahal* no longer existed. They consequently instituted the present suitagainst the substituted property allotted to Nand Lal as representing the old 4-pies share. It is no longer disputed that if the mortgage is a valid and subsisting instrument it is available against the substituted property.

The appellant contends that the case is governed by the decision in *Madho Misser* v. *Sidh Binaik Upadhya* (1). In the document in question in that case no words of hypothecation appear. It begins with an acknowledgment by Sidh Binaik that he has borrowed Rs. 99 from Madho Misser and he undertakes to pay interest at a certain rate. It then stipulated that the borrower should pay the entire principal with interest in the following year, and if he did not do so he was to lose his right to a plot of land situated in *mauza* Kutha and the lender was to take possession of the land, ater which no interest on the money was to be paid by the borrower. The Court held, without giving any detailed reasons, that the document in question was not a mortgage and indeed the point was not seriously pressed on behalf of the lender. The Court further held that the instrument did not create a present charge upon the property within the meaning of section 100 of the Transfer of Property Act. The reason for the latter part of the decision was that the document did not, in the opinion of the Court, create an immediate charge but merely the possibility of a charge depending upon a future contingency. No doubt there is a difference between a charge within the meaning of section 100 of the Transfer of Property Act and the mere possibility of a charge or a promise to create a charge in the future and the question for determination in that case was merely one of construction. The decision however has been criticised on more than one occasion in subsequent cases. See *Imbichi* v. *Achampat Anukoya Haji* (2) and *Narayanasamy Rao* v. *Ramasamy Naicken* (3). In the former case Coutts-Trotter, J., commenting on the decision in *Madho Misser's case* and a somewhat similar decision in *Harjas Rai* v. *Naurang* (4) pointed out that these decisions were capable of two constructions but if they were supposed to enunciate the proposition that whenever you have a charge to secure a liability which will arise only, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, he refused to follow them. In my opinion the view so expressed is correct. It is, moreover, the view of the late Sir Rash Behari Ghose, an undoubted authority on the Law of Mortgage, who states in dealing with this subject that a charge may undoubtedly be created as well as a mortgage for the discharge of a contingent liability, and he cites the decision of the Madras Court above referred to as well as the decision of the Allahabad High Court in *Maina* v. *Bachchi* (5): See the Law of Mortgage in India, 5th Ed., Vol. I, p. 158, note.

In my opinion the instrument in this case created a mortgage of the share in *mauza* Dharauli to secure by way of usufruct the interest on the loan and the subsequent possession of the mortgagee completed the transaction. It also created a simple mortgage of the share in both villages of the *mahal* to secure repayment of the principal sum advanced including subsequent interest if the mortgagee should be deprived of possession It seems to me that this was a present hypothecation to secure a future liability to repay the mortgage-money if the mortgagee should be deprived of possession. Although the due date of repayment was the end of Jeyth 1298 F. the charge created on the property to secure repayment of the principal sum could only be enforced in the event of the mortgagee being deprived of possession but, nevertheless, in my opinion, the property was hypothecated from the out-

(2) 39 Ind. Cas. 867; 38 M. L. J. 58; 6 L.W. 1158; (1917) M. W. N. 533.
(3) 60 Ind. Cas. 611.
(4) 8 A. L. J. 220; A. W. N. (1906) 82.
(5) 28 A. 655 ; A. W. N. (1906) 165 ; 3 A. L. J. 551.

set to secure repayment of the loan in the event which has in fact happened, and the mortgage is not bad upon the ground urged by the appellant. There is also I think another reason why the appellant cannot now question the validity of the mortgage bond. In the suit to recover possession brought by the plaintiffs against Nand Lal in 1907 the decision partly turned upon the validity of the mortgage which was the basis of the plaintiffs' title and which was challenged by the defendants in that suit. The plaintiffs' title under the mortgage as a valid and binding instrument was declared, and as between the same parties the matter would appear now to be *res judicata*.

The second point relating to limitation can be shortly dealt with. Although the date of repayment of the mortgage-bond was Jeyth 1298 F. the right to enforce payment by sale of the security did not arise until dispossession which took place in 1917, the year before the suit was instituted. Up to that time this right had not accrued and the only claim the mortgagees had against the property was the right to receive the usufruct in lieu of interest. The claim is, therefore, not barred by limitation. In my opinion the appeal should be dismissed with costs.

Z K. *Appeal dismissed.*

Kulwant Sahay, J.—I agree.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 53 OF 1923.

November 27, 1923.

Present:—Sir Shadi Lal, Chief Justice, and Mr. Justice Le Rossignod

THE LAHORE BANK LTD., RAWALPINDI, IN LIQUIDATION—DECREE-HOLDER—APPELLANT

versus

GHULAM JILANI—RESPONDENT.

Execution of decree—Court, duty of—Decree against minor not represented in proceedings—Court, whether can refuse to execute.

An executing Court has no jurisdiction to criticise or go behind the decree ; all that concerns it is the execution of it. If the decree should be annulled that is not the function of the executing Court.

Kalipad Sarkar v. *Harimohan Dalal*, 35 Ind. Cas. 856 ; 44 C. 627 ; 24 C. L. J. 375 ; 21 C. W. N. 1104. *Rashid un-Nissa* v. *Muhammad Ismail Khan*, 8 Ind Cas. 864 ; 31 A. 502 ; 13 C. W. N 1184 ; 10 C. L. J. 318 ; 6 A L. J. 822 ; 11 Bom. L R. 1245 ; 6 M. L. T. 279 ; 19 M. L. J. 631 ; 36 I. A. 168 (P. C), relied on.

Jangli Lal v. *Laddu Ram Marwari*, 50 Ind. Cas. 529 ; (1919) Pat. 105 ; 4 P L J 240 (F. B.) ; *Chuck* v. *Cremer*, (1816) 1 G. L. J. Ch. 92 ; 2 Ph. 113 ; 1 Coop. C. C. 338 ; 41 E. R. 884 ; 78 R. R. 45, referred to.

An executing Court cannot refuse to execute a decree merely on the ground that it was passed against a minor who was not represented in the proceedings in which the decree was passed.

Letters Patent Appeal under section 10 of the Letters Patent from the order of Mr. Justice Harrison, dated the 6th January 1923, in Civil Appeal No. 340 of 1922.

Rai Bahadur *Bakhshi Sohan Lal*, for the Appellant.

Mr. *Abdul Ghani*, for the Respondent.

Judgment.—This Letters Patent Appeal arises out of the following facts :—

The Liquidation Judge Lahore, made an order for payment of Rs. 1,165-7-0 against 'Ghulam Jilani, minor son of Muhammad Zaman'.

That order is enforceable as a decree, but the executing Court refused execution on the ground that the minor had not been represented before the Liquidation Court and, therefore, no decree existed.

The Hon'ble Judge in Chambers concurred on the ground that the decree was *ex facie* invalid and considered that *Jangli Lal* v. *Laddu Ram* (1) was an analogous case.

We are unable to accept either of the reasons adopted by the Courts below. The decree is certainly in existence ; it is on the record for all who have eyes to see ; a decree is not invalid merely because it is issued against a minor.

SANO v. PURAN SINGH

A reference is made in *Jangli Lal* v. *Laddu Ram Marwari* (1) to a principle laid down in *Chuck* v. *Cremer* (2) that there must be 'a valid decree in existence, which has not ceased to be operative and is capable of execution', but this clearly means that the decree must exist and that it has not been satisfied and the relief granted is of such a nature that it is capable of execution.

It has no reference to the procedure of the Court which issued the decree.

With all respect, *Jangli Lal* v. *Laddu Ram Marwari*(1) appears to us to miss the real point, which is not, whether a decree has no force, but how and by what Court the decree is to be rendered of no force.

However that may be, the matter is concluded by the decision in *Kalipal Sarkar* v. *Hari Mohan Dalal* (3), and *Rashid-un-Nissa* v. *Muhammad Ismail Khan* (4) and there is no difference in principle between those two cases and this.

The broad clear rule is that an executing Court has no jurisdiction to criticize or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled, that is not the function of an executing Court.

We accept the appeal with costs throughout, set aside the orders of the Courts below and direct that execution be allowed.

Z. K. *Appeal allowed.*

(1) 50 Ind. Cas. 529; (1919) Pat. 105; 4 P. L. J. 240 (F. B).
(2) (1846) 16 L. J Ch. 92; 2 Ph. 113; 1 Coop. C.C. 333; 41 E. R. 884; 78 R. R. 45.
(3) 35 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104.
(4) 8 Ind. Cas. 864; 31 A. 572; 18 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.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 91 OF 1922.

January 29, 1924.

Present:—Mr Baker, O. J. C.

MT. SANO *alias* MT. INDRANI BAHU —PLAINTIFF—APPELLANT

versus

Baboo PURAN SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Jains—Widow, whether has absolute power over property inherited from husband—Custom, proof of—Judicial decisions, value of.

Jains are Hindu dissenters and when their customs are set up they must be proved like other customs varying the ordinary law, and, when so proved, effect must be given to them. [p. 462, col. 1.]

Sheokuarbai v. *Jeo Raj*, 61 Ind. Cas. 491; 16 N. L. R. 170; (1940) M. W. N. 627; 2 U. P. L. R. (P. C.) 161; 25 C. W. N. 273 (P. C.); *Sheo Singh Rai* v. *Dakho*, 1 A. 638; 2 C. L. R. 193; 5 I. A. 87; 3 Sar. P. C. J. 807; 8 Suth. P. C. J. 54); 2 Ind. Jur. 396, 1 Ind. Dec. (N. S.) 481 (P. C.); *Chotay Lall* v. *Chunnoo Lall*, 4 C. 744; 3 C. L. R. 46); 5 I. A. 15; 3 Sar. P. C. J. 850; 8 Suth. P. C. J. 572; 3 Ind. Jur. 175; 2 Ind. Dec. (N. S.) 473, relied on.

When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. [p. 462 col. 1.]

Gangadhar Rama Rao v. *Rajah of Pittapore*, 47 Ind. Cas. 354; 41 M. 778 at p. 785; 35 M. L. J. 392; 21 M. L. T. 276; 16 A. L. J. 353; 48 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1053; 23 C. W. N. 173; (1918) M. W. N. 922; 45 I. A. 143 (P. C.), relied on.

Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place. [p. 462, col. 2.]

Harnath Pershad v. *Mandil Das*, 27 C. 879 at p. 891; 14 Ind. Dec. (N. S.) 251; *Shimbhu Nath* v. *Gayan Chand*, 16 A. 379; A. W. N. (1894), 123; 8 Ind. Dec. (N. S.) 246, relied on.

A Jain widow has absolute power of disposal over property inherited from her husband which was his non-ancestral property. [p. 462, col. 2.]

Appeal from the decree of the District

SANO *v.* PURAN SINGH

Judge, Saugor in Civil Appeal No. 88 of 1921, dated the 24th October 1921.

Messrs. *V. R. Pandit, R. B.* and *G. L. Subhedar*, for the Appellant.

Mr. *M. Gupta* for the Respondent.

JUDGMENT.—The plaintiff, who was the daughter of one Gopal, sued to set aside a sale deed executed in favour of defendant by Mt. Nonibahu, who was the widow of Gopal. The plaintiff is the daughter of Gopal's first wife, also called Nonibahu.

Both Courts have dismissed the plaintiff's suit, holding that as Mt. Nonibahu was a Jain widow she had an absolute power of disposal over the estate inherited by her from her husband which was not ancestral, and that there was legal necessity.

The plaintiff makes this second appeal on the ground that the custom by which a Jain widow has an absolute power of disposal over her husband's unancestral property is not proved, and that there was no legal necessity for alienation.

It is contended on behalf of the appellant that the law as laid down by the Privy Council is, that Jains are Hindu dissenters and when their customs are set up they must be proved like other customs varying the ordinary law and, when so proved, effect must be given to them : cf. *Sheokuarbai* v. *Jeo Raj* (1), *Sheo Singh Rai* v. *Dakho* (2) and *Chotay Lall* v. *Chunnoo Lall* (3). It has been held in *Gangadhar Ram Rao* v. *Rajah of Pittapore* (4) that when a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It was also held in *Harnath Pershad* v. *Mandil Dass* (5), that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place. In that case it was further held that a childless Jain widow acquires an absolute right in her husband's separate property. This case was from Arrah but it was held that there was nothing to differentiate the Jains at Arrah from the Jains eleswhere So also in *Shimbhu Nath* v. *Gayan Chand* (6), it was held that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom. This was a case from the Saharanpur District.

The parties in the present case are residents of Saugor and the existence of such a custom among the Jains of Saugor has been recognised by this Court in the unreported case of *Mojilal* v. *Mt. Gori Bahu* (Second Appeal No. 416 of 1897) where the existence of the custom that a Jain widow has an absolute power over self acquired property inherited by her from her husband was admitted. This is sufficient for the purposes of the present case. It has been contended that this decision refers to Pawar Jains whereas the parties to the present case belong to a different section of the Jain community, but it was never pleaded in the Courts below that there was any distinction as regards widows of the different subdivisions of Jains. The plaintiff's witnesses 1 and 3 have themselves admitted the existence of the custom. In these circumstances, there are no grounds for interference with the findings of the lower Courts as to the existence of the custom.

This is sufficient for the decision of the appeal, but the lower appellate Court has also dealt with the question of legal necessity. The findings of the Courts below as to the financial position of the widow are findings of fact which cannot be disturbed in second appeal. It has been found by the lower appellate

(1) 61 Ind Cas. 481; 16 N. L. R. 170; (1920) M. W. N. 627; 2 U. P. L. R. (P. C.) 161; 25 C. W. N. 278 (P C.).

(2) 1 A. 688 ; 2 C. L. R. 193 ; 5 I. A. 87 ; 3 Sar. P. C. J. 807 ; 3 Syth P. C. J. 529 ; 2 Ind. Jur. 396; Ind. Dec. (N. S.) 481 (P. C.)

(3) 4 C 744 ; 3 C. L. R. 465 ; 6 I. A. 15 ; 3 Sar. P. C. J. 880 ; 3 Luth P. C. J. 572 ; 3 Ind. Jur. 175 ; 2 Ind. Dec. N. S) 473.

(4) 47 Ind. Cas. 854 ; 41 M. 778 at p. 785 ; 35 M. L. J. 392 ; 24 M. L. T. 276 ; 16 A. L J. 588 ; 28 C L. J. 428 ; 5 P. L. W. 267 ; 20 Bom. L. R. 1056 ; 28 C. W. N. 173 ; (1918) M. W. N. 922 ; 46 I. A 148 (P. C.)

(5) 27 C. 879 at p. 891 ; 14 Ind. Dec. (N. S.) 251.

(6) 16 A. 379 ; A. W. N. (1894) 128 ; 8 Ind. Dec. (N. S.) 246.

Court that in 1912 the widow was indebted to one Alam (D. W. 6) to the extent of Rs. 347 and that the house was sold in order to pay off the debt and buy a small house. The respondent was aware that the house required repairs and that the debt was due to Alam.

There are no reasons for interference and the appeal is dismissed with costs.

Z .K. *Appeal dismissed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 81 OF 1923.

November 28, 1923.

Present :—Sir Dawson-Miller, Kt., K. C , Chief Justice, and Mr Justice Mullick.

Maharajadhiraj SIR RAMESHWAR SINGH—PLAINTIFF—APPELLANT

versus

Sheikh WAZUL HAQUE —DEFENDANT—RESPONDENT.

Landlord and tenant—Rent, additional, in respect of fruit trees, legality of—Abwab—*Custom—Bengal Tenancy Act VIII of* 1885, *s.* 153—*Dispute as to amount of rent payable—Appeal, second, whether lies.*

Abwabs have been abolished under the Regulations for many years but the right to *Bankar, Jhalkar* and *Phalkar* was always an exception from the abolitions made by the Regulations and rent in respect of fruit trees or other classes of trees may well be charged in addition to the ordinary rent either under an agreement between the landlord and tenant, or if any custom to that effect can be made out. [p 464, col. 1.]

A custom whereby the landlord is entitled to charge a certain rate of rent in respect of fruit trees in addition to the ordinary rent payable for the land is not illegal. [p. 464, col. 2.]

Where, in answer to a suit for rent, the tenant pleads that the rent claimed by the landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and a second appeal is, therefore, competent in the case. [p 465, col. 1]

Kanai Mahaldar v. *Madhu Sudan Ghose*, 6 C. L. J. 669, referred to.

Appeal under section 10 of the Letter Patent.

Messrs. *K. P. Jayasmal* and *M. Prasad*, for the Appellant.

Mr. *L. K. Jha*, for the Respondent.

Dawson-Miller C. J.—The suit out of which this appeal arises was instituted by the plaintiff as landlord against the defendant as tenant claiming rent of a certain holding which had been purchased by the defendant from the previous tenant. The area of the holding was 5 *bighas* 7 *cottahs* 18 *dhurs* and the *jama* recorded in the Record of-Rights was Rs. 16 and some odd annas. In addition to the *jama* so recorded the plaintiff claimed certain rental under a custom of the village in respect of palm trees from the time when they became juice yielding at certain rates. The plaintiff alleged with regard to this part of the claim that under the custom of the village a *raiyat* who has palm trees pays to the *malik* for each tree which becomes *shirbar* (yielding juice) 4 annas per tree for the *Baishaki* season 4 annas for the *Ghaur* season and 2 annas for the *Basanti* or *Aghani* season and further alleged that he had been realising this all along.

The defendant in his written statement did not in terms traverse the allegation about custom. The written statement is not very sufficiently worded but his contention was that he was not responsible for anything more than Rs. 16 odd which was recorded in the record of rights.

Both the learned Munsif before whom the case came and the Subordinate Judge in appeal disallowed that part of the plaintiff's claim which related to the palm trees. It appears that there was no entry in the Record-of-Rights with regard to any such custom as that which was relied upon by the plaintiff. The rent recorded there was Rs. 16-1-1½ and that was the rent which the defendant admitted to be due. The learned Munsif considered that anything over and above that rental in respect of the palm trees was something in the nature of *Abwab* and was, therefore, not recoverable according to law.

The learned Subordinate Judge, when the case went before him on appeal, pointed out that, according to the plaintiff, the tenants pay *sairat* for palm trees under a custom which had existed for a long time. He then refers in detail to the evidence of the various witnesses who had deposed to this custom. He points out that the witnesses could not say when the *sairat* had first of all been recovered, which is hardly surprising if indeed the custom had existed for a long time and he adds that, "It is clear from the evidence of the plaintiff's witnesses Nos. 4 and 6 that the *sairat* for

palmyra palms is realised by the Raj as customary dues of the Raj. It is not realised as part of the rent of the holding. According to the plaintiff's witness No. 2 the *sairat* is claimed in addition to the *khatian jam.*" The issue, therefore, which had to be determined was whether or not the plaintiff had made out the custom which he set up and under which he claimed this *sairat*. The learned Judge does not in terms come to a clear finding as to whether such a custom had been made out or not but he drew attention to the fact that the *sairat* for palms was not shown in the rent receipts granted to the defendant. He found as a fact, however, that papers were kept in the Raj *sherista* some of which had been filed from the year 1311 to prove the realisation of *sairat* for the palmyra palms and he accepted these entries as genuine and did not consider, as had been suggested, that they were forged. In this state of affairs,it seems to me that the learned Judge ought to have come to a clear finding one way or the other whether this custom whereby the landlord collected this additional rent for the palm trees had been proved or not, but all he says upon that point is: "I do not think that a landlord can claim anything more than the legal rent under any such custom." By the legal rent it is clear that the learned Subordinate Judge meant the rent recorded in the Record of-Rights which did not include the rent said to be payable in respect of the trees. He then adds : "A few years payment by the defendant will not give any legal right to the plaintiff to such impositions" and that is all he said about it. It seems to me that the learned Judge did not think it necessary to determine one way or the other whether the custom had been made out because he considered that even if such a custom did exist it was a custom regarding certain illegal impositions which even a custom could not legalise. In my opinion if that was his view it was not justified. It is true that *abwabs* have been abolished under the Regulations for many years but the right to *Bankar*, *Jhalkar* and *Phulkar* was always an exception from the abolitions made by the Regulations and rent in respect of fruit trees or other classes of trees may well be charged in addition to the ordinary rent either under an agreement between the landlord and tenant or if any custom to that effect can be made out.

From the decision of the Subordinate Judge an appeal was preferred to this Court. The learned Judge before whom the case came considered that the decision of the lower Court could not be disturbed. His view was that the settlement of the land with the tenant included not merely the settlement of the land for agricultural purposes but also for the purposes of collecting and using the fruits of the trees and that, therefore, the tenant being entitled to the use and occupation of the land was entitled without the payment of any further rent to the fruits of the trees. He further was of opinion that if by any custom there was a *sair* for palm trees it must come under the term rent as defined in the Bengal Tenancy Act where those palm trees stand on the holdings." So I take it that the question in this case is what is the rent payable by the defendant for his land." That question the learned Judge considered was answered conclusively by the Survey *khaiian* which stated the rent to be Rs. 16-1-1½. He, therefore, dismissed the appeal.

In my opinion, with great respect to the learned Judge, he failed to appreciate that a custom such as that set up by the plaintiff in this case might be a perfectly legal custom and that, if it could be proved to the satisfaction of the Court, the plaintiff would be entitled in addition to the rent to the *sair* or rent for the use of thepalm trees. As, in my opinion, the learned Subordinate Judge did not come to any definite conclusion upon this question of custom I think that this case should go back to the Court of the Subordinate Judge for him to arrive at a finding as to whether or not the custom alleged by the plaintiff in his plaint has been made out to his satisfaction. The custom there alleged is: " Under the custom of the village a *raiyat* who has palm trees pays to the *malik* for each tree which becomes *shirbar* (yielding juice) 4 annas per tree for the *Baishaki* season, 4 annas for the *Ghaur* season and 2 annas for the *Basanti* or *Aghani* season." If in fact that custom can be made out it is not an illegal custom but a perfectly valid one and one which ought to be given effect to. In arriving at a conclusion upon this point the learned Judge will, of course, bear in mind the facts which it is necessary to prove in order to establish a custom.

RAY BINODE BIHARI BOSE *v.* TOKHI SINGH

The only other point which was taken in this appeal was that no second appeal was permissible under section 153 to the Bengal Tenancy Act. In my opinion the question which arises in this case is clearly one relating to the amount of the rent payable. It is, therefore, a case which is excepted from the provisions of the section and a second appeal is permissible.

The case will remain upon the file of this Court and the learned Judge will return his finding upon the issue stated within two months of this date. I do not think any additional evidence ought to be called in this case. The learned Subordinate Judge will determine the issue upon the evidence already upon the record.

Mullick, J —I agree. I have only to add with regard to the preliminary objection that the case upon which the learned Vakil for the respondent relies, namely, *Kanai Mahaldar* v. *Madhu Sudan Ghose* (1) does not shew what were the facts of that case. On the other hand, the facts in the present case are similar to those in second appeal No. 815 of 1901 before the Calcutta High Court in the case of *Nabu Sheikh* v. *Jogendra Nath Bhaira*. There the plaintiff claimed at a certain *jama* and the defendant pleaded that the *jama* was included in a larger *jama* and, therefore, asserted that the *jama* claimed was not due. It was held that the decision was a decision as to the amount of rent and a second appeal lay.

Z. K. *Case remanded.*

(1) 6 C. L. J. 669.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1545 OF 1921.

November 14, 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

RAY BINODE BIHARI BOSE AND OTHERS —PLAINTIFFS—APPELLANTS

versus

TOKHI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 70—Division of crops—Final order—Suit for rent—Jurisdiction of Civil Courts.

In a proceeding under section 70 of the Bengal Tenancy Act, the Sub-Divisional Officer passed the following order :—" Parties heard. The *khasra* seems fair and is accepted. The landlords's share, if not accepted, may be sold and proceeds deposited in the Treasury." There was a subsequent order to the effect, " Sale proceeds deposited into the Treasury. Case disposed of :"

***Held* (1) that both orders must be read together as a whole, and, taken together, they amounted to a final order under section 70 of the Bengal Tenancy Act, enforceable as a decree ;**

(2) that a Civil Court, therefore, had no jurisdiction to pass a decree for rent in respect of the period dealt with by the orders of the Sub-Divisional Officer.

Appeal from a decision of the District Judge, Gaya, dated the 30th August 1921, modifying a decision of the Subordinate Judge, Gaya, dated the 12th July 1920.

Mr. *N. C. Sinha*, for the Appellants.

Mr. *S. N. Ray*, for the Respondents.

JUDGMENT.

Ross, J.—The only question in this appeal is as to the claim for rent of 1325 and 1326. The Courts below held that no award could be made by the Civil Court in respect of these years, inasmuch as the matter had been decided by the Revenue Court under section 70 of the Bengal Tenancy Act.

The contention on behalf of the landlords who are the appellants, is that there is no final order enforceable as a decree passed by the

Revenue Court. The orders are in the following terms and in each case the final order consists of two parts. As regards the year 1325 the order is as follows :—" 28th February 1918 parties heard. The *Khasra* seems fair and is accepted. The landlord's share if not accepted, may be sold and proceeds deposited in the Treasury" " 16th March 1918: " Sale proceeds deposited into the Treasury by Chalan No. 75, dated 15th March 1918. Case disposed of." In the case of the year 1326 the order is as follows :—" 20th January 1919 *Khasra* examined. There is no objection before me by any party. I approve the *khasra*" "The landlords have refused to accept the *Hakmi* share of the crops. The same will be sold and the sale proceeds will be deposited in the Treasury to their credit. Issue orders to the *Sarpanch* accordingly." " 3rd January 1919. Sale proceeds Rs. 140-0 3 credited into Treasury by Chalan No. 15 dated 27th January 1919 case disposed of " with regard to the second order, that is, for the year 1326, the learned Vakil for the appellants concedes that that is a final order enforceable as a decree, but he contends that the order dealing with the year 1325 is not a final order or one enforceable as a decree, because there is no direction that the money is to be paid to the credit of the landlords. The order must be read as a whole and it comes to this. The *Takhmina* papers were considered by the Subdivisional Officer and the division was approved. That means that the crop was divided between the two parties landlord and tenant. With regard to the landlord's share a further direction was given that if he did not accept it then it should be sold and the money deposited in the Treasury. The money that was deposited was the sale proceeds of the londlord's share and, consequently, it was his money and no further direction in my opinion was necessary and the landlord would be entitled on that order to withdraw the money. There is clearly a final order enforceable as a decree and the provisions of section 70 of the Act have been fully complied with. I would, therefore, dismiss this appeal but without costs.

The cross-appeal is not pressed and is dismissed.

Das, J.—I agree.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1849 OF 1921.

January 16, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

BABU RAM RAI AND OTHERS—APPELLANTS

versus

MAHESHWAR PRASAD SINGH AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 63—Mortgage—Accession to mortgaged property—Tenancies acquired by mortgagee—Civil Procedure Code (Act V of 1908), s. 151—Remand under inherent power of Court—Order whether can be re-considered at final hearing.

Tenancy lands which are acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property and the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expense of acquiring them.

No appeal lies from an order of remand made in the exercise of the inherent power of an Appellate Court, and that Court has jurisdiction to consider the correctness of the order of remand when the case comes before it for final decision.

Appeal from a decision of the Additional District Judge, Saran, dated the 30th June, 1921, modifying a decision of the Subordinate Judge, Saran, dated the 26th March, 1918.

Messrs. *C. C. Das* and *B. N. Mitter*, for the Appellants.

Messrs. *S. Sultan Ahmed* and *Sivasaran Lal*, for the Respondents.

Das, J.—I think there was a serious error in the order of remand to which I was a party. In dealing with the dispute in regard to the nine *bighas* of tenancy lands which were of Harakh, I said as follows in the order of remand: "so far as the tenancy lands of Harakh are concerned (and there is no dispute that the 9 bighas of Harakh were tenancy lands) the question is a little more difficult. It appears that the mortgagees in their suit for rent against Harakh got a decree for ejectment against him. The learned.

Vakil on behalf of the respondents argued that as soon as ejectment takes place the *raivati* interest is extinguished and the landlord gets into possession freed from the tenancy. That undoubtedly is so; but the question still remains whether the mortgagees treated these acquisitions as merged in the mortgage-security or not. The question is again one of intention and I am not satisfied that the learned District Judge has properly considered all the evidence in the case.' The arguments of Mr. C. C. Das have convinced me that the view expressed by me in the order of remand is wholly erroneous. I have no doubt whatever that tenancy lands which are acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property, and that the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expense of acquiring it. The learned Additional District Judge has very properly proceeded on the order of remand; and I wish to make it clear that if we are obliged to vary the decree passed by him, it is not because there is any error in his judgment, but because the order of remand, upon which he has proceeded, is itself wrong.

A question was raised before us whether it is open to the appellants to challenge the correctness of the order of remand. The remand was not under the provisions of O. XLI r. 23; and, there being no appeal from an order of remand in the exercise of the inherent powers of the Court, this Court, in my opinion, has complete powers to investigate the correctness of the order.

In regard to the other question raised in this appeal, the finding of the learned Judge is a finding of fact, and is binding on us in second appeal.

I would vary the decree passed by the Court below by providing that, upon paying to the mortgagees defendants the expense of acquiring it, the plaintiffs do recover *khas* possession of (nominally) nine *bighas* of *kasht* land referred to as nine *bighas* of *kasht* of Hardeo, Jagdeo and Nand, sons of Harakh, in the judgment of the learned Judge.

There will be no order as to costs incurred in this Court.

Ross, J.—I agree to the order proposed.

Z. K. *Decree varid.*

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 13 AND 14 OF 1923.

November 6, 1923.

Present :—Sir Dawson-Miller, Kt., K. C., Chief Justice, and Mr. Justice Mullick.

BHIKARI BEHERA—DEFENDANT—APPELLANT.

versus

SRIMATI SITAMONI DEVI AND ANOTHER—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaration, suit for—Interest, proof of—Hindu Law—Widow, alienation by—Benami *transaction, whether confers title on alienee.*

An alienation by a Hindu widow is not void but merely voidable. On the other hand, a mere *benami* transaction whereby a Hindu widow places certain property in the names of alienees not on their own behalf but on behalf of herself, does not amount to an alienation and confers no title on the alienees.

It may be that in certain cases a defendant has no *locus standi* to call in question a transaction alleged by the plaintiff, but where a plaintiff is seeking a declaration from the Court, the Court before granting the declaration ought to be satisfied that the plaintiff has an interest in the property in respect of which the declaration is claimed which is a valid and subsisting interest.

Appeal under Section 10 of the Letters Patent from the judgment of Mr. Justice Ross

Messrs *S. M. Mullick* and *N. N. Sen*, for the Appellant.

Messrs. *R. C. Bhaduri* and *C. S. Banerji*, for the Respondents.

JUDGMENT.

Dauson-Miller, C. J.—The suits out of which these two appeals arise were instituted by two ladies, Sitamoni Devi and Ram Bhawani Devi, against the defendant who is the appellant before us, claiming a declaration of their title to a 1 anna 7 *gands* share in the *Zemindari* Patna Bhagabanpur Samil, *Mouza* Syamsundarpur, and for confirmation of their possession or, in the alternative, for the ejectment of the defendant if he should be found to be in possession.

BHIKARI BEHERA *v.* SRIMATI SITAMONI DEVI

It appears that the property which is in dispute and which constitutes a 1 anna 7 *gandas* sha re of the *Zemindari* originally belonged to Birai Behera and after his death his widow Chemai Devi remained in possession as a Hindu widow. On the 1st August 1918 Chemai Devi by two *kobalas* of that date purported to transfer the property in equal shares to the two plaintiffs in the present suits. At that time the defendant Bhikari Behera was apparently living with Chemai Devi as her son and was treated in that capacity. He is found by the decision of the District Judge on appeal to have been in possession of the property at all events during Chemai Devi's life and looking after it presumably on her account. After the date of the execution of the *kobalas* in August 1918 it is found as a fact that the defendant still remained in possession of the property. It is further found as a fact that at no time since that date up to the date of the present suits in 1920 did the plaintiffs ever obtain possession of the property, and although there is no direct finding that the defendant was in possession after the death of Chemai Devi, I think it must be presumed upon those findings that he in fact was the person who was in possession up to the date of the suits. When the plaintiffs endeavoured to obtain mutation of names in the Land Registration Department after the transaction of 1918 their claim was opposed by the defendant who alleged that he was the adopted son of Chemai Devi and her late husband Birai Behera. The application for registration was accordingly dismissed and the present suits were, shortly afterwards, instituted, as I have said, in June 1920.

The Munsif before whom the case came for trial was of opinion that the transfer made by Chemai Devi was a genuine transfer and conferred title upon the plaintiffs. He was further of opinion that the defendant had not made out his case that he was the adopted son of Chemai and her late husband and he accordingly entered judgment for the plaintiffs and granted them the declaration which they claimed.

The case went on appeal to the District Judge who, after reviewing the evidence at considerable length, came to the conclusion, for reasons which it is not necessary to enter into as his conclusions are binding upon this Court, that the transaction of 1918 upon which the title of the plaintiffs is based was a purely *benami* transaction and that the property was transferred into the names of the plaintiffs in order to protect the interests of Chemai Devi against one of the co-sharers who was an influential man and endeavouring to obtain the property from her possession. He arrived at the conclusion, therefore, that no interest ever passed to the plaintiffs by reason of that transaction except in so far as they became *benamidars* for Chemai Devi. He further found as a fact that the evidence of the plaintiffs as to their possession was quite inconclusive and unsatisfactory and that there was sufficient evidence for the defendant to show that the property had remained in possession of Chemai. On these findings the learned District Judge overruled the decision of the Munsif and refused to grant the declaration asked for. In my opinion he was perfectly right in so doing. It must be remembered that this was a suit asking for a declaration and the very ground upon which the claim to a declaration was based was that the plaintiffs had acquired on their own behalf a title in the property from the late holder and that they had been in possession as owners ever since but that a cloud had been cast upon their title by the refusal of the Land Registration Department to enter their names in place of the late holder. If the plaintiffs should fail to satisfy the Court either that they had any valid title to the pro-p erty or that they were in possession then it seems to me quite clear that no Court ought, in such circumstances, to grant a declaration such as that prayed.

The plaintiffs, however, were not satisfied with the decision of the learned District Judge and came on second appeal to this Court. The case was heard before Mr. Justice Ross, who, with great respect to the learned Judge, took a view of the law which, in my opinion, cannot be supported. He was bound by the findings of the lower Court that the conveyance or the alleged conveyance in favour of the plaintiffs were without consideration and mere *benami* transactions but he was much impressed by the fact that the defendant had failed at the trial to make

out that he was in fact the adopted son of Chemai Devi. He considered, accordingly, that the defendant had really no *locus standi* and was not, therefore, entitled to question the nature of the transaction upon which the plaintiff's title was based. But in arriving at that conclusion the learned Judge seems to have assumed that there was in fact an alienation by the widow which was valid until it could be set aside. It is quite true that an alienation by a Hindu widow is not void but merely voidable but, with great respect to the learned Judge, he seems to have lost sight of the fact that the transaction in the present case was not an alienation which transferred the property to the alienees but was merely a *benami* transaction whereby the property was placed in the names of the alienees not on their own behalf but on behalf of the widow who has since died and this fact having been proved at the trial I think that the learned Judge was bound to take notice of it with the result that he ought to have held upon the facts proved that the plaintiffs had no title whatever after the death of Chemai Devi whom alone they represented. It may be that in certain cases a defendant has no *locus standi* to call in question the transaction alleged by a plaintiff, but where a plaintiff is seeking a declaration from the Court it seems to me that the Court ought to be satisfied that the plaintiff has an interest in the property in respect of which the declaration is claimed which is a valid and subsisting interest. In the present cases the plaintiffs have entirely failed to prove any such interest and even if the point had not been taken by the defendant or even if the defendant had not been entitled to take such a point the evidence is now before the Court and the Court was entitled to demand evidence in support of the plaintiffs' case. That case having failed it seems to me that the Court cannot in the circumstances and upon the facts proved grant the declaration prayed. In my opinion these appeals must be allowed. The decision of Mr. Justice Ross will be set aside and the decree of the learned District Judge will be restored. The appellant is entitled to his costs here and in all the lower Courts.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1844 OF 1921.
December 5, 1923.

Present :—Mr. Justice Das and Mr. Justice Ross.

JAMUNA PRASAD SINGH —PLAINTIFF—APPELLANT

versus

Musammat SHEORATI KUER AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Gift—Acceptance by donee, what amounts to.

Under the Hindu Law express acceptance by the donee is necessary for the completion of a gift. [p. 470, col. 2.]

Mohamed Abdul Nayeem v. *Jhonti Mehton*, 41 Ind. Cas. 389, dissented from.

Even if it is assumed that, under the Hindu Law, acceptance of a gift by the donee may be presumed until his dissent is signified, still upon the whole case the Court must be satisfied that there was acceptance by the donee, before it can give effect to a deed of gift upon which a party to the suit may rely. [p. 470, col. 2]

Acceptance of a deed of gift is *prima facie* evidence of the acceptance of the gift, but the whole conduct of the donee in connection with the acceptance must be carefully scrutinised for the purpose of determining the question whether there was in fact an acceptance of the gift. [p. 471, col. 1.]

Acceptance of a gift need not be made at once, but it must be made during the lifetime of the donor and while he is still capable of giving. [p. 471, col. 2.]

Whenever a question of acceptance is raised, there are two points which ought to be very carefully considered by the Court; first, whether the donee is in possession of the deed of gift, and, secondly, whether he is in possession of the gifted properties. [p. 471, col. 2.]

Appeal from the decision of the District Judge, Gaya, dated the 19th September 1921, affirming that of Subordinate Judge, Gaya, dated the 8th June 1920.

Messrs. *Sushil Madhab Mullick* and *Kailash Pati*, for the Appellant.

Messrs. *Murari Prasad* and *P. C. Roy*, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of a suit instituted by the appellant for a declaration of

JAMUNA PRASAD SINGH *v.* SHEORATI KUER

his title to certain properties specified in the plaint and for confirmation of his possession and for an order restraining the defendant No. 1 from doing certain acts of ownership in relation to those properties. The case of the plaintiff is, that Raghunath, who was the owner of these properties, made a gift of these properties to him by a registered deed of gift, dated the 24th of March 1905, and that he obtained possession of these properties on the 24th of March 1905, and that ever since he has been in possession thereof. It is not disputed that a deed of gift was in fact executed by Raghunath on the 24th of March 1905, but it is contended on behalf of the defendants, who are the respondents before us, that the deed of gift was a colourable transaction and was not acted upon, and that in fact Raghunath, by another document, dated the 26th of April 1905, purported "to release" these lands in favour of his wife and others. The learned District Judge has come to the conclusion that there was no acceptance of the gift by or on behalf of the plaintiff, and in that view, agreeing with the decision of the Court of first instance, he dismissed the plaintiff's suit.

The short question before us is, whether the finding of the learned Judge in the Court below to the effect that there was no acceptance of the gift by or on behalf of the plaintiff, can be regarded as a legal finding binding on this Court in second appeal. Mr. Sushil Madhab Mullick strongly contends that the learned Judge, in so far as he placed the onus upon the plaintiff, clearly committed an error of law and that it was not for the plaintiff to prove that there was any acceptance of the gift by or on his behalf. Reliance was placed upon a decision of this Court *Maulvi Muhmmad Abdul Nayeem* v. *Jhonti Mahton* (1) It was indeed laid down in that case that it was essential to a Hindu gift that there should be acceptance by the donee, but the learned Judge thought that acceptance could be express or implied, and that it should be presumed unless dissent is signified. The learned Judge referred to the view expressed in the 15th volume of the Laws of England, at page 418, which is as follows. "Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified even though he is not aware of the gift, and this is equally so, although the gift may be of an onerous nature or of what is called 'an onerous trust' I have myself some doubt whether this statement of law is equally applicable to cases under Hindu Law. In England it is not necessary that there should be express acceptance by the donee. Under the Hindu Law, as I understand it, express acceptance is necessary for the completion of a gift, and one may refer to the definition of "Gift" in section 122 of the Transfer of Property Act: "Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

In my opinion it is unnecessary to express any final opinion on this point. Let it be assumed that acceptance of a gift by the donee may be presumed until his dissent is signified. But still, upon the whole case, the Court must be satisfied that there was acceptance by the donee, whether express or implied, before the Court can give effect to a deed of gift upon which a party to the suit may rely. The learned Judge in the Court below says that the plaintiff has failed to adduce evidence of acceptance and if we are to examine the facts in this case it is difficult to come to the conclusion that there was in fact any acceptance by or on behalf of the minor. Mr. Sushil Madhab Mullick has referred to the terms of the deed of release and his argument is that the deed of release completely establishes that there was acceptance of the gift by the father of the donee on behalf of the donee, who was at the time of the gift a minor, and he expressly refers to the following passage in the deed of release: "Whereas on account of some indifference with my wife and others I have before this executed a deed of gift, dated the 24th March 1905, in favour of Jamuna Prasad, son of Ganesh Narain Singh, inhabitant of Mahuain, Pargana Charkawan, District Gaya, who is my cousin, in respect to the shares, lands and houses aforesaid and got it registered and in that deed of gift certain conditions relating to the performance of personal services and to meeting the expenses of my daughters' marriages were laid down, and

(1) 41 Ind. Cas. 889.

when I demanded from Ganesh Narain Singh the expenses of (my) daughter's marriage he totally refused to pay it and expressly told me that he would not meet those expenses. Thereupon I told him that as he himself refused to fulfil the conditions of the deed of gift and to pay the expenses, there could be no expectations of future benefit from Jamuna Prasad who was then three years old and was merely an infant, and that, therefore, it would be better that he should return back my original deed of gift. Accordingly, Babu Ganesh Narain Singh has to-day returned back the said deed of gift in the presence of certain reliable persons on taking from me Rs. 79-9-0 on account of expenses incurred and now the said deed of gift has become invalid and inoperative, and it was not given effect to." The argument is that there is a clear admission in this document that the original deed of gift, as made over to Babu Ganesh Narain Singh, the father of Jamuna Prasad, and it was contended before us that the acceptance of the deed of gift operated as an acceptance of the gift. But if we are to examine the alleged admission contained in this document it is necessary for us to examine the whole document in order to see how far the admission helps the case of the plaintiff. It is clear from this document that there were certain conditions in the gift more or less of an onerous nature and that the donor demanded the preformance of the obligations with which the gift was burdened, and that Babu Ganesh Narain Singh, on behalf of his minor son, declined to perform those obligations and that thereupon the donor asked Babu Ganesh Narain Singh to return the deed of gift which Babu Ganesh Narain did. Now I quite agree that the acceptance of a deed of gift is *prima facie* evidence of the acceptance of a gift; but then the whole conduct in connection with the acceptance must be carefully scrutinized for the purpose of the determination of the question whether there was in fact an acceptance of the gift. Now, what are the facts stated in the deed of release. They are, first, that the document was made over to Babu Ganesh Narain Singh; secondly, that the donor called upon Babu Ganesh Narain Singh on behalf of his minor son to perfrom the obligations with which the gift was burdened; thirdly, that Babu Ganesh Narain Singh (to quote the words of the document) "totally refused to do so"; fourthly, the donor thereupon called upon Babu Ganesh Narain Singh to return the deed of gift and Babu Ganesh Narain Singh did so. Now, upon those facts, the question arises whether there was in fact an acceptance of the gift by Babu Ganesh Narain Singh on behalf of the minor It should be noticed that, acceptance need not be made at once but that it must be made during the life time of the donor and while he is still capable of giving. I am unable to agree, having regard to the circumstance stated in the deed of release, that the acceptance of the deed of gift operated in this particular case as an acceptance of the gift. As I have stated, the gift was burdened with various obligations and it was necessary for Babu Ganesh Narain Singh, as the father of the donee, to examine the deed before he could possibly come to the conclusion whether the gift should or should not be accepted, and the fact that he returned the deed of gift, in my opinion, establishes that he did not accept the gift on behalf of the minor.

Whenever a question of acceptance is raised, there are two points which ought to be very carefully considered by the Court: first, whether the donee is in possession of the deed of gift; and, secondly, whether the donee is in possession of the properties. Admittedly, the deed of gift has been produced by the defendants. It was the case of the plaintiff in the Courts below that he was in possession of this deed of gift and that it was stolen from him by the donor. That case has failed in the Courts below and it has not been persisted in in this Court. On the question of possession of the properties, the Courts below have concurrently come to the conclusion that the plaintiff has never been in possession of the properties in dispute.

In my opinion the finding of the learned Judge in the Court below on the question of acceptance is a finding of fact and is binding on us in second appeal. I would dismiss this appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

Z. K.

HARNARAYAN PANDE *v.* SURESH PANDE

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 103 of 1921.

January 28, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

HARNARAYAN PANDE—PLAINTIFF—APPELLANT

versus

SURESH PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Joint property—Burden of proof—Separation in food, effect of—Mutual dealings—Presumption.

The question whether the members of a Hindu family are joint or separate is ultimately a question of fact to be determined on the evidence produced before the Court, but where a nucleus of joint family properties is admitted, the initial *onus* is on the party who asserts that there was a separation to prove that the separation did in fact take place. Cesser of commensality is one of the matters to be taken into consideration by the Court in arriving at a finding as to whether there has been separation or not, but it is not by any means conclusive. [p. 472, Col 2.]

Where there have been dealings between the parties themselves, that circumstance may be taken as very strong evidence in favour of the view that there has been a partition. [p. 47 , Col. 1]

Appeal from a decision of the Subordinate Judge, Saran, dated the 28th April, 1920.

Messrs. *Sushil Madhab Mullick* and *Sambhu Saran*, for the Appellant.

Messrs. *Naresh Chandra Sinha* and *Harihar Prasad Singh*, for the Respondents.

Das, J.—This appeal arises out of a suit instituted by the appellant for partition of joint faimly properties. The defence, which has succeeded in the Court below, is that there was a previous partition and that the plaintiff is not entitled to a fresh partition of the properties. No documentary evidence was adduced in the case ; but the learned Subordinate Judge has relied upon the testimony of one or two of the witnesses produced on behalf of the defendants and has found in favour of the case set up by the defendants. The learned Subordinate Judge attached considerable value to the fact that, admittedly, there has been a cesser of commensality. The view of the learned Subordinate Judge may be stated in his own words. He says as fallows: "It is not the case of the plaintiff that the parties have been joint in every respect. He admits separation in mess, whereas the defendants plead complete separation, so it is for the plaintiff more or less to show that the parties have been joint." With this conclusion I am unable to agree. The cesser of commensality is no doubt one of the matters to be taken into consideration by the Court when the question in debate before the Court is whether the parties are joint or separate, but it by no means concludes the question. As this case must go back to the learned Subordinate Judge, it is desirable to state that the question whether the parties are joint or separate is ultimately a question of fact to be determined on the evidence produced before the Court. In this case it is admitted that there is a nucleus of joint family properties. That being so, the initial onus is upon the party who asserts that there was a separation and it is for the party asserting separation to prove that the separation did in fact take place. As it is pointed out in Mayne's Hindu Law, numerous circumstances may be "set out as being more or less conclusive of a partition having taken place, such as separate food, dwelling, or worship; separate enjoyment of the property; separate income and expenditure ; business transactions with each other and the like." "But," as Mr. Mayne points out, "all these circumstances are merely evidence, and not conclusive evidence, of the fact of partition." To quote again the words of Mr. Mayne: "Partition is a new *status*, and when it is brought about by consensus of the members of a co-parcenary they must intend that their condition as co-parceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, and intend to alter, their title to it. They must cease to be joint owners and become separate owners. And as, on the one hand, the mere cesser of commensality and joint worship, the existence of separate transactions, the division of income, or the holding of land in separate portions, or a mere definition of shares in revenue and village papers do not establish partition, unless such steps were taken with a view to partition ; so, on the other hand, if a division in status has in fact been effected between the members of the family, it is not necessary that they should proceed to a physical separation of the particular pieces of their property." (Mayne on

Hindu Law and Usage, Ninth Edition, page 717). But it has been pointed out in more than one case that where there are dealings between the parties themselves, that circumstance may be taken as very strong evidence in favour of the view that there has been a partition.

In this case the dispute between the parties arose during the Survey proceedings and a petition of compromise was filed before the Settlement Officer which settled all the disputes of the parties so far as the immoveable properties were concerned. That petition runs as follows : " Your petitioners submit that there was a dispute between us"—all the names are names are mentioned—" which has been compromised in the presence of the *punches* .....that both parties should receive half and half of all the ancestral properties, *zemindari*, *kashtkari*, etc., over which we, the parties, have possession and occupation and with respect to which the names of us, the parties, have already been entered ; and that the names of Mahadeva Pande, son of Nandkeshwar Pande, Tapesar Pande, son of Abhiram Pande, and Suresh Pande, son of Ram Yad Pande, be recorded with respect to three-fourths, in equal shares, and the name of Har Narayan Pandey, son of Gopi Pande, be recorded with respect to one-fourth of the zemindari bearing *tauji* No. 4964, in which five-annas four-pies share has been recently purchased. The signature of the *punches* are affixed below. Therefore, these few words have been written in the form of *Sulahnama*, so that the same may be of use when necessary". Now, the properties to which this petition refers, are properties entered in Schedule I and properties Nos. 1 and 2 in Schedule II of the petition of compromise. It seems to me that, so far as these properties are concerned, there has been a complete settlement between the parties ; and the learned Subordinate Judge should have given effect to this petition of compromise. Mr. Naresh Chandra Sinha states that the Record of-Rights was, as a matter of fact prepared on the basis of this petition of compromise. If that be so, and we have no reason to doubt that that is so, the plaintiff is still entitled to a partition by metes and bounds of those properties; and we are assured that there are some properties which have been recorded in the joint names of the plaintiff and the defendants. So far as tauji No. 4964 is concerned, the interest of the parties is clearly specified in the petition of compromise and the plaintiff is clearly entitled to a partition by metes and bounds of this property. So far as property No 3 in Schedule No. II is concerned, it is pointed out that a stranger is interested in this property and it cannot, therefore, be partitioned by metes and bounds. Withr egared to the properties in Schedule No. I, hte partition will be on the basis of the Record-of-Rights which we accept as correctly defining the rights of the parties.

I now come to the *zarpeshgi* bonds which are set forth in Schedule II of the plaint. The right of the plaintiff to have a partition of these bonds must depend upon the question whether the parties are joint or separate. I have already said that the learned Subordinate Judge was not correct in placing the whole onus upon the plaintiff. We think that this question must be again determined by the learned Subordinate Judge. If he comes to the conclusion that the parties are joint, he must direct an enquiry in order to ascertain what the joint family properties consist of, and he must give a share in these joint family properties to the plaintiff. This enquiry must be in respect of the *zarpeshgi* bonds set out in Schedule I and the properties set out in Schedules III and IV of the plaint.

I would accordingly allow this appeal, set aside the decision of the learned Subordinate Judge and remand the case to him for disposal according to the directions given in this judgment. Costs will abide the result and will be disposed of by the learned Subordinate Judge.

Ross, J.— I agree.

Z. K. *Appeal allowed.*

KUMAR KAMAKSHYA NARAYAN SINGH *v.* SURAJNATH MISRA

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1469 OF 1921.

January 4, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

KUMAR KAMAKSHYA NARAYAN SINGH—
PLAINTIFF—APPELLANT

versus

SURAJNATH MISRA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 14—"Successor", "Resumption", meaning of.

The word "successor" in section 14 of the Chota Nagpur Tenancy Act means not only a successor *de jure* but also a successor *de facto*. [p. 475, col. 1.]

The word "resumption" in section 14 of the Chota Nagpur Tenancy Act means an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter upon the land. [p. 475, col. 2.]

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 6th May 1921, confirming a decision of the Munsif, Hazaribagh, dated the 23rd February, 1920.

Mr. *Sultan Ahmad*, for the Appellant.

Mr. *Bankim Ch. De* for the Respondents.

Das, J.—We are concerned in this litigation with 7.68 acres and 8.57 acres of lands lying in *mauza* Chepa Kalan which admittedly was the *Jaigir* of Brijbhukan and his male descendants. Brijbhukan was succeeded by his son Seodayal who died in 1859. Seodayal was succeeded by his widow Brijraj Kuari who it appears was allowed to remain in possession of the whole *mauza* by the Ramgarh Raj up to the time of her death which occurred some time in 1895. Upon her death one Udai Nath took possession of the *mauza*. In 1896 the Raj instituted a suit for resumption of the *mauza* as against Udai Nath. It appears that Udai Nath died sometime in 1896 and the suit abated upon his death. Upon the death of Udai Nath his widow Ranjit Kuari took possession of the *mauza*. The Raj instituted another suit against Ranjit Kuari, but it was dismissed on the ground that the previous suit having abated against her husband the Raj was not competent to institute a suit against her. It appears that upon the death of Ranjit Kuari a nephew of Udai Nath took possession of the village in 1907. The Raj thereupon instituted a suit against Udai Nath's nephew and on the 12th January 1914 it got a decree as against the defendant in that suit. On the 21st of June 1915 the Raj took possession of the *mauza*. The disputed lands have all along been in the possession of the defendants, and, having resumed what the Raj claims to be a resumable tenure, the Raj instituted a suit on the 20th of August 1919 as against the defendants for *khas* possession of the disputed lands. The plaintiff's case was that an under-tenure was created in favour of the defendants by either Brijbhukan or Seodayal and that upon the resumption of the tenure the under-tenure came to an end and that the Raj became entitled to recover possession of the disputed lands. The defendants' case was that the disputed lands were settled with them by the Raj and that the settlement was confirmed by Udai Nath and that the defendants were the tenants of Udai Nath and that the suit against them is barred by limitation. Both the Courts have dismissed the plaintiff's suit on the ground that it is barred by lapse of time. The only question which we have to consider in this appeal is whether, having regard to the lapse of time, the plaintiff is now entitled to recover possession of the disputed lands.

Section 14 of the Chota Nagpur Tenancy Act upon which the plaintiff relies is as follows:—"Upon the resumption of a resumable tenure, every lien, sub-tenancy, easement or other right or interest created, without the consent or permission of the grantor or his successor in interest, by the grantee or any of his successors, on the tenure or in limitation of his own interest therein, shall be deemed to be annulled." Then, certain exceptions follow which it is unnecessary to consider in the present case. The question of limitation arises in this way. The defendants assert that the tenure itself came to an end certainly in 1895 if not in 1859 and that the Raj became entitled to resume this reasonable tenure certainly in 1895 if not in 1859, and they say that they have been in possession without any title whatever certainly since 1895 and have acquired a title by lapse of time. The plaintiff, on the other hand, asserts that though he may have been entitled to resume the tenure in 1895 he altogether denies that, having

regard to the compromise he was entitled to resume the tenure in 1859 time as against the defendants did not begin to run until the actual resumption of the reasonable tenure by the Raj which event, according to the plaintiff, happened on the 21st June 1915; and he contends that no question of limitation arises as he brought the suit within 12 years from the date of the actual resumption of the resumable tenure.

Two questions arise upon the arguments that have been advanced by the parties; first, what meaning are we to attach to the word "resumption" occurring in section 14 of the Chota Nagpur Tenancy Act; and, secondly, whether it can be said that an interest was created in favour of the defendants by the grantee of the tenure or any of the successors of the grantee

The second question is a short one and may be disposed of at once. The defendants themselves rely upon a title created in their favour by Udai Nath. Udai Nath was undoubtedly in possession of the tenure and in his view rightfully in posession thereof. The defendants have all along claimed that they were in possession of a sub-tenancy properly created in their favour by Udai Nath who, according to them, was the successor of the original grantee. This being the case of the defendants, they ought not to complain if they are not put in a better position than if they were what they pretend. In my opinion, the word "successor" in section 14 of the Act means not only a successor *de jure* but also a successor *de facto*. That being so, I must hold, upon the case of the defendants themselves, that an interest was created in their favour by the successor in interest of the original grantee and section 14 of the Chota Nagpur Tenancy Act will apply provided the suit has been brought within time.

This brings me to the question of limitation: and the decision of this question must depend upon the meaning of the word "resumption" in section 14 of the Chota Nagpur tenancy Act. The extreme argument on behalf of the plaintiff is that resumption means actual re-entry upon the tenure and that as that re-entry took place on the 21st June 1915, his suit, brought on the 20th August 1919, is well within time. The extreme argument on behalf of the defendants is that "resumption" means the happening of an event entitling the landlord to resume the tenure and the contention is that as that event happened in 1895, the suit is clearly barred by limitation. I am unable to accept the exteme contention put forward on behalf of the defendants. In my opinion 'resumption' means an entry upon the land; and the problem for our investigation is whether re-entry is equivalent to actual pyhsical possession of the land. An alternative argument was suggested by Mr. B. C. De and it is this: that re-entry is equivalent to institution of proceedings with a view to resume the land and he contends that as the suit for resumption was brought in 1896, time began to run in favour of the defendants from that year. In my opinion this argument is entitled to succeed. As I understand the position, resumption is nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. Although the event which entitled the plaintiff to resume the tenure had happened, it was not obligatory on the plaintiff to resume the tenure. He might indeed have resumed it or have made a fresh grant to the person actually in possession of the tenure or have allowed the defendants to remain in possession of the disputed lands paying a rent for the same to him. It was, therefore, necessary for the plaintiff to resume the tenure before he could be heard to say that the interest of the defendants has been annulled. Until the final election to resume the tenure was made, the defendants were entitled to say that they were in possession of an interest in the disputed lands by virtue of a transaction created in their favour by one against whom no action had been taken by the plaintiff and as such they were entitled to remain in possession of that interest. I think, therefore, that 'resumption' means an unequivocal demand for possession which operates as a final election by the landlord to re-enter upon the land. This unequivocal demand for possession took place in 1896 and operated, in my opinion, as a resumption of the tenure. The present suit, having been brought more than twelve years from the date of the unequivocal demand for possession, is clearly barred by limitation.

I would dismiss this appeal with costs.

Ross J.—I agree.

Z. K. *Appeal dismissed.*

NAND KISHORE CHAUDHURI *v.* RAMESHWAR SINGH

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 30 OF 1923.

November 12, 1923.

Present.—Sir Dawson-Miller, Kt., K. C., Chief Justice, and Mr. Justice Mullick.

NAND KISHORE CHAUDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Maharajadhiraj SIR RAMESHWAR SINGH BAHADUR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885) s. 167—Rent decree—Sale of tenure—Annulment of incumbrance—Mortgage suit instituted by incumbrancer, effect of—Notice issued by Collector—Annulment, whether can be questioned—Burden of proof.

The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction-purchaser of his right to annul the incumbrance under section 167 of the Bengal Tenancy Act, if the application is made within the time prescribed by the section, that is to say, within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance. [p. 477, col. 1.]

Under section 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment, the incumbrance must be deemed to have been annulled This does not, however, mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. [p 477, col. 2.]

Appeal under section 10 of the Letters Patent, against a decision of Mr. Justice Ross.

Mr. *Jonak Kishore*, for the Appellants.

Messrs. *M. Prasad* and *B. N. Mitter*, for the Respondent.

JUDGMENT.

Dawson-Miller, C. J.—This appeal is brought under the Letters Patent against a decision of Mr. Justice Ross reversing the decree of the District Judge.

The appellants, Nand Kishore Chaudhuri and others, instituted the suit out of which this appeal arises on the 25th January 1919 claiming certain declarations in respect of a mortgage upon the holding of Ashrafi Jha and Bhudhan Jha granted by their deceased father. The two persons named are the first party defendants in the suit. Sometime before the suit was instituted, namely, on the 9th September 1917, the holding had been sold at auction in execution of a rent-decree obtained by the landlord, the Maharajadhiraja of Darbhanga, who himself purchased the holding. The landlord was impleaded as the second party defendant in the present suit. The plaintiffs averred that the rent-decree obtained by the landlord and the subsequent sale in execution thereof were fraudulent transactions brought about by collusion between the landlord and the tenants and, further, that no notice under section 167 of the Bengal Tenancy Act annulling the incumbrance had been served upon the plaintiffs. The plaintiffs claimed a declaration that as no notice had been served by the auction-purchaser under section 167 of the Bengal Tenancy Act the purchase in execution could not bind the mortgaged property, and a further declaration that the decree in the rent-suit and the subsequent sale were collusive and fraudulent and should be set aside.

The defendants first party did not enter appearance but the landlord, the second party defendant, on the 18th July 1919 filed a written statement traversing the allegations in the plaint and pleading that he had no knowledge of the plaintiffs' mortgage until he received the summons in the suit. On the 6th August 1919, that is, within 12 months of the service of the summons in the suit, he applied to the Collector under section 167 of the Bengal Tenancy Act to serve notice on the plaintiffs annulling the incumbrance. The plaintiffs appeared in that proceeding and filed an objection alleging that the landlord's application was barred by limitation as he had notice of the incumbrance more than 12 months before the application. The hearing was adjourned by the Collector to enable evidence on the point to be called. On the day fixed, namely, the 19th November 1919, the objectors failed to produce any evidence and their objection was dismissed. The Collector issued the notice of annulment under section 167. On the following day, the 20th November, the plaintiffs amended their plaint by adding a prayer asking for enforcement of their mortgage by sale of the property.

No issue was raised at the trial raising the question as to whether the landlord had notice of the incumbrance more than a year before the application to annul. The only issues framed were:—

NAND KISHORE CHAUDHURI *v.* RAMESHWAR SINGH

1. Is the mortgage-bond in suit genuine and for consideration?

2. Is the defendant second party bound to pay the debt under the mortgage-bond in suit?

3. To what relief, if any, are the plaintiffs entitled and against which defendant?

4. Whether the decree in Rent Suit No. 417 of 1916 was obtained by the fraudulent suppression of summons and whether the sale in Execution Case No. 510 of 1917 was also obtained by fraudulent suppression of notice and other processes. ?

The issues were decided by the Munsif as follows:—No. 1 in the affirmative, Nos. 2 and 4 in the negative. With regard to No. 3 he was of opinion that, although the plaintiffs had appeared and filed objections in the proceedings under section 167 of the Act and although, notwithstanding the objection, the notice had been issued by the Collector such notice was not binding upon the plaintiffs as it was filed during the pendency of the present suit. He came to no conclusion as to when the landlord first became aware of the incumbrance. In the result, he ordered the plaintiffs to pay the landlord within two months the amount due to him under the rent-decree and subject thereto he passed a mortgage-decree in favour of the plaintiff ordering the sale of the property to satisfy their claim.

The landlord appealed to the District Judge who differed from the Munsif in so far as the latter had held that a notice served after the institution of the present suit could not be valid. In this respect the learned District Judge, in my opinion, took a correct view of the law. The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction-purchaser of his right to annul the incumbrance under the Bengal Tenancy Act if the application is made within the time prescribed by the section, that is to say, within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance. The learned District Judge, however, found that as the notice was admittedly given more than a year after the sale and as there was no evidence to show that the landlord came to know of the incumbrance at a later date the notice could not be deemed to have been given within the time limited by law and was, therefore, not a valid notice. He accordingly dismissed the appeal on that ground.

The landlord then appealed to the High Court. The appeal was heard before Mr. Justice Ross. The learned Judge was of opinion that the Collector had jurisdiction to entertain the application for service of a notice under section 167 if he were satisfied that it was within time, or to reject it if not so satisfied, and that having issued the notice after objection by the plaintiffs it must be deemed that the Collector was satisfied as to the propriety of issuing the notice. Clause (3) of section 167 provides as follows:—

"When an application for service of a notice is made to the Collector in manner prescribed in this section, he shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served."

Under the section once the Collector has issued the notice the incumbrance must be deemed to have been annulled. This does not mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. I consider, however, that the effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. It was, therefore, incumbent upon the plaintiffs in the present case to prove that the landlord had in fact notice of the incumbrance more than 12 months before he made the application to the Collector. The learned District Judge treated the case as one in which the onus lay upon the landlord. In this respect he was, in my opinion, misinterpreting the section. The landlord appears to have given no evidence upon the point and no issue was raised upon it which may account for his failure to do so. Had no evidence been given at all upon this point I should have agreed with the decision of Mr. Justice Ross who, in my opinion, rightly placed the onus upon the plaintiffs who questioned its validity. We have been informed, however, by the learned Vakil for the appellants that the plaintiffs did at the trial adduce some evidence in support of their contention that the landlord had notice of the incumbrance more than 12 months before the application under section 167. The learned District Judge did not mention this fact and

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did not deal with this part of the evidence and say whether he accepted it or not.

In this condition of affairs I think the proper course to pursue is to remand the case to the lower Appellate Court under O. XLI, r. 25 of the Civil Procedure Code to determine the following issue :—

" Did the second party defendant present to the Collector his application under section 167 of the Bengal Tenancy Act within one year of the date on which he first had notice of the plaintiffs' incumbrance ?"

As no issue was framed upon this point both parties will be permitted to tender fresh evidence upon it. The District Judge shall determine the issue and return his finding and the reasons therefore together with the evidence as soon as possible to this Court for final disposal of the appeal.

Mullick, J.—I agree.

Z. K. *Case remanded.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 132 OF 1923.

January 17, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

Babu LAL PASI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Babu RAMSARAN LAL CHOWDHRY AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908) s. 15, Sch. I, Arts. 181, 182 (5)—Execution of decree—Injunction restraining execution—Step-in aid of execution—Limitation.

Execution of a mortgage-decree for sale of a house was first taken out on 7th July 1917. On 12th September 1917 an injunction was issued restraining the sale of half the house. An application to take a step-in-aid of execution with respect to the other half of the house was made on 19th November 1917 and that half of the house was sold. The injunction was dissolved on 8th November 1918. An application for execution with respect to the other half was made on 10th January 1922;

***Held* (1) that the last application to take a step-in-aid of execution having been made on 19th November 1917, limtation began to run from that date;**

(2) that the only period which the decree-holder was entitle to exclude on account of the injunction was from 19th November 1917, the date on which limitation began to run, to 8th November 1918, the date on which the injunction was dissolved;

(3) that, therefore, the present application made on 10th January 1922 having been made more than three years after the date of the last application, after deducting the period during which the injunction was in force after the date of the last application, was barred by limitation.

Appeal from an order of the District Judge, Patna, dated the 16th April 1923, reversing an order of the Subordinate Judge, Patna, dated the 5th June 1922.

Mr. *Manohar Lal*, for the Appellants.

Mr. *N. C. Sinha*, for the Respondents.

JUDGMENT.

Ross, J.—This appeal raises a question of limitation. The relevant dates are these: On 9th June 1916 a final decree for sale of a house was passed in favour of the mortgagee—respondent. On 7th July 1917 execution was taken out (Execution case No. 203 of 1917). On 6th August 1917 sale proclamation was issued and 17th September 1917 was the date fixed for sale. On 3rd September 1917 a third party instituted a suit claiming title to one half of the house and an injunction restrainining the respondent from selling it. On 12th September 1917 an injunction was granted. On 19th November 1917 the other half of the house was sold and the sale was confirmed on 22nd December 1917. On 8th November 1918 the suit of the third party was dismissed for default and the injunction was thus dissolved. There was an application for re-hearing which was dismissed and an appeal against the dismissal was rejected on 25th February 1919. The present application for execution was made on 10th January 1922 and the question is, whether it is within time, or, in other words, within three years of the last application to the Court to take some step in-aid of execution. Now, the last application to the Court to take some step-in aid of execution was on the 19th November 1917. Three years from that date expired on 19th November 1920. To this must be added, under section 15 of the Limitation Act, the time of the continuance of the injunction staying the execution. Between 19th November 1917 and 19th November 1920 the injunction was in force for 11 months and 20 days (*viz.* from 19th November 1917 to 8th November 1918). If this period be added, the respondent was entitled to apply

for execution up till 8th November 1921. The learned District Judge has allowed the decree-holder to calculate the period of limitation from 19th November 1917 and also to deduct the period from 12th September 1917 till 8th November 1918. But it is impossible to deduct time which had already elapsed before limitation began to run.

It is argued for the respondent that the present application should be treated as a continuation of the previous application. I doubt whether this argument has any relevancy since section 15 of the Limitation Act was amended so as to include execution proceedings. But, in any view, there must be some limitation to the continuation of execution proceedings and the limitation would appear to be imposed by Art. 181. The result, therefore, is the same. The right to apply accrued when the injunction was dissolved and three years from this date expired on 8th November 1921.

The result is that the present application must be held to be out of time. The appeal is allowed with costs and the order of the Court below is set aside and the execution is dismissed.

Das, J.—I agree.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 189 OF 1923.

August 9, 1923.

Present :—Mr. Justice Macpherson.

SRI NEWAS SITARAM—PLAINTIFF—PETITIONER

versus

EAST INDIAN RY. CO. AND ANOTHER—OPPOSITE PARTY

Railways Act (IX of 1890) ss. 71, 76—Risk Note Form B—Suit for compensation for non-delivery of goods—Loss, plea of—Wilful neglect, proof of—Theft, allegation of.

In answer to a suit for compensation for non-delivery of goods consigned under Risk Note Form B, it is sufficient for the defendant Company to plead loss as contemplated by the Risk Note, and it need not call evidence to satisfy the Court that the goods are still not in its possession.' [p. 480, col. 1.]

Wilful neglect on the part of the Railway Administration or of its servants is not established merely by the fact that the Company allege that the wagon in which the goods were being carried was broken into by thieves.

Revision from an order of the Small Cause Court Judge, Patna, dated the 19th February 1923.

Messrs. *S. Dayal* and *Brij Kishore Pd.*, for the Petitioner.

Mr. *S. N Bose*, for the Opposite Party.

JUDGMENT.

Macpherson, J.—This is an application under section 25 of the Provincial Small Cause Courts Act against the decree of the Small Cause Court of Patna dismissing, except in respect of an item immaterial for the present purpose, the suit of the petitioner for compensation for non-delivery of one bale of goods consigned from Bombay on the Great Indian Peninsular Railway to the petitioner at Patna City and not delivered to him by the East Indian Railway. The value of the bale was put at Rs. 393-12 0 and the rest of the claim of Rs. 472 was made up of expenses, railway freight, interest and loss of profit.

The goods had been sent under Risk Note B and the Court held that the plaintiff had failed to prove that the loss of the bale was due to the wilful neglect of the defendant Railway Company and further that the Company was under that Risk Note absolved from liability for the loss of the bale.

On behalf of the petitioner it is contended by Mr. Shiveshwar Dayal that the contract being admitted and also the breach thereof, the plaintiff's suit can only be defeated by the Risk Note B, that for the Risk Note to avail, the plea of loss must be expressly taken and that as that plea was not taken evidence of loss was not admissible. He would base this contention upon two rulings of this Court, *G.I.P. Railway Company* v. *Jitanram Nirmal Ram* (1), decided by a Division Bench and the *East Indian Railway Co.* v. *Sukdeo Das* (2), decided by a Single Judge. To my mind the contention is not sound since loss has been

(1) 72 Ind. Cas. 440; 4 P. L. T. 173; 2 Pat. 442; 1 P. L. R. 169; (1923) A. I. R. (Pat) 285; (1923) Pat. 82.

(2) 74 Ind. Cas. 481; 4 P. L. T. 143.

distinctly pleaded in paragraph 4 of the written statement presented on behalf of the defendant Company and that was also the interpretation put upon the paragraph by the plaintiff himself when leading evidence. Indeed, having regard to the fact that he filed Exhibit 5, a letter, wherein the Railway Company alleged loss and disclaimed negligence, no other position was possible to him. Accordingly, the second case cited is distinguishable since therein the defendant had not pleaded even by implication that the goods had been lost, while the plea of loss as contemplated by the Risk Note having been advanced on behalf of the defence, the first mentioned case far from being in favour of the present contention is against it, since it has been held therein that it is sufficient for the defendant Company to plead loss as contemplated by the Risk Note and it need not call evidence to satisfy the Court that the goods are still not in the Company's possession. The evidence on the record as to loss was thus not inadmissible. This plea fails.

It is next contended by the learned Vakil that the petitioner is at least entitled to a remand for further consideration of the effect of the exception to the protection accorded by the Risk Note. He argues (1) that Exhibit 5, the letter of the Railway Company to the petitioner, states that the consignment which included the bale lost, proceeded in a wagon as far as Dildarnagar correctly, but there the wagon was found to have been broken into by thieves and no clue to the stolen property had been discovered by the Police ; (2) that under the exception, read with the proviso thereto, theft (not being robbery from a running train) is not necessarily excluded from " the wilful neglect of the Railway Administration or .... the wilful neglect of its servants" in respect of which the Railway Company under the Risk Note still continues liable when a complete package of a consignment is lost ; (3) that Exhibit 5 was not considered by the Judge in this connection, and (4) that if the Judge had directed his mind to the matter, he might have held, as other Courts have been known to hold, that the theft was due to the wilful neglect either of the Railway Administration or of its servants.

To my mind it cannot be inferred that Exhibit 5 was not considered in this connection. Moreover, though the second proposition is unexceptionable, it was for the plaintiff to prove that he came within the exception. It is not enough to say that theft may in law evidence " wilful neglect on the part of the Railway Administration . . .or of its servants." The real question is whether any Court would be justified in holding, merely on the expression used in Exhibit 5, namely, "broken into by thieves" and in the absence of further evidence such as that the wagon which was *ex hypothesi* closed, and may even be taken to have been fastened or locked was negligently closed or fastened or was left altogether exposed and unguarded that wilful neglect was established. In my opinion such a finding would be unjustifiable. There is in the present case no such further evidence. The finding of the learned Judge is thus the only possible finding and a remand is contraindicated.

The application is dimissed with costs.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 528 OF 1922.

July 24, 1923.

Present :—Mr. Justice Daniels

NAWAB SAYED SULTAN HUSAIN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JWALA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Non-occupancy plot—Permission to convert into grove, effect of—right to transfer trees.

Where permission is given by a *semindar* to plant a grove on a non-occupancy tenure, the effect of it is to put an end to the tenancy as such, and to substitute therefor a fresh contract between the parties by which the position of the tenant is converted into that of a grove-holder with transferable rights. [p. 491, col. 2.]

Jalesar Sahu v. *Raj Mangal*, 63 Ind. Cas. 487 ; 43 A. 606 ; 19 A. L. J. 616, followed.

Daya Kishan v. *Muhammad Wasir Ahmad*, 30 Ind. Cas. 565 ; 13 A L. J. 838, dissented from.

Lal Baijnath Singh v. *Chandrapal Singh*, 78 Ind. Cas. 529 ; 21 A. L. J. 457 ; (1923) A. I. R. (A.) 553, relied on.

SULTAN HUSAIN KHAN *v.* JWALA

Second appeal against the decree of the District Judge, Farrukhabad, dated the 6th January 1922.

Mr. *M. A. Aziz*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This was a suit for damages for certain trees alleged to have been wrongfully cut and for an injunction against the defendants forbidding them to cut any further trees in a plot numbered 378. The plaintiffs-appellants are the zemindars. They alleged in their plaint that the trees were of spontaneous growth, but pleaded in the alternative that even if they had been planted the first defendant, who is an occupancy tenant in the village, had no right to transfer them. The trees which have been cut were sold by the first defendant to the second and third defendants and cut down by them. The first defendant pleaded that he was the owner of the trees, which were planted by his ancestor with the permission of the *zemindar*, and that he had a right to sell them. He also alleged a custom by which tenants planting a grove had a right to sell the trees. A great deal has been made in argument of the fact that the learned Judge finds that the *wajibularz* does not support the special custom relied on and that it is not proved. It has been argued that, on this finding, the suit should have been decreed without going into other matters, but, as the Calcutta High Court remarked in a recent case, it is not every variation between pleading and proof which is fatal to a suit or a defence. The main defence of the defendant was that he was the owner of the trees and was entitled to sell them, and it was on this question and not on the question of special custom that an issue was framed in the trial Court.

The facts found by the Court below are that this grove was planted some 40 years ago with the permission of the *zemindar* by the defendant's ancestor on what was at the time a non-occupancy holding. He further finds that the grove was planted only a year or two after the commencement of the tenancy. The area which was converted into a grove originally formed a portion of a larger plot but at the last Settlement it formed a separate plot numbered 378. The learned Judge has relied on the reported ruling in *Jalesar Sahu* v. *Rajmangal*, (1) and, following that ruling, has held that, when permission was given by the *zemindar* to plant a grove on the non-occupancy tenure, the effect of this was to put an end to the tenancy as such, and to substitute therefor a fresh contract between the parties by which the position of the defendant was converted into that of a grove-holder with transferable rights. That case related to an occupancy holding, but the case is much stronger where the land was held without occupancy rights as in the present case. It is most unlikely that the tenant would agree to spend the considerable sum of money necessary to convert the plot into a grove if he was still to remain liable to be turned out of the land and to lease trees at any time.

In appeal the plaintiffs have relied on an earlier decision in *Daya Kishen* v. *Muhammad Wazir Ahmad* (2). That decision is, to my mind, clearly inconsistent with the decision in *Jalesar Sahu* v. *Rajmangal* (1), and, though in the later ruling an attempt was made to distinguish it on what appears to me very slender grounds, it appears to me that the earlier ruling must now be considered to have been overruled and to be no longer good law. The later ruling has been followed and approved in a number of cases by me personally, *e.g.*, *Lal Baijnath Singh* v. *Chandrapal Singh* (3, and I believe by other Judges also, and it has rightly been held by the learned District Judge to govern the present case. Following that ruling, I dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 63 Ind. Cas. 437 ; 43 A. 706 ; 19 A. L. J. 616.
(2) 80 Ind. Cas. 565 ; 13 A. L. J. 893.
(3) 78 Ind. Cas. 529 ; 21 A. L. J. 457 ; (1923) A. I. R. (A) 553.

SHEO DHARI RAM *v.* GUPTESWKR PATHAK

PATNA HIGH COURT.

CIVIL REVISION NO. 357 OF 1923.

January 24, 1924.

Present :—Mr. Justice Foster.

SHEO DHARI RAM—PETITIONER

versus

GUPTESWAR PATHAK AND ANOTHER —OPPOSITE PARTIES.

Limitation Act (IX of 1908) s. 14—Time spent in prosecuting appeal which is not permitted, whether can be excluded—Party proceeding in ignorance of law, whether acts with due diligence and "in good faith."

Proceedings which are sought to be brought within the purview of section 14 of the Limitation Act must be such as are recognised by law as legal in their initiation though a party has carried the proceeding to a wrong Court

A party who is proceeding in ignorance of law can hardly be said to be proceeding with due diligence or in good faith within the meaning of section 14 of the Limitation Act.

Time spent in prosecuting an appeal which is not permitted under the law cannot be excluded under section 14 of the Limitation Act.

Revision from the decision of the Subordinate Judge, Arrah, dated the 25th June 1923, affirming that of Munsif, Buxar, dated the 29th January, 1923.

Messrs. *S. P. Varma* and *Mahabir Prasad*, for the Petitioner.

Messrs. *P. Dayal* and *Harnarain Prasad*, for the Opposite Parties.

JUDGMENT.

Foster, J.—This is a petition in revision. The applicant as a judgment-debtor instituted a proceeding under O. XXI, r. 90 which, on the 6th January 1923, was dismissed for default neither party being present. The applicant then filed an appeal on the 12th February 1923. The Subordinate Judge who heard the appeal found that no appeal lay and that in any case it was out of time. It is urged here that the lower Court was wrong in holding that the appeal was incompetent. But the matter is of little consequence, for I find that the final order of the Subordinate Judge was justified on the ground of limitation. I come, therefore, to the point of limitation. The appeal (if it lay) was filed six days out of time so far as I can see from the documents put before me on the applicant's behalf. It is urged that sections 14 and 5 of the Indian Limitation Act should have been applied. Section 14, in my opinion, has no application. The petition for restoration of the case which was dismissed on the 29th January was dismissed because that petition was one not recognized by the law Proceedings coming under section 14 must be such as are recognised by law as legal in their initiation though a party has carried the proceeding to the wrong Court. It can hardly be said that a party who is proceeding in ignorance of law has been proceeding with due diligence or in good faith. The words "good faith" are explained in the earlier part of the Act as connoting due care and attention. Nor do I find any ground for the application under section 5, inasmuch as the applicant had plenty of time between the 29th January and the date on which the period of limitation for appeal (if any) would expire.

The last point is urged by referring to the case of *Naurang Ram Sahu* v. *Bhakhori Mandar* (1). It is argued that the Munsif in the Original Court did not show under what provision of the law he was dismissing the application under r 90 and, therefore, he acted without authority and his act amounted to a refusal to exercise jurisdiction. It seems to me this is stretching the argument too far. In the case quoted, the order was one that could not with any certainty be labelled, if I may use the expression, with any indication of the provision of law under which it was passed Here the order of the 6th Januapy 1923 could only have been passed under O. XVII, r. 2, read with O. IX r. 3, for it was an order passed after adjournment and in the absence of the two parties.

I find no reason to interfere. The petition is rejected with costs.

Z. K. *Petition rejected*

(1) 51 Ind. Cas. 189; 4 P. L. J. 277.

ABDUL HAQ *v.* MUHAMMAD YAHYA KHAN

PATNA HIGH COURT.

CIVIL APPEAL FROM ORIGINAL DECREE No. 174 OF 1920.

July 2, 1923.

Present :—Mr. Justice Das and Mr. Justice Foster.

Shaikh ABDUL HAQ—PLAINTIFF—APPELLANT

versus

Babu MUHAMMAD YAHYA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 15, 16, 17, 27 (b) —Contract by guardian for himself and minor—Specific performance of whole or part, whether can be decreed —Mutuality, want of, effect of—Muhammadan Law—Guardian, de facto, power of, to sell minor's property.

A *de facto* guardian of a Muhammadan minor has no power to enter into a contract for the sale of the minor's property. [p. 484, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind Cas. 518 ; 45 C. 878 ; 35 M L. J 422 ; 16 A. L J. 800 ; 24 M. L. T. 330 ; 28 C. L J. 409 ; 23 C W. N. 50 ; 5 P. L. W. 276 ; 20 Bom L. R. 1024 ; (1919) M W. N. 91 ; 9 L W. 518 ; 45 I. A. 78 (P. C.), followed.

Specific performance will not be decreed of a contract to sell immoveable property entered into by a guardian on behalf of a minor. [p 484, col. 2.]

Mir Sarwarjan v. *Fakhruddin Mahomed*, 13 Ind. Cas. 331 ; 39 C. 232 ; 16 C W. N. 74 ; (1912) M. W. N. 22 ; 9 A L. J 33 ; 15 C. L. J. 69 ; 14 Bom L. R. 5 ; 21 M. L. J. 156 ; 11 M. L. T. 8 ; 39 I. A 1 (P. C.) followed.

The operation of section 27 (4) of the Specific Relief Act is confined to cases where the contract is, in the first instance, enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon the antecedent liability of the party to the contract under whom he claims, and arises by reason of the fact that as such transferree he takes subject to the transferors's pre-existing contractual obligation. But where there is no pre-existing contractual obligation, the case entirely fails against the transferee. [p. 485, col. 1.]

The Court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. It may be that the contract though in form one and entire, is in substance divisible, and where this is so there is nothing to prevent the Court from carrying into effect that portion of it, in substance a separate contract, which is capable of being carried into effect. But a contract for the sale of immoveable property in one lot will generally be considered indivisible. [p. 485, cols. 1 & 2, p. 486, col. 1]

A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Want of mutuality in the contract is a well recognized defence to a suit for specific performance. [p. 486, col. 1.]

When, therefore, whether from personal incapacity to contract or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. [p. 486, col. 1.]

Mir Sarwarjan v. *Fakhruddin Mahomed*, 13 Ind. Cas. 331 ; 39 C 232 ; 16 C. W. N. 74 ; (1912) M. W. N. 22 ; 9 A. L. J. 33 ; 15 C. L J. 69 ; 14 Bom. L. R. 5 ; 21 M. L. J. 156 ; 11 M. L. T. 8 ; 39 I. A. 1 (P. C.) followed.

Where a person is jointly interested in an estate with another person and purports to deal with the entire estate, specific performance will not be granted against him as to his share. [p. 486, col 2.]

Lumby v. *Ravenscroft*, (1895) 1 Q. B. 683, 64 L. J. Q. B. 441 ; 14 R. 346 ; 72 L T. 382 ; 43 W. R. 584 ; 59 J. P. 277, relied on.

Sections 15 and 16 of the Specific Relief Act are inapplicable to such a case. [p. 487, col. 1.]

Appeal from the decision of Subordinate Judge, Saran dated the 30th April 1920.

Mr. *A. B. Mukherji*, for the Appellant.

Messrs. *S M. Mullick*, *S. M. Tahir*, *Sveshwar Dayal*, *Noorul Hassan* and *Sultanuddin Hussain*, for the Respondents.

Das, J.—This appeal arises out of a suit instituted by the appellant for specific performance of an agreement by defendant No. 1 and by defendant No. 2 for self and as guardian of defendants Nos. 3 and 4 to sell certain properties to the plaintiff. The agreement is alleged to have taken place on the 20th August 1916 and the plaint was filed on the 25th September 1916. On the 24th October 1916 the defendants Nos. 1 to 4 sold the properties to defendant No. 7 and defendant No. 7 was added as a party to the suit on the 26th August 1918. The learned Subordinate Judge has found that there was a valid pre-existing contract to sell the properties to the plaintiff and that defendant No. 7 purchased the properties with notice of the prior contract in favour of plaintiff, but being of opinion that defendant No. 7, as a co-sharer in all the properties contracted to be sold to the plaintiff, had a right of pre-emption, has declined to give the plaintiff a decree for specific performance. The view of the learned Subordinate Judge is that, though defendant No. 7 is not a purchaser without notice, she is still entitled to defeat the plaintiff's suit on the ground that she had a right of pre-emption in respect of the

properties in dispute. In this view the learned Subordinate Judge dismissed the plaintiff's suit for specific performance but has given him a decree for Rs. 605 as against defendants Nos 1 to 4.

It is, in my opinion, unnecessary for us to express an opinion on the question which has been discussed at great length by the learned Subordinate Judge, for, in my view, this appeal must fail, first, on the ground that defendant No. 2 as the *de facto* guardian of defendants 3 and 4 had no power to convey to the plaintiff the shares of defendants Nos. 3 and 4 in the properties agreed to be sold, and, secondly, on the ground that it is quite impossible for the Court to give the plaintiff a decree for specific performance as against the minors and consequently as against the adult defendants. So far as the first point is concerned, the case of *Imambandi* v. *Mutsaddi*(1), is directly in point. It is quite true that that was not a case of specific performance, but the principle is equally applicable to a case where the *de facto* guardian has entered into a contract with a third party for the sale of the minor's property. To direct the contract to be carried into effect as against the minors' is to sanction a plain breach of trust on the part of the *de facto* guardian ; and this, I apprehend, this Court will not do. The second point is equally clear. The allegation of the plaintiff in regard to the contract is contained in the second paragraph of the plaint which is as follows : "Defendant No. 1 and defendant No. 2 for self and as guardian of defendants Nos. 3 and 4 completed a contract for the sale of the above-mentioned shares to the plaintiff on the 20th August 1916 at Bihar according to the stipulation given below, Rs. 7500 was fixed as the consideration thereof and Rs. 200 as *salami*, in all Rs. 7,700. To complete the transaction it was settled that defendants Nos. 5 and 6 should go to Siwan and do all that may be necessary for the execution of the deed of sale." I will assume that the contract was a concluded one : but the question still remains whether the Court will carry into effect a contract confessedly entered into by a guardian on behalf of the minors. The decision of the Judicial Committee in *Mir Sarwarjan* v. *Fakruddin Mahomed* (2), is, in my opinion, final and decisive. The question which their Lordships had to consider was whether a contract entered into on behalf of a minor by his manager or guardian and found to be for his benefit, was enforceable by a decree for specific performance at the suit of the minor through his manager or guardian, and, in dealing with this question, their Lordships said as follows :—" They are, however, of opinion that is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract." That was a case of contract for purchase, but, in my opinion, no distinction can be drawn between a contract for purchase and a contract for sale. The decision of the Judicial Committee rests on the broader ground that it is quite impossible for the Court to decree specific performance against a minor.

It was, however, argued that, though the contract may be unenforceable against the minors, no difficulty arises in the present case, as the defendants have conveyed the properties to defendant No. 7 and there is no rule which prevents the Court from directing defendant No. 7 to convey the properties to the plaintiff. The argument is founded on the terms of section 27 (b) of the Specific Relief Act which provides that " except as otherwise provided by this Chapter, specific performance of a contract may be enforced against any other person;" that is to say, against any person other than a party to the contract "claiming under him;" that is to say, claiming under a party to the contract " by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract." In my opinion it is quite impossible to entertain the argu-

(1) 47 Ind. Cas. 513 ; 45 C. 878 ; 35 M. L. J. 422 ; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409 ; 28 C. W. N. 50 ; 5 P. L. W. 276 ; 20 Bom. L. R. 1022 ; (1919) M. W. N. 91 ; 9 L. W. 518 ; 45 I. A. 73 (P. C).

(2) 13 Ind. Cas. 332 ; 39 C 231 ; 16 C. W. N. 74 ; (1912) M. W. N. 22 ; 9 A. L. J. 33 ; 15 C. L. J. 69 ; 14 Bom. L. R. 5 ; 21 M. L. J. 156 ; 11 M. L. T. 8 ; 39 I. A. 1 (P. C.)

ment. The operation of section 27 (b) of the Specific Relief Act is confined to cases where the contracts are, in the first instance, enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon the antecedent liability of a party to the contract, and arises by reason of the fact that, as such transferee, he takes subject to the transferor's pre existing contractual obligation; and where there is no pre-existing contractual obligation, it seems to me that the case entirely fails as against the transferee. It is quite clear that you cannot enforce a contract as against a transferee unless the transferee has notice of the original contract. Now, notice of the original contract must mean notice of an existing obligation under the contract, and where the contract is itself unenforceable, it seems to me that it is impossible to maintain the view that the contract can be enforced as against a subsequent transferee. In my opinion the plaintiff's suit must fail so far as defendants 3 and 4 are concerned.

The next question is, whether the plaintiff is entitled to a decree for specific performance against defendants Nos. 1 and 2 in regard to their shares in the properties agreed to be sold. Now, as to this, the rule is that the Court will not, as a general rule compel specific performance of a contract unless it can execute the whole contract. It may, of course, be that the contract though in form one and entire, is in substance divisible, and where the contract is in substance divisible, there is nothing to prevent the Court from carrying into effect that portion of it (in substance a separate contract) which is capable of being carried into effect. Mr. Abani Bhusan Mukherji strongly contends that the question whether the contract was indivisible or divisible is a question of fact, and that, as the question was not raised in the form in which it has been argued before us, we ought not to adjudicate on it, but that we ought to remand the case to the Court below for taking evidence. I do not think that Mr. Mukherji is entirely right in saying that the question was not raised by the defendants. The minor defendants in their written statement took the plea that the contract was not enforceable as against them, but I have no doubt whatever that the queston was not argued in the Court below in the form in which it has been argued before us. It seems to have been argued in the Court below that as there was a certificated guardian of the minors appointed by the District Court, the contract for sale without the sanction of the District Judge was unenforceable in law; and that question the learned Subordinate Judge has decided against the defendants. But the question was undoubtedly raised in the written statement of the minors, and the question as to whether a decree for specific performance can be passed against the minors is a question of law. In regard to the other question, namely, whether the contract is one and entire or divisible it is sufficient to say that the plaintiff's own case in the plaint and in the evidence is to the effect that the contract was one contract and not separate contracts. I have already referred to paragraph 2 of the plaint which is to the effect that there was one contract, one *salami* and one consideration. It is the plaintiff's case that the contract between him and the defendants was embodied in a document dated the 1st of September 1916. This document makes it clear beyond all doubt that the contract was one and entire and that under the contract the defendants agreed to sell certain properties of which they were owners, to the plaintiff for the sum of Rs. 7,700. Neither in the plaint nor in Ex. 5 the document of the 1st September 1915 is there any specification of the shares of the vendors, nor is it stated how much of the consideration was to go to defendant No. 1, how much to defendant No. 2 and how much to defendants Nos 3 and 4. The evidence which has been read before us by Mr Mukharji is conclusive on the question that the contract was one and entire. That being so, it is quite unnecessary to remand the case for taking fresh evidence, for it is possible for us, upon the allegation of the plaintiff himself, to decide the question without having recourse to the doubtful propriety of sending the case back to the Court of first instance.

I have said that where the contract is in substance divisible, there is nothing to prevent the Court from carrying into effect that portion of it which in substance is a separate contract and which is capable of being carried into effect. But here, again, the rule is firmly established that a contract for sale of prop-

erty in one lot will generally be considered indivisible for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided parts or shares of the estate. Now, in the present case the plaintiff having purchased certain specific properties belonging to four persons could not be compelled to take the shares of two of them in those properties. Defendants Nos. 1 and 2 could not be heard to say, "it is true that we contracted to sell not our shares in the property, but certain properties belonging to us and two minors and that we are unable to convey the shares of the minors, but none the less you are bound to complete the sale so far as our shares are concerned." The plaintiff would be entitled to say if such a case was put forward by defendants Nos. 1 and 2 " I did not contract to purchase your shares but I contracted to purchase certain specific properties of which you, together with the minor defendants, are the owners." Such a contention on the part of the plaintiff would, in my opinion, be unanswerable, and no Court will force upon the plaintiff shares of the property when he has contracted to purchase the entirety. It is quite true that that is not the attitude of the plaintiff in the present case, and he, through his learned Vakil, has intimated his willingness to take a conveyance of the shares of defendants Nos. 1 and 2, but a contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Want of mutuality in the contract is a well recognized defence to a suit for specific performance, and was at the bottom of the decision of the Judicial Committee in the case of *Mir Sarwarjan* v. *Fakhruldin Mahomed* (2). The rule is stated in these terms in a recognized work on the subject: —" When, therefore, whether from personal incapacity to contract or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." (Fry on Specific Performance, page 219). The contract was, in my opinion, incapable of being enforced against the plaintiff. That being so, the plaintiff is incapable of enforcing it against defendants Nos. 1 and 2.

The exact point was decided by the English Court in *Lumley* v. *Ravenscroft* (3). That was a case where the defendants, an infant and his sister, agreed by their agent to grant the plaintiff a lease of premises in which they were jointly interested. The plaintiff brought an action for specific performance of the agreement, and applied for injunction to restrain the defendants till after the trial of the action from leasing the premises to another person. It was held that an injunction ought to be granted only where a case was made out for specific performance, and that one of the defendants being an infant the plaintiff was not entitled to specific performce against both of them, nor against the sister as to her interest in the absence of any proof of misrepresentation or misconduct on her part. Lindley, L. J., in delivering the judgment, said as follows:—" If Mcore's principals were both of age, there would be a complete contract and no difficulty in the case. But unfortunately one of the principals is an infant nineteen years of age, and the agreement is unquestionably an agreement for a lease by the two. It is an agreement by the two with the plaintiff for a lease to him of cert in property of which as it appears a lease was being granted to the two. What is the law? Specific performance is out of the question. You cannot get specific performance against an infant, and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Grifth*, (4) and *Thomas* v. *Dering*, (5) but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share." It is only necessary to mention that there is no charge of any misrepresentation or misconduct within the meaning of those terms in *Price* v.

(3) (1895) 1 Q. B. 683 ; 64 L. J. Q. B. 441 ; 14 R 347 ; 72 L. T 3-2 ; 43 W. R 584 ; 59 J. P. 277.

(4) (1851) 1 D. G. M and G. 80 ; 21 L. J. Ch. 78 ; 15 Jur 1092 ; 42 E. R. 482 ; 91 R. R. 87.

(5) (1857) 1 Keen 729 ; 6 L. J. (N.S.) Ch. 267 ; 1 Jur. 427 ; 44 R. R. 158 ; 48 E. R. 488.

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Griffith (4) and *Thomas* v. *Dering* (5) as against defendants Nos. 1 and 2 in this case.

It was lastly argued that the question should be decided not on the English Law, but on the terms of sections 15, 16, 17 of the Specific Relief Act It will be noticed that the general rule adopted in the Act is that, except in cases coming within certain exceptions, the Court shall not direct the specific performance of a part of the contract. The general rule is laid down in section 17 of the Act ; the exceptions are enumerated in sections 14, 15 and 16 of the Act. It is conceded that section 14 has no application, but it is contended that the case comes not within the prohibition of section 17 but within the exceptions mentioned in section 15 and 16 of the Act. In my opinion, section 15 has no application whatever to this case. The section applies to a case where a party to a contract is unable to perform the whole of his part of the contract. In the case before us, provided the Court could carry into effect the contract as against the minor defendants, no question would arise as to the ability of defendants Nos. 1 and to 2 to perform the whole of their part of it. Here defendants Nos. 1 and 2 agreed to convey their interests in the disputed properties to the plaintiff. They undoubtedly have an interest in the properties, and they made no representation whatever that they were entitled to the whole interest in the properties. Had they made such a representation, and the contract was concluded on the footing that they were entitled to the whole interest in the properties agreed to be sold, section 15 would have applied and the plaintiff would be entitled to a decree directing defendants Nos. 1 and 2 to perform specifically so much of their part of the contract as they could perform, provided the plaintiff relinquished all claim to further performance, and all right to compensation either for deficiency or for the loss or damage sustained by him through the default of the defendants. But there is no default in the present case on the part of defendants Nos. 1 and 2 and the whole difficulty has arisen by reason of the fact that defendant No. 2 as the *de facto* guardian of defendants Nos. 3 and 4 (who are also interested in the properties agreed to be sold) agreed to convey the interests of the minor defendants in the properties to the plaintiff ; and to such a case section 15, in my opinion, is not applicable. I should mention that the case would have stood on a different footing had defendant No. 2 (who is the certificated guardian of defendants Nos. 3 and 4) acted with the leave of the Court. In entering into the transaction she did not take the permission of the Court : and, so far as the transaction is concerned, she cannot be considered to have acted as the certificated guardian. In my opinion, section 15 has no application whatever. Section 16, in my opinion, does no more than embody the rule of English Law, and the relevant enquiry under section 16 is, is the contract one and entire or is it a divisible contract. I have given my reasons for holding that the contract is not a divisible contract. That being so, the general rule must apply and it is quite impossible to give the plaintiff a decree for specific performance as against defendants Nos. 1 and 2.

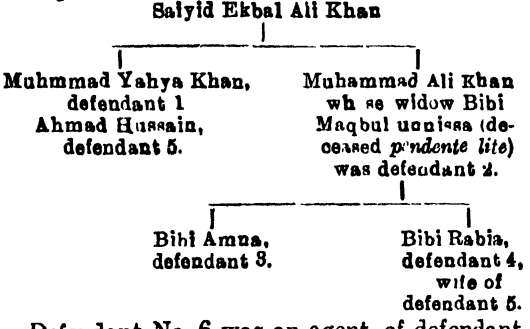
I would dismiss this appeal with costs.

So far as the cross-appeal is concerned, I am quite clear that the plaintiff is entitled to a decree for money as against defendants Nos. 1 and 2 ; but I am equally clear that he is not entitled to a decree as against the minors. defendant No. 2 is now dead, and is represented in this appeal by defendants Nos 3 and 4. The decree passed by the learned Subordinate Judge will be varied by providing that the plaintiff will have a money decree for Rs. 605 with interest at 9 per cent. per annum from the 11th September 1916 up to the 30th April 1920 with costs as against defendant No. 1 and defendants Nos. 3 and 4 as the representatives in interest of defendant No. 2, and to the extent of the assets of defendant Nos. 2 in their hands. As provided by the learned Subordinate Judge. the decree will carry interest at 6 per cent. from the 30th April 1920 until realization. Subject to this variation, the cross-appeal fails and is dismissed.

Foster J.—This is a suit for specific performance of a contract to sell to the plaintiff shares in six Revenue Estates *tauzi* Nos. 1012, 1016, 1046, 1288, 1157 and 1012 in Saran district. The plaint sets out that defendants Nos. 1 to 4, whose genealogy is given below, owned a share in each of these estates: on the 20th August 1916 at Bihar they made a verbal contract to sell and on the 1st September 1916 they completed the contract at Siwan, by receiving the earnest

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money and passing to the plaintiff a written receipt.



Defendant No. 6 was an agent of defendant No. 2, who was said to have made the contract on her behalf, and defendant No. 7 is a subsequent purchaser of the property by deeds of sale dated the 24th October 1916. The latter was made a party defendant before the hearing of the case, the only relief sought against her being a declarartion of the invalidity of the sale-deeds executed in her favour. The main relief specific performance of contract, is claimed only against defendants Nos. 1 and 2. On the issues which were framed between the parties the learned Subordinate Judge has arrived at the following material conclusions. He finds the alleged contract with the plaintiff proved; the necessity for the contract, a decree threatening serious and permanent injury to the interests of the defendant's family, is not a matter in dispute He finds that the subsequent sale to defendant No. 7 is genuine and valid, but that the contract to sell to her (defendant No. 7) was not prior to the contract upon which the plaintiff is suing; and, moreover, defendant No. 7 purchased with full knowledge of the existence of that contract with the plaintiff. At this point the judgment diverges into a discussion of the twelfth issue, and the Judge finds that defendant No. 7 has a right of preemption which debars the plaintiff from suing for specific performance in respect of three or four of the six estates; as to the rest of the estates, the plaintiff's fortune was left to the decision of a subsequent suit if the plaintiff should think fit to bring it. In the result, no order was passed upon the claim for specific performance but defendant Nos. 1 to 4 were made liable for such money as had actually passed hands upon the contract. The plaintiff appeals.

In my view of the arguments in appeal, they fell under five main propositions: (1) the contract is enforceable against the defendants No. 1 and 4; (2) it is enforceable against the minor defendants Nos. 3 and 4; (3) it is enforceable at least against defendants Nos. 1 and 2 for what they can convey; (4) at least compensation in money can be obtained against each and all of these four defendants; (5) the relief sought against defendant No. 7 a declarationthat her purchase is invalid should be granted.

I proceed to consider these propositions. The contract itself has, for the purposes of this appeal, been taken to be genuine, the only question being as to its legal effects. To deal with that question I shall, as briefly as possible, discuss the four propositions Nos. (2) to (5) set out above.

The emergent necessity and the fact that the minor's mother contracted are urged as reasons for involving the minors in the consequences of the contract. (I may mention here that the defendants are Sunni Muhammadans). The mother if only *de facto* guardian and not the legal guardian is not competent to dispose of the immoveable property of her infant children: *Imambandi* v. *Mutsaddi* (1). In this case it is not denied that the mother defendant No. 2 was the legal guardian of the minor defendants, appointed by the District Judge of Patna under Act. VIII of 1890. Under section 27 of that Act she could do all acts which are reasonable and proper for the realization, protection or benefit of the minor's property, but under sections 29 and 30 she could not validily mortgage, or charge or transfer any part of the immoveable property of the minors without the previous permission of the Court. The word "previous" is important, for it explains how a contract of sale made by a certificated guardian without the permission of the District Judge has been treated by the Court as "a contract made by a trustee in excess of his powers," and so incapable of being enforced specifically under section 21 of the Specific Relief Act: *Narain Pattar* v. *Aukhoy Narain* (6). In my opinion, the suit for specific performance fails on this ground as against the minors.

(6) 12 C. 152; 6 Ind. Dn. (N. S.) 104.

The next question is whether the suit is enforceable againg defendants Nos. 1 and 2 for what they can convey. Had the defendant Yahia Khan brought a suit to enforce the contract written out by his son on his behalf and now relied on by the plaintiff (Exhibit 5) he would have had either to express his readiness and ability to perform his part of the contract or to admit that that contract could not be performed in its entirety. The contract was for the sale of the shares of defendants Nos. 1 to 4 in the six revenue estates. Now, even according to the plaint (paragaph 1) the defendants have concurrent ownership and possession of the properties, which include shares in rents and shares in land held in direct possession. It is manifest that no part of the contract stands on a separate and independent footing from any other part for, whichever portion of the property be affected by the decree for specific performance, there will have to be a partition to ascertain that portion. So I do not consider that section 16 of the Specific Relief Act applies to this case. As to the application of sections 14 and 15 of that Act, I have found more difficulty. The learned Vakil for the appellants is ready to pay the whole price for such shares as defendant No. 1 (or defendants Nos. 1 and 2) are capable of transferring.

I would not go so far as to say that partial performance *in specie* cannot be enforced, but in such cases as these the question is whether it can and should be enforced. The contract obviously lacks mutuality, but in my opinion this case can be distinguished in its legal aspects from *Mir Sarwanjan's case* (2). In that case, there was an absolute lack of mutuality. This case in fact falls into one of the exceptions to the doctrine of mutuality, an exception recognised in sections 14 to 16 of the Specific Relief Act. For a clear exposition of this matter I refer to Halsbury's Laws of England, "Specific Performance," Part II, section 5. In my opinion this case is governed by the latter part of section 15 of the Specific Relief Act.

So I return to the question—what is the suitable remedy in the circumstances of this case? In my opinion the relief to be granted should be restricted to compensation in money, the principle being that contracts should not be enforced to the detriment of the rights of third parties. The third party is *Musammat* Batul, defendant No. 7. She is a purchaser for value now in possession of the properties. At the time when the contract of this suit was made she was a co-sharer in every one of six revenue estates, and the plaintiff was a stranger in respect of three or perhaps four of them. Under the law of pre-emption, therefore, *Musammat* Batul had, on the whole, a superior right to purchase. With this view, I record my opinion that specific performance ought not to be granted, but the plaintiff should, in accordance with section 19 of the Specific Relief Act, be awarded compensation for the breach of the contract But as the contract would always have been exposed to the superior claims of *Musammat* Batul as pre-emptrix in respect of a considerable part of its subject-matter, I would confine the damages to the amount decreed in the lower Court, namely the money which actually changed hands. As *Musammat* Maqbul-unnissa is dead, and as there is little or no evidence to show that any part of the money ever reached the minors I agree with the order propounded by my learned brother.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 46 OF 1923.

November 15, 1923.

Present:—Sir Dawson Miller, Kt., K. C., Chief Justice, and Mr. Justice Mullick.

Musammat TAIBUNNISSA BEGUM—PLAINTIFF—APPELLANT

versus

JAGDIP PANDEY, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XIII, rr. 1, 2—Documents, production of, at late stage—Admission—Discretion of Court.

Rule 2 of O XIII of the Civil Procedure Code gives no discretion to the Court to receive documentary evidence at a later stage than that mentioned in the previous rule unless good cause is shown to the satisfaction of the Court for the non-production thereof. [p. 491, col. 1.]

The scope of the rule has sometimes been enlarged by allowing the late production of documents in cases where it is quite obvious that no prejudice would arise to the other party by their late production and where the genuineness of the documents sought to be admitted is beyond all question. [p. 491, col. 1.]

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The object of the Legislature in enacting this rule was to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings. [p. 491, col. 1.]

Taleswar Singh v. *Bhagwan Das*, 12. C. W. N. 312, referred to.

But the mere fact that a document has been in existence for more length of time before proceedings were instituted is not in itself a sufficiently good cause for allowing it to be produced at a late stage of the proceedings. [p. 491, col. 2.]

Appeals under section 10 of the Letter Patent from a decision of Mr. Justice Ross.

Mr. *S. M Tahir*, for the Appellant.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

Dawson Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Ross overruling the decree of the lower Courts and remanding the case for retrial after the admission of certain evidence which was rejected by both the lower Courts.

The plaintiff obtained against one Mr. Mackenzie a decree and in execution of that decree sold certain property alleged to belong to Mr. Mackenzie and in the execution sale the plaintiff purchased the property sold. Subsequently, the defendants instituted proceedings under O. XXI, r. 100 of the Civil Procedure Code claiming to have the sale set aside on the ground that they were the sole parties interested in the property and that Mr. Mackenzie was not the proprietor at all. In those proceedings the defendants succeeded. The plaintiff thereupon brought the present suit against the defendant Jugdip Pande who had brought the proceedings under O. XXI, r. 100 and certain other persons who are apparently joint with him in estate claiming to recover possession of the property from the defendants.

The plaintiff succeeded in establishing her title to the property and in disproving the defendants' title and judgment was pronounced in her favour by the trial Court and on appeal that decision was upheld.

The only ground upon which the appeal was preferred was that the learned Munsif before whom the case came for trial had improperly rejected certain evidence tendered by the defendants at a late stage of the case. It appears that the issues in the suit were framed on the 14th April and under the rules in the Civil Procedure Code all documentary evidence of every description in the possession or power of the parties ought to have been produced at the first hearing which was either on or before the 14th April. Later, applications were made for adjournment of the hearing and it was not until the 29th May that the actual hearing of the suit commenced and on the following day arguments were heard and judgment was delivered on the 31st. On the 29th May the defendants produced the documents in question and the learned Munsif rejected them on the ground that they ought to have been produced at an earlier stage.

On appeal, the District Judge upheld the ruling of the Munsif being of opinion that he was perfectly justified in rejecting the documents tendered at that late stage of the proceedings.

From that decision a second appeal was preferred to this Court and the matter came before Mr. Justice Ross. The learned Judge was of opinion that the Munsif had improperly exercised his discretion in rejecting the documents in question and remanded the case for re-trial by the Munsif after taking the evidence which had been excluded.

From that decision the present appeal under the Letters Patent is brought by the plaintiff. I ought to mention here that the documents which were tendered in evidence on the 29th May were, first of all, a letter which purported to have been written by Mr. Makenzie who, I understand, is now dead and certain counterfoils of rent receipts in connection with the property the subject-matter of dispute. These had been used by the defendants and filed before the Judge in the proceedings under O. XXI, r. 100 in which the defendants were successful, and the only possible ground upon which it could be suggested that the defendants had good cause for not producing their documents at the proper time would be that these documents had been in existence before the suit was instituted and, therefore, there was no pressing necessity for producing them at the very first moment and that this in itself was sufficient cause for inducing the Court to admit the document at a later period. In considering this question it is necessary to bear in mind exactly what the law is on the

subject as laid down in O. XIII of the Civil Procedure Code. I have already referred to the first rule of that Order which makes it obligatory upon the parties to produce all their documentary evidence at the first hearing of the suit. Rule 2 of the same Order provides that no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of r. 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof and the Court receiving any such evidence shall record the reasons for so doing. It will be observed that rule gives no discretion to the Court to receive evidence at a later stage than that mentioned in the previous rule unless good cause is shown to the satisfaction of the Court for the non-production thereof. The rule is precise and excludes all documentary evidence produced at a late period unless good cause is shown for its non-production. That rule has been found, perhaps, in some cases to work a certain amount of hardship and the tendency has no doubt been to endeavour, to some extent at all events, to enlarge the scope of the rule by allowing the late production of documents in cases where it is quite obvious that no prejudice would arise to the other party by their late production and where the genuineness of the documents sought to be admitted is beyond all question. In the case of *Taleswar Singh* v. *Bhagwan Das* (1) the learned Judges of the Calcutta High Court pointed out that, whilst it is for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list or ought to have been produced earlier were not so produced for good and sufficient reasons, at the same time, the object of the Legislature in enacting this rule was to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings. In that case, although it would appear that no valid excuse had been proved for not producing documents of that nature at the first hearing of the suit, nevertheless the Court allowed the production of public documents at a later period either before or at the actual hearing. The principle relied upon in that case, however, must not, in my opinion, be pushed too far. It seems to me that that decision may be justified upon the ground that where you have a public document which clearly is one beyond all suspicion as to its authenticity and which can be procured at any time by either party that fact may in itself be sufficient cause for not producing the document at the earliest stage, because, unless, some prejudice is suffered by the other side by its late production, which of course would be sufficient to exclude it, it seems fairly obvious that the other party can suffer no harm by its late production because the genuineness of the document is beyond question, and, therefore, as I say, that fact may in itself be quite sufficient excuse or sufficient cause for the non-production of the document in the first instance. In the present case, however, the documents which it is now sought to have admitted after trial and which the defendants asked to have admitted at a late stage in the proceedings are not documents of that nature. They are not public documents. The principal document is a letter said to be signed by Mr. Mackenzie himself which it is said will have a material bearing on the question in dispute in this case and the only ground upon which it has been suggested that there was good cause for non-production of that and of the other documents is that those documents were in fact exhibited in the proceedings under O.XXI, r. 100, and, therefore, it must be presumed that they at least were not fabricated for the purposes of the present case. Further, it is said that both parties were aware of these documents because in the previous proceedings both the plaintiff and the defendants had also been parties. I am not prepared to say that the mere fact that a document has been in existence for some length of time before the proceedings were instituted is in itself sufficiently good cause for allowing the documents to be produced at a later stage of the proceedings. When the application was made to the learned Munsif no cause apparently of any sort was shown why the documents should be admitted and what exactly were the grounds which induced the learned Munsif to reject these documents we have now no means of determining. The learned Vakil can give us no assistance upon that point and all we know from the record of the case is that the documents were tendered and rejected. It may

(1) 12 C. W. N. 812.

well be, in the absence of any proof as to the cause which was shewn for their late production, that the Munsif had very good reasons either from a perusal of the documents themselves or from something which may have been stated to him in Court for rejecting these particular documents, and in fact, so far as we can judge for ourselves, the principal document in the case is one which indicates something if not exactly a fraud something which would indicate a desire to set up a different state of fact from those which were actually existing. What the exact worth of these documents may be as evidence it is impossible for us to determine but having had the documents produced, an advantage which my learned brother who heard the second appeal in this Court and from whose judgment this appeal is brought, had not, I certainly am not prepared tosaythat the Munsif exercised a wrong discretion in rejecting them at the stage at which they were tendered. No real cause has, to my mind, been made out why they should necessarily be accepted and, in these circumstances, it does not appear to me that it is right that this Court should interfere with the discretion which in all probability, and as far as one can judge from the circumstances disclosed, was a perfectly proper discretion on the part of the Munsif. I think that the decision of the learned Judge under appeal should be set aside and the decree of the Subordinate Judge affiming that of the Munsif should be restored. The appellant is entitled to her costs of this appeal and of the appeal to Mr. Justice Ross.

Mullick, J.—I agree.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 74 OF 1923.

December 4, 1923.

Present :—Sir Dawson Miller, Kt., K. C., Chief Justice, and Mr. Justice Mallick.

UCHIT KOPRI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ADHIK MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (*XVI of* 1908), *s.* 28—*Place of registration—Small item of property included for purposes of registration—Registration, validity of*—**Mokarrari, malguzar,** *meaning of.*

The mere fact that a small item of property situate in a particular district is included in a deed of transfer in order to give jurisdiction to the Sub-Registrar of that district to register the deed, will not invalidate the registration, if the property was actually intended to be conveyed by the deed. [p. 493, col. 1.]

The use of the word *mukarrari* does not in itself imply any permanent interest but merely fixity of rent. [p. 494, col. 2.]

The word *malguzar* means, primarily, rent payer. It may equally be applied to a tenure-holder or a *raiyat*. In North Behar it generally means tenure-holder. [p. 494, col. 2.]

Appeal under section 10 of the Lattters Patent from the decision of Mr. Justice Bucknill.

Messrs. *S. Ahmad* and *S. Saran*, for the Appellants.

Messrs. *S. Imam* and *S. Dayal*, for the Respondents.

JUDGMENT.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted by the respondents as plaintiffs against the appellants as defendants to eject the defendants from certain lands on the ground that the plaintiffs were the occupancy *raiyats* of the land and the defendants were under-*raiyats* holding under them. The plaintiffs also claimed mesne profits from the date of the expiry of the notice to quit, which was duly served, until the date of possession. The plaintiffs' title to the land as *raiyats* is based upon a purchase by registered deed in the year 1914 from Nunoo Lal and Dwarka Nath, the previous tenants.

The defendants disputed the validity of the plaintiffs' title on the ground that the sale-deed was not properly registered. They further contended that the plaintiffs and their predecessors were tenure-holders and not occupancy *raiyats* and that they, defendants, had acquired occupancy rights as *raiyats* under the plaintiffs. They further relied upon a certain representation contained in a rent-receipt granted by the plaintiffs to the effect that they were tenure-holders and pleaded that this created an estoppel.

The Munsif before whom the case came for trial found all the issues in favour of the plaintiffs and decreed their suit.

UCHIT KOPRI *v.* ADHIK MANDAL

His decision was upheld by the Subordinate Judge on appeal and again by Mr. Justice Bucknill on second appeal to this Court.

The present appeal is preferred by the defendants under the Letters Patent from the decision of Mr. Justice Bucknill.

The first point which was urged before us in this appeal was, that the transfer to the plaintiffs by Nunoo Lal and Dwarka Nath in 1914 was invalid as it was not properly registered. It appears that the land transferred by the sale-deed measured 56 *bighas* 10 *cottahs*. The 56 *bighas* which is the land in dispute in this case are situated in the Purnea district and the 10 *cottahs* are situated in the Bhagalpur district. It is conceded that the 10 *cottahs* were included in the sale-deed for the purpose of enabling the sale-deed to be registered in the Bhagalpur district where in fact the registration took place at the sub-registry office at Madhipura. It was not contended that the 10 *cottahs* of land at Madhipur had no existence nor was any objection taken in the written statement that the registration was not valid and no issue was framed upon this point. The 6th issue, however, was framed thus :—

"Is the *kabala* propounded by the plaintiffs a legal and valid document or not."

This issue was not pressed at the trial and the Munsif found that it had been abandoned. Before the Subordinate Judge on appeal the appellants contended that the registration was invalid, a point which does not appear to have been taken in the trial Court. They relied upon a deposition given by the first plaintiff in an earlier case in 1915 in the Munsif's Court at Purnea which had presumably been put in evidence at the trial in which he stated: "The *kobala* was executed at Madhipura. I purchased 10 *cottahs* of land at Maghipura—it is still in possession of Nunoo Lal for the purpose of getting the *kobala* registered there." It was found by the Subordinate Judge that the land was in fact purchased and even if it was purchased with the express intention of giving jurisdiction to the Sub-Registrar at Madhipura to register the deed, there is nothing illegal or improper about this. It was for the learned Judge to say whether the purchase of the 10 *cottahs* was a genuine transaction or not He found that it was and this appears to me to dispose of this point.

It was next contended that what was purchased by the plaintiffs was not a holding but a tenure and that the defendants were not under-*raiyats* but *raiyats* holding under the plaintiffs as tenure-holders and could not, therefore, be given notice to quit. The learned Subordinate Judge treated the case as one in which the onus was on the plaintiffs to prove that the defendants were under-*raiyats* and that they (the plaintiffs) were *raiyats* and not tenure holders and no objection is taken by the appellants to his ruling upon this point. He went carefully through the evidence upon this part of the case and came to a clear finding that Nunoo Lal and Dwarkanath the predecessors in interest of the plaintiffs had acquired the land for the purpose of cultivation only and had *khas* possession by cultivating the land and not by collecting rents from tenants. The rent receipts for the rent paid to their landlord were produced and they were therein described as *raiyat jotedars* and it was found that for nearly fifty years the proprietors Ugranarain and Fatehnarain had treated Nunoo and Dwarka as cultivating *raiyats*. It was further shewn that some of the defendant's co-sharers had purchased a share of the proprietary interest of the plaintiffs' landlords and that they had collected rent from the plaintiffs describing them in the rent receipts as *raiyat-jotedars*. There were other documents also, notably a plaint in a rent-suit instituted by one of the defendant's co-sharers against Nanoo Lal, in which the interest of the plaintiffs' predecessors was described as that of *raiyats* in possession of the land through *dar-raiyats*. The evidence to the contrary given on behalf of the defendants was very meagre and was not accepted by the learned Subordinate Judge. It was contended, however, that the area of the land transferred to the plaintiffs was over 100 standard *bighas* and that, therefore, there was a presumption arising under section 5 (5) of the the Bengal Tenancy Act that the tenant was a tenure-holder until the contrary was shewn. The learned Judge found as a fact that the area was 56½ *bighas* as stated in the *kobala* of 1914 and that no such presumption arose. It was pointed out, however, no behalf of the appellants that although in the *kobala* the total area of the land was described as 57 *bighas* 1 *cottah* it was also stated to measure 167 *bighas* 10 *cottahs* when measured by a *laggi* of 4

cubits which is the standard measurement and that the smaller area had been arrived at by measurement with a *laggi* of 6½ cubits. The evidence on behalf of the plaintiffs was that the standard pole in the *chakla* where the land in suit was situated was 4½ cubits and not 6½ cubits. If this be accepted the actual standard measurement would be under 100 *bighas*. This evidence appears te have been uncontradicted by the defendants's witnesses and the learned Judge accepted that evidence as correct and found that the area was under 100 *bighas*. As a finding of fact this is conclusive. The finding, however, was criticiseed by the appellants as being contrary to the evidence in the *kobala* itself which described the area of the land when measured by a 4 cubits pole as over 100 *bighas*. This statement in the *kobala* does not appear to have been drawnn to the notice of the learned Judge and no mention is made of it in the judgment. It is contended that it is conclusive of the area and that the learned Judge ought to have given effect to the presumption arising out of the Statute in considering the evidence as to the nature of the plaintiffs' interest. I am not prepared to say that the statement in the *kobala* is conclusive as to the area of the land. It was undoubtedly evidence and very strong evidence of the area but there was evidence of a contrary nature which was apparently uncontradicted by the defendants who appear not to have relied upon the statement in the *kobala* before the Subordinate Judge, but even assuming that it must be taken that the land in suit measured over 100 standard *bighas* and that a presumption arose therefrom in favour of the appellant's contention that the plaintiff's interest was that of tenure-holders the learned Judge did undoubtedly place the onus upon the plaintiffs to prove that their interest was that of *raiyats* and after reviewing the whole of the evidence agreed with the finding of the trial Court and came to a clear conclusion that the plaintiffs had discharged the burden of proof which lay upon them. In these circumstances, it seems to me that the finding of the learned Subordinate Judge on this part of the case ought not to be disturbed.

The last point which was urged before us was that in the year 1324 F. the plaintiffs granted a rent-receipt to the defendants which contains at the foot the following entry : "let out the *jama zamain mukarrari* " and it is signed by the plaintiffs, the first plaintiff Adhik Lal Mandal being described as *Sadar Malguzar*. This receipt was granted after some dispute between the plaintiffs and defendants and after their differences had been referred to a *panchayat* and a compromise arrived at. It was contended that the use of the word *Mukararri* and the description of the plaintiff as *Sadar Malguzar* are an admission that the defendants held a permanent interest at a fixed rent and that the plaintiffs are tenure-holders and that as this was arrived at as the result of acompromise by which some *nazarana* was paid to the plaintiffs the plaintiffs are estopped from denying the truth of the representation made in the rent-receipt. What the exact nature of the compromise was does not appear to have been explained beyond what can be gathered from the rent-receipt. The use of the word *mukarrari* does not in itself imply any permanent interest but merely fixity of rent. In dealing with this part of the case the learned Munsif observed as follows :—" The word *mukararri* means fixity of rent and is not intended to convey the meaning of occupancy *raiyat*. It is urged that the rent of an under-*raiyat* cannot be fixed in perpertuity and so it must mean occupancy *raiyat* with rent fixed. What the parties meant by the expression *mukarrari* in Exts. A and B-1" (the latter being the counterpart of the former) " there is no evidence to show and I am left to speculate as to its meaning not from evidence but from a mere supposition not borne out by the other circumstances. As far as the Glossary goes no such meaning attaches to the word *mukarrari* and I am not justified in interpreting it in that light. It is quite probable that the parties intended that the rent must be fixed once for all and that this may operate as an admission of the plaintiffs as to fixity of rent. Beyond that it cannot take away the plaintiffs' right in ejectment." The learned Subordinate Judge took the same view but neither of them was apparently asked to attach any importance to the description of the first plaintiff as *Sadr Malguzar* as this is not dealt with in either of the judgments. The word *malguzar* means, primarily, rent payer. It may equally be applied either to a tenure-holder or a raiyat and although the word *malguzar* is one of several used

locally in North Bihar to mean tenure holder, the document is not so clear and unambiguous as to amount to a representation on behalf of the plaintiffs that they were treating themselves as tenure-holders and the defendants as *raiyats* holding under them. It is, as Mr. Justice Bucknill pointed out in dealing with this part of the case, " extremely unlikely in view of the position which had always been maintained by the plaintiffs and their predecessors that that position would have been completely thrown away by an admission in a document such as this." The findings of each of the lower Courts are very strong as to the status of the plaintiffs and defendants and I am not prepared to hold that a chance expressoin of at least doubtful import in a rent-receipt is a clear representation by the plaintiffs acted upon by the defendants and amounting to an estoppel. In my opinion this appeal should be dismissed with costs.

Mullick, J.—I agree.

PATNA HIGH COURT.

CIVIL REVISION NO. 335 OF 1923.

January 3, 1923.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Kulwant Sahay.

RUN BAHADUR SINGH AND ANOTHER—PETITIONERS

versus

BAJNANJI PRASAD SINGH, AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, r. 16—Execution of decree—Assignees, dispute between—Question tried in form of suit—Appeal—Revision.

Two persons applied for execution of the same decree, each claiming to be an assignee from the decree-holder. The matter was treated as one under section 47 of the Civil Procedure Code and eventually the Court converted the proceeding into a suit and decided that the assignment in favour of one of the parties must prevail over the assignment in favour of the other. The latter filed an application for revision against the order ;

***Held*, that no revision lay against the order passed by the trial Court, for if the matter was one arising under section 47 of the Civil Procedure Code, the order was open to appeal and not to revision, and if it arose out of a suit the remedy again was by way of appeal against the decree in the suit, but if, on the other hand, it was one to be treated as failing under O. XXI, r. 16 of the Civil Procedure Code, it could not be said that by trying it in the form of a suit, the Court had passed an order without jurisdiction. [p. 497, col. 1.]**

Revision from an order of the Subordinate Judge, Patna, dated the 25th June 1923.

Mr. *S. N. Bose*, for the Petitioners.

Mr. *B. C. Sinha*, for the Opposite Party.

Note by Stamp Reporter :—This is an application for revision under section 115, C. P. C. and section 107 of the Government of India Act. The decision sought to be revised is dated 25-6-23 and is the final judgment by the lower Court in suit No. 61 of 1923 which ended in a formal decree, a copy of which has not been filed with the present application. The decision aforesaid is a decree within the meaning of section 2 of the Code of Civil Procedure. The decision being a decree, an appeal lies under section 96 of the Code. As an appeal lies, the application for revision under section 115 of the Code or under section 107 of the Government of India Act does not lie. The application for revision is simply an attempt at non-payment of the proper Court-fee leviable on a memo of appeal from an original decree.

I request that this note may, subject to approval by the Registrar, be placed before the Hon'ble Judges at the hearing of the application.

ORDER.

Jwala Prasad, J.—We have heard the learned Vakils on both sides. On the 24th February 1923 the petitioners filed an application for execution of a mortgage-decree, dated the 8th December 1915, said to have been assigned to them by means of a registered document, dated the 5th February 1923, by one Basant Lal, the original decree-holder opposite party No. 2. On the 26th February 1923, the opposite party No. 1, Bajrangi Prasad, put in an application for execution of the same decree upon the ground that he was an assignee of the decree by the same decree-holder Basant Lal. Both these applications for execution were put up for hearing on 10th March 1923. The question, therefore, before the Court below was as to which of the executions should proceed. This involved a determination as to the validity of the deeds of assignment in favour of the rival claimants to execute the

decree, namely, the petitioners and opposite party No. 1. The matter was treated as one under section 47 of the Civil Procedure Code, namely, as to the right of the rival claimants to represent the original decree-holder and execute the decree. The judgment-debtors did not make any objection, and, therefore, the dispute was with the two rival claimants as representatives of the decree-holder. The case, however, was treated as one under section 47 of the Civil Procedure Code, and in the course of the hearing of the matter the Court thought that the question was one which should have been determined in a regular suit; and the learned Subordinate Judge converted the proceeding into a suit under clause (2) of section 47 of the Civil Procedure Code. Ultimately, he held by his decision, dated the 25th June 1923, that the deed of assignment in favour of opposite party No. 1, Bajrangi Prasad Singh, must prevail, and that the deeds of assignment set up by the petitioners were ante-dated and were suspicious. He, therefore, held that evidently the opposite party No. 1 was entitled to proceed with the execution of the decree obtained by Basant Lal, opposite party No. 2. The present application is directed against the said order of the Subordinate Judge, and it is said that his order was without jurisdiction and hence capable of being revised by us in our revisional jurisdiction under section 115 of the Civil Procedure Code.

The order in question purports to have been passed in a suit into which the proceeding originally instituted was converted by the Subordinate Judge. A decree also has been prepared in accordance with the said order. The opposite party had, under the direction of the Court, to pay Court-fee upon Rs. 7,000, the consideration money mentioned in his deed of assignment. Now, if the order of the Subordinate Judge is one passed in a regular suit and culminated in a decree regularly prepared and passed under the Code of Civil Procedure, then a first appeal would lie from that decree to this Court. If, on the other hand, the order is one passed under section 47 of the Civil Procedure Code, then also an appeal would lie to this Court.

It is, however, contended that the order in question is neither passed in a regular suit nor under section 47 of the Code, for the question determined by the Court did not arise in a dispute between the parties to the original suit but between the representatives of one of the parties to the suit, namely, the decree-holder.

It is then contended that as the dispute did not come under section 47 of the Code, the Court had no jurisdiction to convert the application made by Bajrangi Prasad Singh into a suit, for it is said that under clause (2) the Court could only convert a proceeding under section 47 into a suit, but as the application was not a valid proceeding under the section the Court had no jurisdiction to treat the same as a plaint in a suit. The learned Vakil contends that the applications of the parties and the order of the Court below would come under O. XXI, r. 16 of the Code, under which the Court has to determine whether an assignee of the decree-holder should be permitted to proceed in execution. It is said that, as the matter comes under that provision of the Code, there is no appeal, and as there is no appeal the present application is competent as an application in revision; but the learned Vakil has failed to show that the final order of the Court below directing Bajrangi Prasad Singh to proceed with the execution was not within the jurisdiction of the Court. Hence the order is not capable of revision. With this final order the learned Vakil has no grievance; but he impugns the procedure adopted by the Court below whereby the Subordinate Judge arrived at this conclusion. In short, his argument is that the Court below should not have tried the application of Bajrangi Prasad Singh as a suit, and should have simply determined the right of one of the rival claimants to execute the decree, leaving the matter to be fought out and determined in a regular suit instituted by Bajrangi Prasad Singh or by the petitioners. He considers the procedure adopted by the Court below to be a grave irregularity affecting the final order passed by the Court below. By whatever method the Court has arrived at its decision, it cannot be said that the Subordinate Judge acted without jurisdiction. In trying the matter as a suit, perhaps, the Subordinate Judge went more exhaustively than he would have done had the matter been treated only as an application under section 47 of the Code. Therefore, we cannot accept

the contention of the learned Vakil that the final order of the Court below was wthout jurisdiction even if it came under O. XXI, r. 16 of the Code. We cannot interfere with this order in revision. If, on the other hand, the matter came under section 47 of the Code, the application in revision is incompetent. Again, if it did not come under section 47 but arose in the course of the trial of the application treated by the Court below as a suit, there is the final decree prepared by the Court below, and the question now raised cannot be determined except in a regular appeal filed against the decree. The present application, therefore, has to be rejected.

The learned Vakil on behalf of the petitioners then asked us to convert the application in revision filed in this Court into a memorandum of appeal against the decree passed by the Court below. This can be done upon the petitioners paying proper Court-fee and filing a copy of the decree.

In the circumstances of the case, we are prepared to treat the application as an appeal upon the condition mentioned above which must be complied with within a week of the determination of the amount of Court-fee payable upon the memorandum of appeal. Upon the requisite Court-fee being paid and copy of the decree filed, the appeal will be heard without the preparation of any paper book, the appellants undertaking to supply typed copies of the papers necessary for determination of the appeal, which we do not think are many.

On the failure of the petitioners to comply with the conditions mentioned above, namely, the payment of the Court-fee and filing of a copy of the decree, the present application will be treated as dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2365 OF 1921.

January 22, 1924.

Present :—Mr. Justice Rankin, and Mr. Justice Mukerji.

RAMMESH CHANDRA MITRA—PLAINTIFF—APPELLANT

versus

DAIBA CHARAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) ss. 25, 87—Landlord and tenant—Non-transferable occupancy holding—Abandonment, relinquishment, repudiation, what amounts to—Sale of holding in execution of decree—Tenant residing in homestead and cultivating land under transferee—Ejectment—Transferee, position of.

A non-transferable occupancy holding was sold in execution of a money-decree and a mortgage-decree against the tenants, but the latter took a tenancy under the transferee and continued to reside on their homestead land and to cultivate several plots comprised in the holding. In a suit by the landlord for ejectment of the transferee :

Held, that there was no abandonment, relinquishment or repudiation of the holding by the tenants, and the landlord was not, therefore, entitled to eviot either the tenants or their transferee.

Dayamoyi v. *Ananda Mohan Roy*, 27 Ind. Cas. 61 ; 42 C. 172 at p. 223 ; 18 C. W. N. 971 ; 20 C. L. J. 52 (F. B.), explained.

Per Rankin J.—A mere denial by are occupancy tenant of the landlord's title or of the relationship of landlord and tenant is not, by itself, a ground for eviction of the tenant, but if in a previous suit the tenant successfully denied the landlord's title, then, on the principle of estoppel by record, an eviction may take place. [p. 500, col. 1.]

A landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not, as against his tenant, the right to end the tenancy, cannot maintain ejectment against a third person merely because that third person has no title in himself. [p. 501, col. 1.]

A transferee of a non-transferable occupancy holding can claim no right as against the landlord has a right to present possession, he cannot maintain ejectment against the tenant or his transferee. The only remedy which the landlord has against the transferee in such a case is to ask for a declaration that the transferee has not got the tenancy right in the landlord's property. [p. 501, col. 1.]

Semble : There can be no abandonment of an occupancy holding apart from the provisions contained in section 87 of the Bengal Tenancy Act.

Per Mukerji, J.—The terms "abanbonment" "relinquishment" and "repudiation" are terms distinct and not interchangeable ; though proof of one may be some evidence, though not conclusive, yet

relevant for establishing facts and circumstances, which might go to constitute another. [p. 501, col. 2.]

Section 87 of the Bengal Tenancy Act, though it does not purport to define abandonment, plainly indicates what it is. The material elements are (i), that the *raiyat* should abandon his residence, and that he should do so voluntarily, without notice to his landlord, and without arranging for payment of his rent as it falls due, and (ii) that he should cease to cultivate the holding either by himself or by some other person. [p. 501, col. 2.]

Mere non-payment of rent is not evidence of abandonment or relinquishment, though non-payment of rent, coupled with non-occupation of land or other facts and circumstances, is evidence of an intention to abandon the holding or may amount to relinquishment. [p. 502, col. 2.]

Goher Sheik v. *Alimudin Sheik*, 51 Ind. Cas. 856; 30 C. L. J. 13; *Nilmany Dassy* v. *Sonatun Doshayi*, 15 C. 17; 7 Ind. Dec. (N. S.) 597, followed.

The whole law of re-entry is based upon the principle that, so long as the tenancy is not terminated by abandonment, relinquishment or repudiation, the tenancy interposes and operates as a barrier and the landlord cannot re-enter. [p. 503, col. 1.]

Appeal against the decree of the District Judge, Jessore, dated the 24th August 1921, reversing that of the Munsif, 1st Court, Narail, dated the 15th September 1920.

Babu *Surendra Chendra Sen*, R.B., (with him Babu *Hemendra Chendra Sen*), for the Appellant:—Where a *raiyat* sells his non-transferable occupancy holding and takes a sub-lease, in some cases it has been decided that the landlord is entitled to get *khas* possession by ejecting both the transferor and the transferee, whereas in other cases it has been decided that the transferor, *i.e.*, the original *raiyat* is not liable to be ejected but the landlord is entitled to get a declaration that the transferee has not acquired a title as against the landlord. So the decisions are all uniform in this respect that the landlord in such cases is entitled to a declaration that the transferee has not acquired any title.

It is true that the present case is not one of voluntary transfer but is a case where the *raiyat's* holding was sold in execution of a decree and the defendant purchased at the execution sale. It has been decided that a person who is not the landlord may also acquire a title against the *raiyat* in execution sale. The question as to abandonment of the holding or repudiation of the tenancy does not arise inasmuch as the present suit is not against the original tenant. Even if such question is relevant for the present purpose, my submission is that the tenant has abandoned the holding and repudiated the tenancy. The admitted facts are that the original *raiyat* has taken a sub-lease of a portion of the land and is paying rent to the defendant. When, therefore, the original *raiyat* has attorned to the defendant he should be considered to have repudiated the tenancy, and as he occupies the land as a sub-tenant of the transferee he has abandoned his original *raiyati* right under his landlord. Refers to the following cases:—

Dayamoyi v. *Ananda Mohan Roy* (1), *Chandra Binode Kundu* v. *Ala Bux* (*Special Bench case*) (2), *Dinanath Roy* v. *Krishna Bejoy* (3), *Madan Mandal* v. *Mahima Chandra Mazumdar* (4), *Kalim Sheikh* v. *Mochan Mandal* (5), *Rajani Kanta Biswas* v. *Ekkari Das* (6), *Kalicharan Ghosh* v. *Arman* (7), *Kalinath Chakravarti* v. *Upendra Chandra Chowdhury* (8).

I submit that the cases in *Naba Kishore Saha* v. *Dhananjoy Saha* (9) and *Separjan* v. *Ramdeh Rai*, (10) relied on by the lower Appellate Court are distinguishable.

Babu *Trailokya Nath Ghose*, for the Respondent:—In this case it is necessary to determine the question whether the original *raiyat* has abandoned the holding or repudiated the tenancy. The *raiyat* is still on a portion of the land and, although he is there as a sub-tenant of the transferee he has not actually abandoned in law or fact; he has not repudiated the tenancy inasmuch as neither the taking of a sub-lease nor payment of rent to a third person has the effect of a repudiation of the tenancy. I submit that the present case is covered by the decisions in *Separjan* v. *Ramdeh Rai* (10), and *Naba Kishore Saha* v. *Dhananjoy Saha* (9), which have been relied on by the lower Appellate Court.

(1) 27 Ind. Cas. 61; 42 C. 172 at p. 223; 18 C. W. N. 971; 20 C. L. J. 52 (F. B.).
(2) 58 Ind. Cas. 353; 48 C. 605; 24 C. W. N. 818; 31 C. L. J. 510.
(3) 9 C. W. N. 879.
(4) 38 C. 531 at p. 535; 8 C. L. J. 348.
(5) 36 Ind. Cas. 719; 24 C. L. J. 113.
(6) 34 C. 689 at p. 693; 11 C. W. N. 811; 7 C. L. J. 78.
(7) 4 Ind. Cas. 473; 13 C. W. N. 220; 5 M. L. T. 276.
(8) 24 C. 212; 1 C. W. N. 168; 19 Ind. Dec. (N. S.) 807.
(9) 33 Ind. Cas. 611; 20 C. W. N. 610.
(10) 55 Ind. Cas. 360; 24 C. W. N. 117.

RAMMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS

Rai Bahadur Surendra Chandra Sen, replied in brief.

C. A. V.

On the day on which judgment was delivered the learned Vakil for the Appellant referred to the case in *Monmatha Kumar Roy* v. *Jasoda Lal* (11) and contended that the plaintiff was entitled to get a declaration that the transferee did not acquire any title against the plaintiff.

JUDGMENT.

Rankin, J :—In this case, the landlord sues the transferee of a non-transferable occupancy *jote* for *khas* possession of the holding. It appears that two tenants, Raj Mohun and Sonatan, held the suit lands as occupancy *raiyats* under the plaintiff. In execution of a money-decree obtained against the tenants as well as a mortgage-decree obtained against them, the holding was sold to the defendant No. 1 and thereupon the tenants took a tenancy under the transferee remaining upon their homestead portion which was part of the land of the tenancy and also remaining as cultivators of a certain number of plots being part of the tenancy. In these circumstances, there has been a difference of opinion between the Courts below. The learned Munsif, following *Dayamoyi* v. *Ananda Mohan Roy* (1), has held that, as the tenants no longer pay rent to the plaintiff and as they now claim to hold the homestead and some plots of land within the *jama* under the transferee and not under the plaintiff and as there is no independent evidence that the tenants still regard the plaintiff as their landlord, it is clear that there has been an abandonment of the tenancy within the meaning of *Dayamoyi's case*. (1) He proceeded in theory entirely upon abandonment and, as a matter of fact, in the first Court, little or nothing appears to have been said either about repudiation or about relinquishment. The learned District Judge of Jessore has taken another view. He has treated the case as a question solely of abandonment. He has pointed out that the plaint spoke of abandonment and that there is no allegation of relinquishment or repudiation. He has found that, upon *Dayamoyi's case* (1) and certain subsequent decisions, there is no abandonment and he has accordingly, as against the transferee, dismissed the suit.

There was another defendant against whom the suit was also dismissed. In my opinion that circumstance helps neither party and I do not propose to refer to it again.

This is a typical case and one constantly coming before the Courts. The conditions under which we have to decide it are, I think, these : we are bound by *Dayamoyi's case*; (1) but the decisions previous to *Dayamoyi's case* (1) are not now necessarily binding upon us. This circumstance is of the less importance that the relevant decisions prior to *Dayamayi's case* (1) are in almost no single circumstance consistent or well settled. So far as regards the subsequent cases purporting to interpret *Dayamoyi's case*, (1) we are, I think, bound either to follow those decisions or to refer the matter to a Full Bench. But, above and beyond these cases to which I have just very generally referred, we have to remember that there stand the express provisions of the Bengal Tenancy Act. In dealing with this case, I propose to go first to the decision of *Dayamoyi's case* (1) and to examine the state of the authorities applicable to such a case as the present.

In the second paragraph in the reported judgment of *Dayamoyi's case* (1), the proposition laid down by the Full Bench is in these terms : "Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding ; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy." It will be observed that, in both branches of that proposition, occurs the word "ordinarily", and that word by itself shows that the circumstances mentioned in each branch are being regarded as evidence of, or, as importing reference to, some higher, more precise or more ultimate test. One asks one-self in the present case whether the circumstance that the tenants are still upon their homestead lands and are still cultivating part of the holding is a consideration which takes the case out of the qualification intended by the word "ordinarily". I am quite clear that such a case as this is not an ordinary case for the purpose of the proposition. In the second part of the

(11) 77 Ind. Cas. 551 ; 28 C. W. N. 800.

proposition, it would appear that the ultimate test is abandonment (under section 87) relinquishment or repudiation of the tenancy. But it does seem to me possible that the meaning of the first part of the proposition is that, on proof that a tenant has transferred the whole of his holding out and out, the Court may conclude that there is an abandonment not necessarily within the meaning of section 87 or a repudiation of the tenancy that would not necessarily be allowed as by itself a sufficient reason for eviction under section 25 of the Bengal Tenancy Act. I say that that is a possible interpretation of the language of the first branch. It has to be remembered that, whether they were right or not, there were a considerable number of decisions to the effect that section 87 is not exhaustive. Whether the Court meant to keep that open is not clear. In like manner, as regards repudiation, the law, as I understand it, is that a mere denial of the landlord's title or of the relationship of landlord and tenant is not, by itself, a ground of eviction, having regard to the express terms of such sections as sections 10 and 25; but that, if in a previous suit, a tenant successfully denied his landlord's title then, on the principle of estoppel by record, an eviction may take place. This question whether in interpreting the word "ordinarily" in the first part of the proposition, we are to have sole regard to section 87 and to the provisions of the law as regards eviction which I have already expressed is, to my mind, the main difficulty in these cases. In the present case, however, I am of opinion that on the evidence and on the findings, there is no justification for our holding that there is, in any legal sense of the word, an abandonment or in any legal sense of the word a repudiation. In this matter, one has, first of all, to remember that section 87 speaks of the tenant abandoning his residence without making provision for the payment of rent and ceasing to cultivate the holding by himself or another person. In the present case, the tenant has not changed his residence and has not altogether ceased to cultivate the holding. There is no proof of refusal to pay rent. It seems to me, that, on these facts, any mere inference to be drawn from the fact of the sale in execution cannot amount to abandonment or repudiation in any sense of those expressions justifiable under the law. It has to be observed that in this case the sale was forced upon the tenants. Assuming that there was a mortgage-decree as well as a money-decree, still there can be no doubt that the money-decree alone would have necessitated the sale. That being so, the tenants are in this position that they cannot question the title of the transferee. The landlord may elect to do so or may elect not to do so. One has to look to what the tenants in these circumstances have done. Not knowing whether the landlord will or will not assent, they have made terms with their transferee which provide that they shall have still a residence on the suit lands and shall still have the right to cultivate some of the lands. It seems to me that the tenants have done as much as they reasonably could in these circumstances to escape conduct amounting to abandonment or amounting to repudiation.

I do not propose here to discuss the question whether there is any real justification for the proposition that there may be abandonment apart from the terms of section 87. Having regard to the provisions as regards eviction and to the express terms of section 87, it is manifest that there is considerable difficulty in maintaining the doctrine of abandonment outside the Bengal Tenancy Act. The only common law on the subject known to me would be the general principle that, for breach of a condition of a tenancy as distinct from a mere covenant, the landlord may re-enter. So far as contractual conditions are concerned, they are covered by the express language of such sections as section 25. So far as I know, ejectment for breach of an implied condition has always been limited to cases either of estoppel by record or of cases where the tenant has made an attempt to assert a title paramount to the landlord in himself or in some other person.

It was contended by Mr. Sen that, although as between landlord and tenant there might be no right to evict, as between the landlord and the transferee whom he has not recognised and who has no right as against him, a decree for ejectment would be quite admissable. For that proposition, there is undoubtedly some authority prior to *Dayamoyi's case* (1) in particular, in the cases of *Dinanath Roy* v. *Krishna Bejoy Saha* (3) and *Madar Mandal* v. *Mahima Chandra Majumdar* (4). Since *Dayamayi's case*, (1) I do not regard these

decisions as binding and in my opinion, that proposition is absolutely indefensible on any principle. It is perfectly true that the transferee can claim no right as against the landlord; but, unless the landlord has a right to present possession, he cannot possibly maintain ejectment against anybody whether he be the tenant's transferee, the tenant's invitee or licensee or tenant's uncle, cousin or aunt. It is quite impossible that, on any principle of law, the landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not, as against his tenant, the right to end the tenancy could maintain ejectment against a third person merely because that third person has no title in himself. Accordingly, in this particular case, the fact that the suit was brought against the transferee and not against the tenants is, in my opinion, no reason whatever why the landlord should succeed. The correct form of the question in these cases was put by Sir R. Couch in *Narendra Narain Roy* v. *Ishan Chunder Sen*, (12) and is quoted in *Manlan Mondol's case* (4), one has to find whether nothing is left in the tenant which would prevent the *Zemindar* from recovering the possession from the person who claims under the transfer. The landlord has to show that he is entitled to possession of the land now. If he is not entitled to possession of the land now then the only remedy which he could in any case get against the transferee would be a declaration that the transferee has not got the tenancy right in the landlord's property.

The cases subsequent to *Dayamoyi's case* (1) do not, in my opinion, conflict with the view expressed. On the contrary, the case of *Sehper Jan* v. *Ramdeh Rai* (10), seems to me almost exactly in point and the case of *Monmatha Kumar Ray* v. *Jasoda Lal* to (11) which Mr. Sen has been so good as to refer us this morning is, in my opinion, exactly to the same point. For these reasons, I think this appeal fails and should be dismissed with costs.

Mukerji, J :—I entirely agree in the order proposed to be passed by my learned brother; but in view of the importance of the questions involved I would make a few observations as to what I consider about the matter.

(12) 22 W. R. 22 at p. 26.

The original tenants, according to the findings of both the Courts below, are still in possession of their homestead and several of the culturable plots, under the transferee, the defendant No. 1. It has not been found, nor do I think has it been suggested, that the original tenants ever vacated the holding in pursuance of the sale. The sale, therefore, operated in effect not as a transfer of an entire holding but only of a portion of it. There is authority for the proposition that in such a state of things the sale in substance is a sale of a portion of the holding [see *Noba Kishore Saha* v. *Dhananjoy Saha* (9)]. Now, applying to this position the rule laid down in the case of *Doyamoyi* v. *Ananda Mohan Ray* (1) the landlord would not be entitled to recover possession of the holding unless there has been (*a*) an abandonment within the meaning of section 87. Bengal Tenancy Act or (*b*) relinquishment of the holding or (*c*) a repudiation of the tenancy. It is quite clear then that, in order to succeed, the landlord will have to bring his case within one or other of the aforesaid three classes.

Now as to abandonment, it is not open to us upon the plain terms of the aforesaid rule to consider whether the abandonment necessary to be established to confer a right of reentry on the landlord may not be of a description not covered by section 87 of the Bengal Tenancy Act, a point upon which the decisions appear to be apparently conflicting.

The terms "abandonment," "relinquishment" and "repudiation" are terms distinct and not interchangeable; though proof of one may be some evidence, though not conclusive, yet relevant for establishing facts and circumstances, which might go to constitute another. Section 87 of the Bengal Tenancy Act, though it does not purport to define abandonment, plainly indicates what it is. The material elements are (*i*) that the *raiyat* should abandon his residence, and that he should do so voluntarily, without notice to his landlord, and without arranging for payment of his rent as it falls due, and (*ii*) that he should cease to cultivate the holding either by himself or by some other person. In the case of *Narendra Nath Ray* v. *Ishan Chandra Sen* (12), which was a case under Act VIII (B.C.) of 1869, Chief Justice Sir Richard Couch observed that if a *ryot* having a right of occupancy, endeavours to transfer it to any person, and in fact

quits his occupation and ceases himself to cultivate or hold the land, he may be rightly considered to have abandoned his right. In *Madar Mondol* v. *Mohima Chandra Majumdar* (4) the Court observed that there can be no doubt that, in order to entitle the landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of section 87, namely, that the *raiyat* voluntarily abandons his residence without notice to the landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate. In *Ram Pershad Koeri* v. *Jawahir Roy* (13) it was held that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due and for cultivating the land. In *Separjan* v. *Ramdeh Rai* (10) it was held that where a tenant having a non-transferable right of occupancy sells such right to a third person, and having obtained a sub-lease from the purchaser, remains in possession of the land and cultivates it, the landlord, in the absence of repudiation by the tenant of his relation to the landlord as such, is not entitled to recover possession, inasmuch as it does not amount to abandonment, and the learned Judges relied for this proposition upon the decisions in *Madar Mondol* v. *Mahima Chandra Majumdar*, (4) *Rajani Kanta Biswas* v. *Ekkowri Das* (6) and *Kalim Sheikh* v. *Mohan Mandal*. (5) The decisions in the cases of *Ishan Chandra Dhupi* v. *Nishi Chundra Duphi* (14) and *Sailabala Debi* v. *Sriram Bhattacharya* (15) may perhaps be distinguished on the ground that in those cases the *ryot* had parted with the whole of the agricultural portion of the holding and remained in possession of the homestead portion only and ceased paying rent,—circumstances from which abandonment might be inferred. The decision in the case of *Kali Nath Chakervarti* v. *Kumar Upendra Chandra* (16) in so far as it purports to lay down that where a tenant transfers his non-transferable holding, ceases to pay rent to his landlord and accepts a new tenancy from the transferee and to be based upon the Full Bench Case in *Narendra Nath Ray* v. *Ishan Chunder Sen* (12), referred to above, cannot be treated as dealing with a question of abandonment within the meaning of section 87 of the Bengal Tenancy Act. In the present case none of the facts which would go to constitute an abandonment has been proved or found by the Courts below. Mere non-payment of rent is not evidence of abandonment though non-payment of rent, coupled with non-occupation of land, is evidence of an intention to abandon it. *Gohar Shiekh* v. *Alimuddin Sheik* (17).

The next question is, has there been a relinquishment of the holding? It is sufficient for me to say that it was not alleged that there was any. It is true that rent has not been paid, but mere non-payment is not sufficient though coupled with other facts and circumstances it may show relinquishment, *Nilmany Dassy* v. *Sonatun Doshayi*. (18)

Nextly, has there been a repudiation of the tenancy? I am not prepared to hold that merely entering into an arrangement with the transfree to hold under him a portion of the holding, the sale whereof is binding on the tenant under the law a portion of the holding having been sold in execution of a money-decree and the other in execution of a mortgage-decree would amount to repudiation of the tenancy. If special facts are proved such as were found in the case of *Rajani Kanta Biswas v. Ekkowri Das* (6) or the refusal on the part of the tenant to pay rent continued for a sufficiently long series of years and is based upon the ground of non-liability, repudiation may be inferred. So also in the case of *Monmatha Kumar Ray* v. *Josada Lal* (11) to which our attention has beendrawn by Mr. Sen this morning it was held that mere execution of a *kabuliat* in favour of the transferee does not amount to a repudiation of the tenancy. The original tenants were not parties in the present suit though one of them has been examined as a witness; and what he is alleged to have deposed in the present suit can not be taken to have constituted a repudiation of the tenancy in the eye of law.

A further question arose in the case as to whether the landlord could get a decree for *khas* possession against the transferee although there was no abandonment, relinquishment or repudiation made out on the part

(13) 12 C. W. N. 899; 7 C. L. J. 72.
(14) 41 Ind. Cas. 378; 22 C. W. N. 853; 29 C. L. J. 1.
(15) 11 C. W. N. 878; 7 C. L. J. 803.
(16) 1 C. W. N. 168.
(17) 51 Ind. Cas. 256; 80 C. L. J. 13.
(18) 15 C. 17; 7 Ind. Dec. (N. S.) 597.

of the orignal tenants. Mr. Sen contended on the authority of several cases of this Court that a landlord is entitled to have such a decree although he may not succeed in ejecting the original tenants. Reliance has been placed upon the decisions in *Madar Mondol* v. *Mohima Chandra Majumdar* (4) and *Dinanath Roy* v. *Krishna Bejoy Saha* (3) and other cases upon which they are based. Speaking for myself, and I say this with the greatest respect for the learned Judges who decided these cases, I have not been able to discover any principle upon which these decisions are founded. The whole law of re-entry is based upon the principle that, so long as the tenancy is not terminated by one or other of the modes indicated above, the tenancy interposes and operates as a barrier and the landlord cannot re-enter. I cannot very well see how the original tenant may not be touched on the ground that the tenancy subsists, and, so far as the landlord is concerned, the tenancy continues unaffected and the landlord is entitled to look for payment of rent to the original tenant, and yet the landlord can get a decree for *khas* possession as against the transferee. At any rate, we have not been referred to any decision since the decision in *Dayamoyi's case*(1) in which a similar view has been taken. In the case of *Monmatha Kumar Roy* v. *Josada Lal* (11) under similar circumstances, it appears that the landlord only obtained a declaration against the transferee that the latter had no right as against the landlord. Of course, if the transferee has not acquired any title by his purchase there is nothing to prevent the landlord from getting a declaration in a suit properly framed for the purpose, that the transfer was not binding upon him, as was laid down in the case of *Skeikh Gozaffur Hossein* v *Dablish* (19). I, therefore, agree that this appeal must be dismissed with costs.

S. D. *Appeal dismissed.*

(19) 1 C. W. N. 162.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2239 OF 1921.

February 7, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

KASIRAM KAIBORTA AND OTHERS—PLAINTIFFS—APPELLANTS,
versus
BOGA KAIBORTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Abandonment or relinquishment, facts constituting—Paikan *tenure*—Raiyati *holding.*

Leaving, the village and settling in a distant village, cessation of cultivation, cessation of payment of rent and, in short, a total servance of all connection with the land for a period of 16 years constitute a complete relinquishment or abandonment.

For the purpose of ascertaining the factum of relinquishment there is no difference between the incidents which govern a *Paikan* tenure, and a *raiyati* holding under the Bengal Tenancy Act.

Appeal against the decree of the District Judge, Assam Valley Districts, at Gauhati, dated the 21st June 1921, reversing the decree of the Munsif, Gauhati, dated the 20th July 1920.

Babu *Prokas Chandra Majumdar*, for the Appellants.

Babu *Manmath Nath Ray* (*Jur.*), for the Respondents.

JUDGMENT.—This is an appeal from the decision of the learned District Judge of the Assam Valley Districts reversing the decision of the Munsif of Gauhati. The facts may be briefly summarised. The plaintiffs' case was that the land in suit belonged to one Behia who is described as a *paik* of Umanand temple. The land was submerged after the great earthquake of 1897 and the plaintiffs say that Behia left the village in 1900 and thereafter in 1915 conveyed the disputed plot to their father. Four years later, they were dispossessed by the defendants.

The defendants, on the other hand, pleaded that Behia had abandoned the land after the earthquake and that the *dolai* of the temple

settled it with them in 1303 B. S. corresponding to 1905 and granted them a *pottah* on the 22nd February 1912.

The learned Munsif was of opinion that the plaintiffs had proved their possession in the land transferred to them and their subsequent dispossession by the defendants while the defendants had failed to establish Behia's relinquishment. His title, therefore, still subsisted and he was competent to transfer it to the plaintiffs who were thus entitled to succeed.

The learned District Judge on appeal took a different view. He held that the main point for decision was whether Behia had relinquished the land ; and upon the evidence he came to the conclusion that that, even though there was no verbal relinquishment on his part, his conduct amounted to relinquishment in fact. The learned Judge, therefore, reversed the decision of the Court of first instance.

On appeal to this Court, the learned Vakil for the appellant has argued that the Court of appeal below erred in allowing the defendants to make out a new case which was not in their written statement, namely, that Behia had forfeited his tenancy on the ground of relinquishment.

There is, in our opinion, no substance in this contention. It is clear from the written statement of the defendants that though the term 'relinquishment' was not actually used the defendants intended to raise that question as a bar to the plaintiffs' claim. They said that Behia had no saleable interest and had no possession within 12 years of the institution of suit. This is tantamount to saying that Behia had no saleable interest because he had relinquished the land and, for the same reasons, had not been in possession of the land within 12 years of the institution of the suit.

The learned Vakil has urged that a *paikan* is a tenure which is equivalent to what in English law is known as freehold. He had referred to the case of *Dinabundu Sarma* v. *Bodia Koch* (1) where the rights and privileges of a *paikan*-holder are described. It is said that a *paikan* is a permanent and transferable tenure and, therefore, its incidents are different from those which ordinarily govern a *raiyati* holding under the Bengal Tenancy Act, but that the learned Judge has failed to distinguish the difference between these two classes of tenures.

We are of opinion that there is no difference in the principle under which the fact of relinquishment is, in either case, to be ascertained. It is pointed out in the case of *Ram Churn Singh* v. *Raniganj Coal Association Limited* (2) that the right of relinquishment is a privilege given tenants by means of which they may restrict the lease and establish their tenure upon a new basis or may extinguish the lease altogether and the tenants cannot avail themselves of that privilege to any extent, unless they strictly observe the conditions which are either expressed or implied in the lease. In the case of *Chundermonee Nya Bhooshun* v. *Sumbhoo Chunder Chuckerbutty* (3) was observed that, although where a tenure is a permanent and transferable one, mere abandonment is not a valid relinquishment, yet a voluntary abandonment for a long period without any inevitable *force majeure* or other cause beyond the power of the holder, must be considered to be equal to an express relinquishment ; and that, if a man so abandons his holding for years neither he nor anyone under him can reclaim it. Now, the findings of fact at which the learned Judge arrived may be stated in his own words: "We thus have all the elements of relinquishment ; leaving the village and settling in a distant village, cessation of cultivation, cessation of payment of rent and, in short, a total severance of all connection with the land for a period of 16 years between leaving the village and the sale to plaintiffs' predecessor". When the principles enunciated above are applied to these findings, it is plain that by his relinquishment of the land Behia's interest was determined and his conveyance to the plaintiffs' father was incompetent.

The result, therefore, is that the decree of learned District Judge is affirmed and this appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 15 C. 100 ; Ind. Dec. (N. S.) 651.

(2) 2 C. W. N. 697 ; 26 C. 29 ; 25 I. A. 210 ; 7 Sar. P. C. J. 899 ; 18 Ind. Dec. (N. S.) 622 ; (P. C.)

(3) W. R. 1864 ; 270.

*PERIYA MIYANA MARAKAYAR & SONS *v.* SUBRAMANIA IYER

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 79 OF 1923.
November 5, 1923.

Present :—Sir Walter S. Schawbe, K. C., Chief Justice, and Mr. Justice Ramesam.

K. V. PERIYA MIYANA MARAKAYAR AND SONS AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. K. SUBRAMANIA IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVII, r. 3, scope of—Leave to defend, when given—Defendant, duty of—Conditional leave.

The question to be considered on an application under O XXXVII, r. 3 of the Civil Procedure Code is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. It is not enough for the defendant to say that he has got a good defence but he must say what the defence is, and, as a rule, bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend [p. 505, col. 2.]

Where there is a triable issue, leave to defend must ordinarily be given unconditionally. It is only in exceptional cases that the exception of O. XXXVII comes into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence, and where there is one, effect must be given to that fact and leave to defend should be granted, and it should be made conditional only in cases, where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in order to obtain further time. [p. 506, col. 1]

When the defendant sets up some sort of defence which does not bear the stamp of truth as, for instance, when it is contadicted by documents, the Court may make the leave to put that defence conditional on the defendant being prepared to give security for the amount claimed. [p 505, col. 2.]

Jacob v. *Booth Distillery Co*., (1901) 85 L. T. 262; 50 W. R. 49; *Codd* v. *Delap*, (1905) 92 L. T. 510; *Jones* v *Stone* (1894) A. C. 122; 63 L. J. P. C. 68; 6 R. 437; 70 L. T. 174; referred to.

Appeal from the order of Mr. Justice Kumaraswamy Sastry, dated the 28th August 1923.

Mr. *V. V. Srinivasa Aiyangar*, for the Appellant.

Mr. *N. Chandrasakar Aiyar*, for the Respondents.

JUDGMENT.

The Chief Justice :—This is an appeal from an order made by Kumaraswami Sastri, J., under O. XXXVII of the Civil Procedure Code, the suit being a suit on *hundis* given by the defendants to the plaintiffs or their predecessors. Long affidavits were put in on both sides and a large body of correspondence, by no means complete, is exhibited to those affidavits.

The question to be considered on applications under O. XXXVII, r. 3, is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. It is not enough, for instance, to say, "I have got a good defence;" but the defendant must say what the defence is, and, as a rule, bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend. There is not a great difference between those cases where it is right to give judgment and those where it is right to give leave to defend on paying the amount into Court or on giving security; but there are cases in which the defendants set up some sort of defence, which does not bear the stamp of truth, as, for instance, when it is contradicted by documents, when the Court may well say that he should only be allowed to come and put that defence before the Court, if he is prepared to give security for the amount claimed. I think the principle applicable here has been laid down clearly in similar applications under O. XIV, r. 1 of the Rules of the Supreme Court in England by the House of Lords in *Jacobs* v. *Booths Distillery Co*, (1), *Codd* v. *Delap* (2), and *Jones* v. *Stone* (3).

In this case I do not think that the learned Judge turned his mind to the consideration of the question whether or not there is a triable issue in this case. He seems to have taken the view that here are *hundis* on the face of which *prima facie* the defendants would be liable, and, therefore, they must as a condition of leave to defend pay the money into Court or give security. We have before us the same materials as he had, and on a study of the correspondence, which in these matters is always the most important thing to look at, explained as it is by affidavits on both sides,

(1) (1901) 85 L. T. 262; 50 W. R. 49.
(2) (1905) 92 L. T. 510.
(3) (1894) A. C. 122; 63 L. J. P. C 68; 6 R. 437; 70 L. T. 174.

it seems to me that the relationship between the parties had been so complicated, that there may well have been transactions, which are referred to in certain of the letters, in which the plaintiffs' predecessors and the defendants were signing bills and *hundis* for each other's accommodation. There is an absence of books on the part of the plaintiffs. There is, on the other hand, a statement on oath that the defendants' books, which of course could have been made available by the plaintiffs if they had so chosen, show that the amounts sued for in this suit were not, as between the plaintiffs and the defendants, due from the defendants to the plaintiffs. I think it is quite impossible on the facts of this case to say that there is not a triable issue. We express no sort of veiw as to whether the defence is good or bad: that will be a matter for the trial Judge. But having come to the conclusion that there is a triable issue in this case it will not be right to say that, as a condition of being heard at all, these defendants should find money or security, because, if they are not able to do so, it will be depriving them altogether of a right that they have got of having their case tried. It is only in exceptional cases that the exceptional provisions of O. XXXVII come into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence, and where there is one, effect must be given to that fact and leave to defend should be granted, and it should be made conditional only in cases, where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time.

In these circumstances, this appeal must be allowed and leave to defend the suit must be granted. I think the proper order in this case is that the costs of the original application and of this appeal shall be costs in the cause. Written statement in 14 days.

Ramesam, J.:—I agree.

V. N. V. *Appeal allowed.*

S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 726 of 1922.

January 4, 1924.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Mukerji.

BEHARI LAL—DEFENDANT—APPELLANT

versus

J. MACLEAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Nuisance—Discomfort, when actionable—Nature of interference—Test.

Discomfort caused by a nuisance to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age, or state of health. [p. 507, cols. 1 and 2.]

The nature of the interference has to be examined in each case in the light of the circumstances of the place, where the thing complained of actually occurs, and the degree of inconvenience caused must determine the nature of the relief to which the person complaining may be entitled. [p. 507, col. 2.]

Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does exist elsewhere, not far from the place, cannot be left out of account. [p. 508, col. 1.]

Second appeal from the decree of the District Judge of Farrukhabad, dated the 10th February 1922.

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

Mr. *Gulzari Lal*, For the Respondents.

JUDGMENT.—The plaintiff, Imamuddin, owns a house situated in bazar Katra Ahmadganj in Farrukhabad City. The house is occupied by the other plaintiffs, one of whom is a clergyman and the other, who is his wife, practises as a lady doctor. Behind this house is situated a house belonging to the defendant, where a flour mill worked by an oil engine has been recently started. The allegation of the plaintiffs was that the working

of the flour mill caused great trouble to the occupants of the house and interfered with their business and ordinary physical comfort. The defendant stated that he had been working the flour mill in another house situated at a distance of about 20 to 25 paces from that place from nine years, that that house was recently purchased by Mathura Prasad who started a steam engine of his own in that locality, and that he had consequently to shift from that place to the present house.

Both the Courts below inspected the locality and came to the conclusion that the working of the flour mill in that locality undoubtedly interfered with the comfort of the occupants of the house and disturbed them in carrying on their usual business. The Court of first instance referred to the evidence of one of the plaintiffs and stated that the soot arising from the chimney of the oil engine would spread into the house of the plaintiffs and fall upon the articles kept there, that there would be bad smell produced from the kerosine oil used in the engine, and that the noise resulting from the close proximity of the house of the plaintiffs to the place where the engine was worked would cause substantial inconvenience to the tenants occupying the same and more so to the lady doctor who had to use a stethoscope to examine the hearts and the lungs of the patients coming to her for treatment. The lower Appellate Court made no attempt to discuss the evidence at all. The view taken by it was that the smell of the smoke from the engine caused little discomfort but the noise and regular throb of the engine so close to the house of the plaintiffs was "a distinct and pervading nuisance" to the occupants of the house, whose nerves would naturally be disturbed till, in course of time, they got accustomed to the same.

What may, however, cause inconvenience to persons with dainty or elegant modes or habit of living may not cause similar inconvenience to persons accustomed to live in the busiest portion of a town. A discomfort to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age, or state of health. As pointed out by Lord Westbury in *St. Helen's Smelting Co.*, v. *Tipping*, (1) there is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him. The nature of the interference has to be examined in each case in the light of the circumstances of the place, where the thing complained of actually occurs, and the degree of inconvenience caused must determine the nature of the relief to which the person complaining may be entitled. "If a man lives in a town," said Lord Westbury, "it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop." But where an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material or substantial interference with the ordinary physical comfort and convenience of another person, residing in that locality, then very different considerations unquestionably arise.

No attempt was made by the Courts below to determine how long this oil engine had been at work, if not in this house, at least in the locality close to this building. The lower Appellate Court does not say that the disturbance would be so substantial as to render the house practically uninhabitable for ordinary people without serious discomfort. It is in evidence that Mathura Prasad has a flour mill

(1865) 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N. S.) 785; 12 L. T. 776; 13 W. R. 1083; 11 E. R. 1483; 145 R. R. 848.

worked by a gas engine at about 20 to 25 paces from this locality. It is also in evidence that the present Chairman of the Municipal Board has in his own compound at Fatehgarh close to a public hospital, where patients have to be examined from time to time by the medical attendants, a flour mill in working order, to which no objection has ever been taken on the score of discomfort or otherwise by the residents of the locality. There is also evidence to show that an attempt was made to move the Municipal Board under section 245 of the U. P. Municipalities Act (I of 1916) to remove the oil engines working within Municipal limits or to stop the starting of factories worked by oil engines there and that the Municipal Board refused to take any action in the matter. Several residents of the locality where the flour mill engine is at work, were produced on behalf of the plaintiffs to show that no discomfort was suffered by the neighbours or residents of that locality. A Sub-Assistant Surgeon was, moreover, examined who stated that he had seen the flour mill engine actually at work and that the noise produced by the oil engine was of an ordinary character and that no injury to the health of the residents of the locality was likely to result from the working of that engine at that place. We are prepared to give due weight to the observations made by the Courts below on an examination of the locality and have no doubt that the noise produced by the engine must be a source of some inconvenience to the persons residing there. But a flour mill worked by a gas engine is already in existence in that locality and from the fact that such flour mills exist in other parts of the town we are not prepared to say that any reasonable case for the removal of the flour mill or oil engine has been made out.

Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does exist elsewhere, not far from the place, cannot be left out of account. As pointed out by Clerk and Lindsell, the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and in all actions for discomfort the law must regard the principle of mutual adjustment; and the notion that the degree of discomfort, which might sustain an action under some circumstances, must, therefore, do so under all circumstances is as untenable as the notion that if the act complained of was done in a convenient time and place, it must, therefore, be justified, whatever was the degree of annoyance that was occasioned thereby, (Clerk and Lindsell on Torts, 6th edition, p. 419).

It is not seriously suggested that the house of the plaintiffs will become wholly untenantable by reason of the construction of the flour mill or the use of the oil engine; and we do not consider that any substantial interference with the physical comfort and convenience of the residents of the house has been made out. In these circumstances, we allow the appeal and dismiss the plaintiffs' suit with costs here and hitherto.

S. D. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 1664 AND 1665 OF 1922.

February 1, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

MUTSADDI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

CAPTAIN DR. KHARAG BAHADUR SINGH KARTI, THROUGH HIS SPECIAL ATTORNEY PT. ANANT RAM—PLAINTIFF—RESPONDENT.

Pre-emption—Wajib-ul-arz—*Earlier document containing no recital of pre-emption—Later document creating right of pre-emption—Custom, whether proved.*

Plaintiff sued for possession by pre-emption of certain lands alleging the existence of a custom of pre-emption and basing his right on a clause in the *wajib-ul-arz*. It appeared that there were two *wajib-ul-arais* on the record and that whereas one created a

MUTSADDI LAL *v.* KHARAG BAHADUR SINGH

right of pre-emption in favour of certain classes of persons, the other contained no definite recital of a custom at all.

***Held*, that on these two documents it was impossible to conclude that there was clear and unambiguous evidence of the existence of a custom of pre-emption in the village and the plaintiff's suit was liable to be dismissed.** [p. 510, col. 2.]

Second appeal from the decree of the District Judge of Saharanpur dated 28th of June 1922.

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

Messrs. *Durga Prasad* and *P. L. Banerji*, for the Respondent.

JUDGMENT.—These two appeals have arisen out of two separate suits for pre-emption which were brought with respect to the sales of two items of property situated in a village called Purohitwala Birpur in the district of Dehra Dun.

The plaintiffs based their right of pre-emption upon a clause in the *wajib-ul-arz*.

The defendannts denied the existence of custom. Both the Courts below were of opinion that the custom existed, and after deciding some other question which arose for disposal, awarded the plaintiffs in each case a decree for pre-emption.

The vendees have now come here in appeal and the first point which has been taken on their behalf is that the Courts below were erroneous in finding that a custom existed. After examination of the evidence on this point and the judgments of the Courts below we are of opinion that this appeal ought to prevail. We think the decision of the Courts below is erroneous.

It is apparent from the judgment of the learned District Judge that for the purpose of deciding this issue he looked only to one *wajibul arz* which was filed before him and which according to its tenor was prepared in the year 1884.

According to this document a right of pre-emption is created in favour of certain classes of persons. The first class of pre-emptors according to this *wajib-ul-arz* are own brothers. The second class consists of co-sharers in the village, and the third class consists of the *zemindars* of contiguous villages. It is then declared that if these three classes refuse to purchase then the sale can be made to a stranger (*ghair shakhs*).

It was contended, in the first place, before us that the right of pre-emption which is recited in favour of the owners of contiguous villages is an extraordinary right and one which it is very unusual to find in records of custom. While this may be admitted, this fact by itself would not be sufficient in our opinion to render the *wajib-ul-arz* of no value as evidence of custom and we do not think that for this simple reason the *wajib ul-arz* could be withdrawn from the purview of the ruling cited by the learned Judge of the Court below, namely, *Digambar Singh* v. *Ahmed Sayeed Khan*.

The learned Judge, however, omitted to notice (though the first Court does notice in its judgment), that an earlier *wajib-ul-arz* of 1863 was filed in the case.

A reference to this latter document shows, in the first place, that there is no definite recital of a custom at all. There is indeed a mention of rights of pre-emption in a clause of the *wajib ul-arz* which is headed *zikr intiqal haqiat* (recital of transfers of property). This clause begins by providing for a right of pre-emption in favour of near co-sharers (*hissedar karibi*).

The second class of pre-emptors are the co-sharers of the village, *hissedar deh*. After these two classes have had the offer transfers can be made to any person.

It has been ponited out by Dr. Katju that this clause, *zikr inituqil haqiat*, contains reference to many other matters, and he claims that in view of the well-known rulings of this Court this record of 1863 ought not to and cannot be treated as a record of custom. There is no doubt that there are miscellaneous provisions in the clause in question and one of them amounts to a restraint upon the right of gift which could not possibly be the subject of a custom.

Apart from that, it is important to notice that the scheme of pre-emption which is laid down in this document of 1863 is quite different from the scheme which is to be found in the document of 1884.

As will be observed in the latter document the first right of pre-emption is given to own

(1) 28 Ind. Cas. 84, 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 44 I. A. 10 (P.C.).

brothers irrespective of their being co-sharers or not, whereas in the 1863 document the first right of pre-emption is reserved to relations who are co-sharers. Then, again, as has been pointed out, the class of pre-emptors recited in the document of 1884 under the name of *zemindars* of contiguous villages finds no place in the document of 1863.

We are constrainedto hold, therefore, that any presumption of the existence of a custom which arises from the production of this *wajib-ul-arz* of 1884 has been destroyed by a reference to the earlier document of 1863. It seems to us that on these two documents it is impossible to conclude that there is clear and unambiguous evidence of the existence of this custom of pre-emption in the village in question. We decide accordingly.

The result, therefore, is that both these appeals are allowed and the decrees of the Courts below are set aside and it is directed that both suits be dismissed with costs to the defendants in all Courts including in this Court fees on the higher scale.

S. D. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 148-B. of 1923.

November 23, 1923.

Present:—Mr. Kinkhede, A. J. C.

SHANKAR—APPLICANT

versus

MURARJI—NON-APPLICANT.

Civil Procedure Code, (Act V of 1908), s. 115, O. VI, r. 17—Amendment of plaint, when to be allowed—Order refusing leave to amend—Revision, whether competent.

An order refusing to allow an amendment of the plaint disposes of the case so far as the question of amendment is concerned and is, therefore, open to revision under section 115 of the Civil Procedure Code.

***Mahadeo* v. *Nago*, 12 Ind Cas. 357 ; 7 N. L. R. 130, *Narhar* v. *Bati*, 51 Ind. Cas. 864; 15 N. L. R. 125, followed.**

All amendments of a plaint should be allowed which are intended to shorten litigation and to put the case of the plaintiff more eminently and clearly, if by reason of the plaintiff's case being misconceived in the first instance, it has not been put in proper form.

***Upendra Narayan Roy* v. *Janki Nath Roy*, 47 Ind. Cas. 129; 45 C 805; 22 C. W. N 611; *Charan Das* v. *Amir Khan*, 57 Ind. Cas. 606; 48 C 110; 89 M L. J. 195; 28 M. L. T. 149; 211 P. L. R. (P. C.) 124; 18 A. L. J. 1095; 22 Bom. L. R. 1370; 47 I. A. 255; 13 L. W. 43; 25 C . W. N. 289; 8 P. W. R. 1921, relied on.**

Application for revision of the order of the Subordinate Judge, Amraoti, dated the 10th July 1923.

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

Mr. *V. N. Bapat*, for the Non-applicant.

Order.—This is an application for revision of an order declining to allow the applicant to amend the plaint. The non-applicant objects to the maintainability of this application on the ground that the order is merely an interlocutory order which does not decide the case and at the most it discloses that the Court below has not decided the question of amendment according to law and that the granting of amendments being always discretionary this Court should not interfere with that discretion if the lower Court has thought fit to refuse to exercise it in applicant's favour. Several cases have been cited in support of this objection. I do not think I should leave the plaintiff in the lurch by declining to interfere at this stage. The refusal to allow amendment disposes of the case so far as the question of amendment is concerned and I have jurisdiction to interfere under section 115 Civil Procedure Code. I rely on *Mahadeo* v. *Nago* (1) and also *Narhar* v. *Bati* (2). I, therefore, overrule the preliminary objection. As regards the merits, I think the Courts should follow the salutory rules that all amendments should be allowed which are intended to shorten the litigation and to put the case of the plaintiff more eminently and clearly if by reason of the plaintiff's case being misconceived in the first instance it has not been put in proper form : See *Upendra Narain Roy* v. *Janki Nath Roy* (3) where the whole law has been very clearly discussed and collected. The same principles have been accepted in several other cases which have the support

(1) 12 Ind. Cas. 357; 7 N. L. R. 130 at p. 138.
(2) 51 Ind. Cas 864 ; 15 N. L. R. 125.
(3) 47 Ind. Cas. 129; 45 C. 805 at p. 817; 22 C. W. N. 611.

of their Lordships of the Privy Council : See *Charan Das* v. *Amir Khan* (4).

The objections that the amendment is delayed, inconsistent and not *bona fide* do not seem to me to be valid. The defendant does not lose in any way in having before him the plaintiff's full and clear statement of the case before the parties go to evidence. The stage at which the amendment is sought clearly shows that the plaintiff was not negligent in the matter : compare *Ramsaran Roy* v. *Ram Prasanna Mukerji* (5) where amendment was allowed 18 months after. The defendant can well be compensated by an award of costs Rs. 20 for this.

I, therefore, allow the petition for revision, and the lower Court's order disallowing the petition for amendment is set aside and that Court is directed to allow the amendment subject to payment of Rs. 20 as costs to the defendant as a condition precedent to the making of the amendment.

In the circumstances of the case, I do not think I should order the costs of this petition revision to be paid by the non-applicant. They will be costs in the suit. I fix pleaders fee Rs, 15 for this Court.

G. R. D. *Application allowed.*

(4) 57 Ind. Cas. 606 ; 48 C. 110 ; 89 M. L. J. 195; 28 M. L. T. 149 ; 2 U. P. L. R. (P. C) 124 ; 18 A. L. J. 1095 ; 22 Bom. L. R 1370 ; 47 I. A. 255 ; 13 L. W. 49 ; 25 C. W. N. 289 ; 8 P. W. R. 1921 (P. C.)

(5) 50 Ind. Cas. 49, 29 C. L. J. 206.

PATNA HIGH COURT.

FIRST APPEAL NO. 48 OF 1921.

February 28, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

HARGIR AND OTHERS—APPELLANTS

versus

KUMAR KAMAKHYA NARAIN SINGH—RESPONDENT.

Landlord and tenant - Tenant by sufferance—Limitation Act (IX of 1908), Art. 139—Limitation.

A tenant by sufferance is in by laches of the landlord and is entitled to the benefit of the law of limitation. [p. 513, col. 2.]

The possession of a tenant holding over is wrongful and if there is no evidence from which a fresh tenancy can be inferred in the strict term time begins to run against the landlord when the period of the fixed lease expires. [p. 513, col. 2.]

Chanchi v. *Daji Bhan*, 24 B. 504 ; 2 Bom. L. R. 494 ; 12 Ind. Dec. (N. S.) 867, relied on.

Appeal from a decision of the Subordinate Judge, Additional Court, of Hazaribagh, dated the 28th of August 1920.

Messrs. *P. K. Sen, A. Sen and Abandi Bhushan Mukherji and B. C. De*, for the Appellants.

Messrs. *S. Sultan Ahmad, S. M. Mullick, S. K. Mitra and Govt. Pleader*, for the Respondent.

JUDGMENT.

Das J.—On the 21st of June 1865, an *Istimrari mokarrari* lease was granted by the then proprietor of the Ramgarh Raj to Kanhai Gir and Jainath Gir. It appears that between 1861 and 1866 the Ramgarh Raj executed a considerable number of *Istimrari mokarrari* leases and that there has been a considerable controversy between the Raj and the grantees as to the meaning of the term "*Istimrarari mokarrari.*" It was the case of the grantees that by the term "*Istimrari mokarrari*" a permanent heritable and transferable grant was intended ; whereas, the rival case was that all that was intended to be granted was a lease for life. Certain test cases were instituted by the Raj and the controversy has now been set at rest by the decision of the Calcutta High Court in the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1). That decision was pronounced on the 25th of August 1915 ; and it is now conceded before us that the lease in favour of Kanhai Gir and Jainath Gir was a lease for their life. The survivor of the grantees died sometime in 1890 ; and it has been found by the learned Judge in the Court below that defendants Nos. 1 to 5, who are the heirs of the grantees, have been uninterruptedly in possession of the demised land without payment of any rent to the landlord. On the 16th of November 1911, defendants Nos. 1 to 5 gave an underground lease of 200 *bighas* of coal lands to defendants Nos. 6 and 7 ; and defendants Nos. 6 and 7

(1) 36 Ind. Cas. 821 ; 43 C. 832.

have assigned their interest under the lease of the 16th of November 1911 to defendants Nos. 8 and 9. On the 27th of September 1915, the plaintiff, who was the then proprietor of the Ramgarh Raj, served a notice to quit upon the defendants calling upon them to deliver up quiet possession of the demised land at the end of the Sambat year 1972. On the 18th of September 1917, the plaintiff served a fresh notice upon the defendants asking them to quit at the end of the Sambat year 1974, corresponding to the 11th of April 1918. On the 14th of December 1918, the suit out of which this appeal arises was instituted by the plaintiff for ejectment of the defendants and for recovery of Rs. 10,000 as damages for the unauthorized removal of coal from the demised land. The learned Subordinate Judge has given the plaintiff a decree substantially as claimed by him.

The critical question in this case is whether, having regard to the lapse of time, the plaintiff is entitled to eject defendants Nos. 1 to 5 from the demised land. The lease came to an end in 1890; and it is not disputed by the defendants that the plaintiff was entitled to recover possession of the demised land if he had instituted appropriate proceedings within twelve years from 1890. But the suit was not instituted till the 14th of December 1918. It is contended on behalf of the defendants that the tenancy having come to an end in 1890, the suit is barred under the provisions of Article 139 of the Limitation Act. The case of the plaintiff is that, notwithstanding the determination of the tenancy on the death of the original grantees, defendants Nos. 1 to 5, as the heirs of the grantees continued in possession with the assent of the landlord as tenants from year to year, and that the tenancy from year to year came to an end on the 11th of April 1918. Some attempt was made in the evidence to show that the defendants paid rent to the plaintiff, but the learned Subordinate Judge has not accepted that part of the plaintiff's case and no attempt has been made before us by the learned Counsel appearing on behalf of the plaintiff to establish that there was any payment of rent at any time by defendants Nos. 1 to 5 to the plaintiff. The view of the learned Subordinate Judge, however, is that there was an assent on the part of the landlord to the defendants continuing in possession of the demised land sufficient to convert the tenancy by sufferance into a tenancy from year to year. In this view he he has come to the conclusion that the tenancy came to an end on the 11th of April 1918, and that the plaintiff's suit is well within time.

It is necessary to scrutinise the evidence with some care to see whether the finding of the learned Subordinate Judge on this point can be supported. I have referred to the fact that there was considerable controversy between the parties as to the meaning of the term "*Istimrari mokarrari* lease." The controversy was set at rest on the 25th of August 1915 by an authoritative decision of the Calcutta High Court; and it is an undoubted fact that many suits which were held back pending the decision of the Calcutta High Court were instituted subsequent to that decision. It is necessary to remember these facts in dealing with the evidence whether there was an assent on the part of the landlord to the defendants continuing in possession of the demised land. The first witness examined on behalf of the plaintiff is Sibsahay Lal. He makes a perfectly general statement in his examination-in-chief that the heirs of the original grantees were allowed to remain in possession of the disputed *mauza* as year-to year tenants; but he admits in his cross-examination that his knowledge was derived from the terms of the notices served upon the defendants, and that he had no knowledge of the real facts independently of those notices. He also admits that there are no papers to show that the defendants were yearly tenants and that settlement with the defendants was not made in his presence. Lastly, he admits that only those tenants who pay rent are recognized as yearly tenants and that there are no papers in the Raj to show that the defendants were in possession with the consent of the Ramgarh Raj.

The next witness on this point is Mahta Tilakdhari Prasad. In his examination-in-chief he says that the heirs of the original grantees were allowed to remain in possession of the demised land, but in his cross-examination he makes it perfectly clear that he has no personal knowledge of the actual facts and that "there is no written note anywhere of the fact that the heirs of other deceased

mokarraridars were allowed to remain in possession."

The last witness on this point is Harihar Sahay. He speaks in his examination-in-chief as to a practice in the Raj to make demand for rent upon the heirs of *mokarraridars* and to treat such heirs as tenants-at-will. In his cross-examination he says as follows :—" I do not recollect if demands for rent were made on defendants 1 to 5 but such demands must have been made. No steps were taken against them for non-payment of rent." Upon this evidence it is impossible to hold that there was an assent on the part of the landlord to the defendants continuing in possession of the demised land as tenants.

Mr. Sultan Ahmad on behalf of the plaintiff strongly relies upon an alleged admission made by Meghlal Gir, one of the defendants. The passage in the evidence of Meghlal Gir upon which reliance is placed is as follows :—" The Raj Tahsildars used to demand rent for Tarni from us but we said that we would pay rent if receipts are granted in our names, but they said that they would grant *Marfatdari* receipts." *Marfatdari*, receipts it may be pointed out, are receipts granted in the name of the original tenants through the persons actually paying the rent. The argument of Mr. Sultan Ahmad on this evidence is as follows. The defendants were actually in possession of the demised land. Their possession operated as an offer by them to accept a tenancy. The offer by the Raj to grant receipts to them operated as an offer to recognize them as tenants. There was, therefore an, assent on the part of the landlord to the defendants continuing in possession of the demised land as tenants. With all respect, I am unable to agree with the argument The defendants were no doubt willing to be treated as tenants on their own term and on recognition of their status as tenants. The refusal on the part of the landlord to grant any receipts other than *Marfatdari* receipts to the defendants shows that, although he was willing to accept rent from them he was not willing to recognize their status as tenants. And when the history of the litigation between the landlord and the different tenants under different *Istimrari mokarrari* leases is remembered it will be realised that neither party was willing to make any concession until the controversy was settled by an authoritative decision of the High Court. This, in my view, explains why the landlord was unwilling to give direct rent receipts to the defendants. The evidence of Meghlal Gir upon which reliance is placed establishes that the landlord was unwilling to recognize the defendants as tenants. It is quite true that he suffered them to remain in possession ; but a tenant by sufferance is in by laches of the landlord and is entitled to the benefit of the law of limitation.

The learned Subordinate Judge has strongly relied upon the case of *Krishnaji* v. *Anthaji* (2). That case no doubt supports the conclusion at which the learned Subordinate Judge has arrived. With all respect, I am unable to agree with the view taken in that case. The learned Judges in that case followed *Hellier* v. *Silleox* (3). But in my opinion *Hellier* v. *Silleox* (3) is an authority for the proposition that an action for use and occupation would lie against a person who is in possession of the demised land after the death of the tenant with the permission of the landlord : it is not an authority for the proposition that the person in possession could not appeal to lapse of time if an action for ejectment was brought against him after the expiry of the period of limitation. The case of *Krishnaji* v. *Anthaji* (2) has, in my opinion, been virtually overruled by the decision of the Bombay High Court in *Chandri* v. *Daji Bhau* (4). It was held in that case that the possession of a tenant holding over is wrongful, and if there is no evidence from which a fresh tenancy can be inferred in the strict sense of the term, time begins to run against the landlord when the period of the fixed lease expires. In that case there was a lease for a year. At the end of the year the premises were not given up, nor was any rent paid. The suit was brought more than twelve years after the expiry of the lease. The defendant contended that the plaintiff's claim to recover possession was barred and the High Court gave effect to that contention and dismissed the suit.

In my opnion, the decision of the learned Subordinate Judge on this point cannot be

(2) 18 B. 256 ; 9 Ind. Dec. (N. S.) 670.
(3) (1850) 19 L. J. Q. B. (N. S.) 295 ; 14 Jur. 873 ; 87 R. R. 521.
(4) 24 B. 504; 2 Bom. L. R. 491 ; 12 Ind. Dec. (N. S.) 867.

supported and the plaintiff's claim for possession must be dismissed.

[*The remainder of the judgment deals with questions of fact and is not material for this report.—Ed*].

In the result, I must allow the appeal in so far as the learned Subordinate Judge has granted the reliefs (*a*), (*b*), (*c*), (*e*) and (*h*) claimed in the plaint, and must dismiss the suit so far as those reliefs are concerned the plaintiff is, however, entitled to reliefs (*d*) and (*f*); and to that extent the decree of the learned Subordinate Judge must be affirmed. Costs will be in proportion to the success achieved by the parties in both the Courts.

Ross, J.— I agree.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1963 OF 1921.

January 25, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Page.

KEDAR NATH BISWAS—DEFENDANT —APPELLANT

versus

KAMINI SUNDARI DASSYA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Landlord and tenant—Suit by tenant to recover possession of holding—Dispossession by landlord—Limitation.

Article 3 of Schedule III to the Bengal Tenancy Act applies to a case where dispossession has been by a person who at the time of dispossession, in whatever way the dispossession might take place, either through a civil wrong or by means of criminal force, occupies the position of a landlord or possesses the character of a landlord and has the capacity of a landlord towards the person dispossessed. [p 516, col. 1]

Plaintiff sued to recover possession of a holding on the allegation that she had been dispossessed from it by the defendant landlord in execution of a fraudulent and collusive decree obtained by him against a third person. [p. 516, col. 1]

Held, that the suit was governed by Article 3 of Schedule III to the Bengal Tenancy Act.

Case-law discussed.

Appeal from the decree of the Additional District Judge of Jessore, dated the 20th June 1921.

Babu *Surendra Chandra Sen* (with him Babu *Hemendra Chandra Sen*) for the Appellant—The land in suit admittedly belonged to two persons, namely, Sita Nath and Dwaraka Nath. These were two brothers One of them died leaving his widow as heir so far as his share is concerned. I am the landlord. This suit was brought by the widow who claimed the entire plot, one-half by right of inheritance and the other half by virtue of purchase We have filed a decree showing that we purchased the other half in execution of a rent decree and took possession in execution thereof. In any case, the decree having been found collusive we are bound to accept it, as such. The point before your Lordships is that the suit is time barred under Art. 3 of Sch. III of Bengal Tenancy Act. The Article is applicable because I was all along the landlord. Moreover, the decree I obtained has been found collusive and so the argument that I disposed as purchaser fails. There may be some conflict of decisions but the facts of this case are clear and it is a strong case. Cites *Kamaldhari Thakur* v. *Rameshar Singh Bahadur* (1) *Nabin Chandra Shaha* v. *Shesk Wajid* (2) *Rudra Narain Maity* v. *Nalabar Jana* (3). All the earlier cases are discussed in 31 C. L. J.

Babu *Sib Chandra Palit* for the Respondent—Art. 3 of the Schedule has no application whatsoever. Here, according to the appellant's own case, they took possession on the strength of a decree, which your Lordships may be pleased to observe, was against other persons and purposely ignoring my client. If he obtained possession at all he obtained it not as my landlord but as a trespasser. So far as I am concerned, Art. 3 cannot have any application by any stretch of imagination. In any case, there is a great deal of conflict in decisions. These have been far from being uniform and if your Lordships feel any doubt, your Lordships should refer it to the Full Bench. This is a point of great importance. The appeal cannot succeed.

(1) 19 Ind. Cas. 545 ; 17 C. W. N. 817.
(2) 58 Ind. Cas. 698; 31 C. L. J. 199 ; 24 C. W. N. 882.
(3) 21 Ind. Cas. 481 ; 41 Cal. 52. ; 18 C. L. J. 89; C. W. N. 858,

KEDAR NATH BISWAS v. KAMINI SUNDARI DUSSYA

JUDGMENT.

Suhrawardy, J.—In this appeal the point involved is whether, on the findings of the Courts below, the plaintiff's suit is barred by two years limitation under Article 3 of Schedule III of the Bengal Tenancy Act. The facts are that defendant No. 2 who is the appellant was the landlord in respect of a certain holding which was jointly held by two brothers Sita Nath and Dwarka Nath Sita Nath died leaving plaintiff as his widow on whom dovolved his one-half share. The plaintiff's case is that she purchased the other one-half of Dwarka Nath and thus became entitled to the 16 annas share of the holding. The defendant's case is that in respect of the eastern half of this holding Dwarka Nath was the sole tenant and after his death the defendant No. 4 succeeded him as a tenant; but as defendant No. 4 did not pay the rent in respect of the eastern half of the holding, the defendants Nos. 1 and 2, being the landlords, brought a suit for rent, obtained a decree, purchased the land in execution of the same and obtained delivery of possession through Court on the 8th December, 1913. The lower Appellate Court has found that the defendant's decree against the defendant No. 4 and the sale in execution thereof were fraudulent and collusive. It was the case of the plaintiff and it has been found by the Courts below that the plaintiff was all along the tenant of the defendant Nos. 1 and 2 in respect of the land in dispute and that the decree against defendant No 4 and the sale thereunder did not affect the plaintiff's title. The plaintiff alleged that she was dispossessed in 1325 by a certain act of the landlords. The first Court disbelieved the evidence on that point and found that she was dispossessed by her landlords (defendants Nos. 1 and 2) more than two years before the institution of the suit and held that the suit was barred by limitation. The learned Munsif does not say on which date the dispossession took place but reading the whole judgment it appeare that he was of opinion that the plaintiff was dispossessed from the disputed land in 1913 by virtue of the delivery of possession to the defendants Nos. 1 and 2 in execution of the rent-decree against defendant No. 4. The lower Appellate Court has not found as to when the dispossession took place; but it disposes of the issue, "Is the suit barred by limitation" in these words: "In view of the ruling reported in *Kamaldhari Thakur* v. *Rameshwar Singh Bahadur* (1) the suit is not time barred." I think what he means to say is that, because the dispossession was by the defendant in 1913 as purchaser in execution-sale, it was not dispossession by him as landlord and so two years' bar of limitation did not apply to the facts of this case and, therefore, the plaintiff's suit was not barred by limitation.

On this question as to whether the dispossession under Article 3 of Schedule III of the Bengal Tenancy Act should be dispossession by a person as landlord and not in another capacity though he happened to be a landlord had been the subject of consideration in a large number of cases and there has been a wide divergence of judicial opinion. All the cases on this point have been collected in the Case of *Nabin Chandra Shaha* v. *Shaik Wajid* (2) and in the well-known edition of the Bengal Tenancy Act by Mr. Surendra Chandra Sen whose assistance we had in this case, appearing as he did for the appellant at pp 856 and 858. It is not necessary for us to refer to those cases nor do we feel called upon, in the particular facts of this case, to refer the matter to a Full Bench as we have been invited to do by the learned Vakil for the respondent. The facts of this case are of a peculiar nature. It has been found and it is the case of the plaintiff, that the relationship of the landlord and tenant between the defendant and the plaintiff continued down to the date of the suit and I take it that it still continues. At the time when the sale in 1913 took place and delivery of possession was given to the defendant through Court, he was on that date occupying the position of a landlord in respect of the plaintiff. The collusive decree that was obtained against defendant No. 4 did not put an end to that relationship and it is on the basis of that relationship that the plaintiff now comes to Court and demands restitution of the property of which she was dispossessed. I need not consider the question as to what would have been the effect if the rent decree were against the plaintiff and the dispossession had taken place by the defendant as purchaser in execution of that decree. I may only mention that the ratio of some of the decisions of the class of the case of *Kamaldhari Thakur* v. *Rameshwar*

Singh Bahadur (1) is, that the landlord having ceased to be a landlord by purchasing the holding himself in execution of this decree, he subsequently obtained delivery of possession through Court and thereby dispossessed the tenant not as a landlord but as an auction-purchaser. But here, as I have said, the dispossession was by the defendant when he was holding the character of a landlord in relation to the plaintiff. If we look at it from another point of view it appears that the plaintiff was dispossessed on the 8th December 1913 from the holding as a tenant in respect of the holding. In my judgment, Art. 3 applies to a case where dispossession has been by a person who at the time of dispossession, in whatever way the dispossession might take place either through a civil wrong or by means of criminal force, occupies the position of a landlord or possesses the character of a landlord and had the capacity of the landlord, the dispossession must be taken to have been effected by the landlord. In this view of the finding of the lower Appellate Court, I think that Art. 3 is *not* applicable to the facts of this case and the plaintiff's suit is barred by limitation.

The result is that this appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance restored with costs.

Page, J.—I am of the same opinion. The question in this appeal is whether or not the plaintiff's suit is barred by limitation. The material Article is Article 3 of Schedule III of the Bengal Tenancy Act, which provides that a suit by a plaintiff as a *rayat*, (which was the capacity in which the plaintiff launched the proceedings in this suit) to recover possession of land must be brought within two years from the date when the plaintiff was dispossessed of the land. It is well-settled that dispossession must be by a landlord. I desire to adopt the observation of Jenkins, C.J., in the case of *Rudra Narain Maity* v. *Natabar Jana* (3). Referring to Article 3 His Lordship says: "this is an Article, which, after a lapse of a certain time, deprives the plaintiff of his right to come to Court for the purpose of vindicating a claim which is his and, therefore, it must be clearly made out that any particular case falls within its terms. We recently had occasion to enter a protest against extending the terms of this Article by use of figures of speech and metaphors. What we have to see in each case is whether in fact there has been such dispossession as the Article requires That dispossession, it is conceded, must be by the landlord." There are two findings of fact in this case to which I must refer. The first is that the plaintiff was dispossessed of the premises more than two years before she launched the present suit, and the second finding is that, at the time when she was dispossessed and up till the date when the suit was instituted, she was in fact the tenant of the defendants Nos. 1 and 2. In my opinion these two findings of fact are sufficient to enable us to dispose of this appeal. Upon these facts Article 3 will bar the claim of the plaintiff. But it is contended that Article 3 does not apply because the defendant No. 2 had obtained a decree for possession against some other person on the ground that such other person was his tenant, and that he obtained possession under that decree. The Court below has found, however, that that proceeding was a fraudulent and collusive proceeding between the parties to it. The plaintiff was not impleaded in that suit and she was not barred by the decree passed in it. In my opinion, the fact that the defendant, in collusion which a third person, obtained possession of these premises by fraud does not affect the position of the plaintiff. The finding of fact that at the time of dispossession the plaintiff was the tenant of the defendants Nos. 1 and 2 brings into operation Article 3 of Schedule III of the Bengal Tenancy Act notwithstanding the fraudulent device to which the defendant No. 2 resorted in order to obtain possession. The determination of the question depended upon this finding of fact and in my opininn this appeal should be allowed.

Z. K. *Appeal allowed.*

(3) 21 Ind. Cas. 481; 41 C. 52; 18 C. L. J. 89; 18 C. W. N. 353.

HATIM MIRZA *v.* BHAGWANA

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2950 OF 1922.
April 17, 1923.

Present:—Mr. Justice Broadway.

HATIM MIRZA—DEFENDANT—APPELLANT.

versus.

BHAGWANA AND ANOTHER—DEFENDANTS —HABIB-UD-DIN—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 93—Execution of decree—Sale—Auction-purchaser, right of, to refund of purchase-money—Suit to recover purchase money, whether maintainable.

A suit by an auction-purchaser for recovery of the purchase-money paid by him from persons to whom it has been paid on the ground that the judgment-debtor did not possess a saleable interest in the property sold, is not maintainable, his right to obtain a refund of the purchase-money in such circumstances being entirely the creation of rr 91 and 93 of O. XXI of the Civil Procedure Code. The only remedy of the auction purchaser in such a case is to get the sale set aside by the method prescribed by the Code.

Case-law discussed

An auction-purchaser made an application under O. XXI, r. 91 of the Civil Procedure Code for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. The application was dismissed in appeal and the auction-purchaser was directed to pay into Court the purchase-money which he had withdrawn under the orders of the lower Court. The auction-purchaser thereupon filed a suit for a declaration that he was not bound to re-pay the purchase-money into Court as the judgment-debtor had no saleable interest in the property sold;

***Held*, that the suit was in effect for a refund of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold, and was, therefore, not maintainable.**

Second appeal from the decree of the District Judge, Dehli, dated the 8th August 1922.

Lala *Sardha Ram*, for the Appellant.

Maulvi *Ghulam Mohi-ud-din* and Mr. *Muhammad Monir*, for the Plaintiff—Respondent.

Mr. *M. L. Puri*, for the Defendants—Respondents.

JUDGMENT.—The facts of the case giving rise to this appeal are briefly as follows. In January 1915 one *Musammat* Lachhmi was appointed guardian of the property of her step-son Bhagwan Sahai who was a minor. In the 2nd of January 1917 *Musammat* Lachhmi mortgaged a certain site to Hatim Mirza. In the mortgage-deed the site in question was described as being the property of the mortgagor, no reference being made to Bhagwan Sahai. Hatim Mirza brought a suit on this mortgage-deed and obtained a decree which was made final on the 21st of November 1918. In execution of this decree the mortgaged property was brought to sale at an auction held under the orders of the executing Court and was purchased by one Habib-ud-din for Rs. 4,750 on the 7th of October 1919. The whole of the purchase money was paid in by the 21st of October 1919. Subsequent to this date, Habib-ud-din discovered that the property he had purchased belonged to the minor Bhagwan Sahai and that the judgment-debtor in the decree, namely *Musammat* Lachhmi, had no saleable interest in the site. He accordingly, on the 10th of November 1919, moved the executing Court under O. XXI, r. 91, Civil Procedure Code, to have the sale set aside. His application was granted on the 23rd of January 1920, and he at once applied for and obtained a refund of the money paid into Court by him. Hatim Mirza appealed against the order setting aside the sale and his appeal was accepted on the 8th of March 1920. On the 8th of July 1920 Hatim Mirza asked the Court for a direction that Habib-ud-din should be directed to repay the money into Court so that he could realise it. The Court held that Habib-ud-din was liable to repay the money and directed that he should do so within a fortnight of the order, or institute such suit as he might be advised and obtain an injunction. Habib-ud-din filed no appeal against this order, but on the 18th of December 1920 instituted this suit asking for a declaration that the mortgage-decree was void as against the minor's property and that, therefore, he was not bound to repay the money into Court. Hatim Mirza and Bhagwan Sahai, minor, were made defendants in the case. It should be mentioned that, subsequent to the order in appeal setting aside the cancellation of the sale (8th March 1920), but prior to the order directing Habib-ud-din to repay the money into Court the District Judge passed an order at the instance of Bhagwan Sahai, minor, declaring the mortgage of the site in question void as against his rights therein. This order was passed on the 2nd of July 1920 and was made under section 30 of the Guardians and Wards Act.

The trial Court decreed the suit and an appeal by Hatim Mirza having been dismissed

HATIM MIRZA v. BHAGWANA

he has come up to this Court in second appeal through Mr. Sardha Ram, while I have heard Mr. Ghulam Mohi-ud din for Habib-ud-din and Mr. Mukand Lal Puri for the minor. Mr. Sardha Ram has urged that the suit, for all practical purposes, amounts to a suit by an auction, purchaser for the refund of his purchase-money on the ground that the judgment-debtor had no saleable interest in the property auctioned and that such a suit is not competent. On the other hand, for the respondents it has been urged that the suit is not one for the refund of purchase-money but for a declaration that the auction-purchaser should not be called upon to carry out his contract to purchase on the ground that the decree under which the property was sold and the auction was held was inoperative as against him. I may say at once that it seems to me that the suit really is one for the refund of purchase-money. It is common ground that the sale has been confirmed. Prior to the confirmation the auction-purchaser could, under r. 91 of O. XXI, move the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Mr. Sardha Ram has urged that, inasmuch as the procedure to be adopted by an auction, purchaser, in the circumstances such as exist in the present case, has been laid down by statute, namely the Civil Procedure Code, it is that procedure alone that can be followed and that no suit for the refund of purchase, money was competent. In *Lingappa Goundan* v. *Esudasan* (1) this view was given effect to although that case did not deal with execution proceedings. In *Lakhmichand* v. *Chaturbhuj* (2) it was clearly held that a suit by an auction-purchaser for recovery of the purchase-money from persons to whom it has been paid, on the ground that the judgment-debtor does not possess a saleableinterest in the property sold, is not maintainable, his right to obtain a refund of the purchase-money in such circumstances being entirely the creation of r. 91 and 93 of O. XXI and that the result was that, without getting the sale set aside through the Court and *by the methed prescribed by the Code*, the auction-purchaser had no remedy. It was also held that the general principles of *caveat emptor* affects the purchaser unless he chooses to adopt the remedy given to him by the statute. To the same effect is the case reported as *Bepin BehariGhosh* v. *Hari Charan Ghosh* (3). In *Ram Saroop* v. *Dalpat Rai* (4) a Division Bench of the Allahabad High Court specifically laid down that there was no principle of equity or law according to which on auction-purchaser was entitled to a refund of the purchase-money in case it was discovered later on that the judgment-debtor had no saleable interest and that a suit for refund of the purchase-money was not maintainable. In the following cases the same principles were laid down:— *Parvathi Ammal* v. *Govindasami Pillay* (5), *Bhagwan Das* v. *Allah Baksh* (6), *Nannu Lal* v. *Bhagwan Das* (7), *Krishnaji* v. *Ladhuram Ghasiram* (8), *Subbu Reddi* v. *Ponnambala Reddi* (9), *Dewaji* v. *Amrita* (10), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (11), *Tirumalaisamy Naidu* v. *Subramaniam Chettiar* (12), *Ram Dayal* v. *Rampal Singh* (13), *Mahadev Narayan* v. *Sadashiv Keshev Limaye* (14), and *Tirumalaisamy Naidu* v. *Subramanian Chettiar* (12).

On the other hand, my attention as been been drawn to *Munna Singh* v. *Gajadhar Singh* (15), *Rustamji* v. *Vinayak Gangadhar* (16), *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (17), *Parvathi Ammal* v. *Govindasami Pillai* (5), *Girdhar Das* v. *Sidheshwari Prasad Narain Singh* (18), and *Premraj* v. *Javarmal* (19), and it has been urged by Mr. Ghualam Mohiud-din that the cases relied on by

(1) 27 M. 18.
(2) 55 Ind. Cas. 280; 4 N. L. J. 274.
(3) 64 Ind. Cas. 628.
(4) 58 Ind. Cas. 105; 18 A L. J. 905; 2 U. P. L. R. (A) 318; 48 A 60.
(5) 30 Ind Cas. 827; 29 M. 303; 2 L. W. 861; 29 M. L. J. 467; (1915) M. W. N. 797,
(6) 51 Ind. Cas. 695; 52 P. R. 1919.
(7) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.
(8) 42 Ind. Cas. 440
(9) 49 Ind. Cas. 959; (1918) M. W. N. 655.
(10) 52 Ind. Cas 818; 15 N. L. R. 140.
(11) 19 C 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N S.) 898 (P.C.)
(12) 45 Ind Cas 109; 40 M 1009.
(13) 51 Ind. Cas. 95; 6 O. L. J. 160; 22 I. C. 42.
(14) 59 Ind. Cas. 118; 22 Bom. L. R. 1082; 45 B. 45.
(15) 5 A. 577; A. W. N. (1883) 180; 8 Ind. Dec. (N.S.) 491.
(16) 7 Ind. Cas. 957; 35 B 29; 12 Bom. L. R. 728.
(17) 41 Ind. Cas. 924; 36 C. L. J. 205.
(18) 44 Ind. Cas. 697; 40 A. 411; 16 A. L. J. 286.
(19) 18 Ind. Cas. 351; 15 Bom. L. R. 41.

him show that there is a conflict of authority on the question of the maintainability of a suit such as I hold the present to be. A reference to these authorities, however, shows that the more recent decisions of the High Courts in question are against the maintainability of such a suit. It has been laid down by the Privy Council in *Dorab Ally Khan* v. *The Executors of Khajah Moheeoddeen* (20), that there is no warranty of title at a Court sale, and *Annanajhula Venkatachallamayya Garu* v. *Ramiprjee Neelakantha Girjee* (21) and *U. Pau* v. *N.R.M.A. Chetty* (22) are to the same effect. The right to recover the purcase-money in such a case is, therefore, merely the creation of the Code as provided in rr. 91, 93 of the Civil Procedure Code. Mr. Ghulam Mohi-ud-din laid great stress on the decision of the Bombay High Court *Rustomji* v. *Vinayak Gangadhar* (16) where it was held that at an auction purchase some sort of guarantee of title was conveyed. This view appears to me to be clearly opposed to the decision of their Lordships of the Judicial Committee referred to above, and in *Balwant Rangnath* v. *Bala Malu* (23) it was pointed out that rr. 91 and 93 of O. XX, Civil Procedure Code had very materially attered the provisions of sections 3, 15 of the old Code and that an auction-purchaser, at a Court sale, must get the sale set aside before he can obtain the right to ask for a refund of the purchase-money. It was further held, however, that he would be competent to maintain a suit against the judgment-debtor on the ground of fraud or misrepresentation. No such ground has been urged in this case and I think I am bound to follow the catena of cases referred to above in which it has been consistently held that an auction-purchaser could not sue for the recovery of his money in a separate suit but that his remedy was confined to the procedure laid down in r. 91 of O. XXI. I must, therefore, hold that the present suit which, to all intents and puropses, is for the refund of purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold, was not competent.

In this view of the case, it is scarcely necessary for me to refer to the other points raised at the bar, namely, as to the applicability of section 144, Civil Procedure Code, and the effect of the order passed under section 30 of the Guardians and Wards Act. I would, however, note that section 144, Civil Procedure Code, scarcely applies to the present case as that section deals with the variation or reversal of a decree.

In my view of the case, this appeal must be decreed, and I accordingly accept it and dismiss the plaintiff's suit with costs.

Z. K. *Appeal accepted.*

(20) 8 C. 806 ; 2 C. L. R. 529 ; 5 I. A. 116 ; 3 Suth P. C. J. 519 ; 3 Sar P. C. J. 318 ; 2 Ind. Jur. 426 ; 1 Ind. Dec. (N.S.) 1097 (P.C.).

(21) 43 Ind. Cas. 685 ; 23 M. L. T. 9 ; 34 M. L. J. 156 ; 7 L. W. 159; (1918) M. W. N. 121 ; 41 M. 474.

(22) 61 Ind. Cas. 805 ; 13 Bur. L. T. 152.

(23) 67 Ind. Cas. 360 ; 24 Bom. L. R. 308 ; at p. 309 ; (1922) A. I. R. Bom. 205 ; 46 B. 833.

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 211 of 1922.
July 6, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

SHEO PRASAD DUBE AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJU MAHTO AND ANOTHER,—PLAINTIFFS—RESPONDENTS.

Custom—Pre-emption—Entry in Settlement Record of 1885—Presumption—Contract of pre-emption—Pleadings—Person not party to contract whether can enforce it.

A peculiar weight must be assigned to entries relating to a custom of pre-emption made in Settlement records of 1885, as special instructions had been issued by the Board of Revenue to Settlement Officers regarding the Record of Rights of pre-emption. [p. 520, col. 1]

Ali Nasir Khan v. *Manik Chand*, 25 All. 90, A. W. N. (1902) 207, followed.

But entries relating to rights of pre emption made in such Settlements are not conclusive proof of the custom recorded therein and are not binding on the Civil Courts. [p. 520, col. 2]

Where a plaintiff relies upon a contract in order to succeed in a suit for pre-emption, the contract must be expressly pleaded and the plaintiff must show that the person through whom he claims was one of the contracting parties. [p. 520, col. 2]

A person who becomes an owner by purchase after a Settlement is made is not entitled to enforce a contract which was entered into at the time of the Settlement. [p. 521, col. 1]

SHEO PRASAD DUBE *v.* SARJU MAHTO

Second appeal against the decree of the First Additional District Judge of Gorakhpur, dated the 21st November 1921.

Mr. *U. Upodhiya*, for the Appellants.

Messrs. *Jang Bahadur Lal* and *S P. Sinha*, for the Respondent.

JUDGMENT.—The question in this case is whether the lower Appellate Court was right in holding that the plaintiffs-respondents were entitled to succeed in their suit for pre-emption.

The suit as framed was based on an alleged custom of pre-emption. The Court of first instance dismissed the suit on the ground that the custom was not proved. The Subordinate Judge was also of opinion that the plaintiffs could not rely on any contract for pre-emption inasmuch as no such case had been set up in the plaint.

The plaintiffs went in appeal and the learned Additional Judge, while agreeing with the first Court that there was no proof of custom, nevertheless, held that the plaintiffs were entitled to succeed on the ground of contract.

It is now argued before us on behalf of the defendants vendees that the Judge of the Court below ought not to have decreed the claim on the basis of contract no such case having been set up in the plaint.

On the other hand, the learned Counsel who has argued the case on behalf of the plaintiffs-respondents maintains that the decision of the Court below should be upheld on the ground that the evidence which was produced in the case conclusively proves the existence of custm.

We will deal with the second matter first. The learned Counsel has laid great stress upon the Full Bench case reported in *Ali Nasir Khan* v. *Manik Chand* (1). There it was pointed out with reference to certain entries in the Record of Rights which were prepared in the Basti and Gorakhpur Settlement in the year 1885 that a peculiar weight must be assigned to entries of custom made in the Settlement Records of that time because special instructions had been issued by the Board of Revenue to Settlement Officers. Among other directions given was one regarding the Record of a Right of pre-emption. Such a regard was to be made when the proprietors expressly demanded that it should be noticed and proved conclusively that a custom exists.

There can be no doubt, therefore, that when we find an entry of this kind, as we do find in the present case, we start with a very strong presumption in favour of the existence of custom.

But we do not understand the Full Bench decision to lay down that such an entry is conclusive proof and is binding on the Civil Courts. It will be noted that in the case which was before the Full Bench the only evidence to be considered was a *wajib-ul-arz* of 1866 and an extract from the Record of Rights of the Settlement of 1886-87.

In the present case there is other evidence to be considered and it is principally on this other evidence that the Courts below have decided against the plaintiffs. Documents were produced before the lower Court to show that there was no record of custom in the *wajib-ul-arzes* of 1833 and 1860 and it was further proved to the satisfaction of the Court below that in both those years the village was in the possession of a single proprietor.

We have further evidence in the shape of the statement of the *patwari* which says that there was no transfer of property in this village up till the year 1894 when a sale was effected in favour of Ram Subhag who was the father of the first plaintiff Sarju Mahto. The next transfer which took place was in or about the year 1901 when a second transfer was made in favour of the same Ram Subhag.

In these circumstances, we think it was competent for the Court below to say that there was evidence on the record which overturned the presumption founded upon the entry in the Record of Rights for the year 1885. We cannot, therefore, interfere with the finding of the Court below on this point.

There remains the question of contract. It has been laid down that where plaintiffs rely upon a contract in order to succeed in a suit for pre-emption the contract ought to be pleaded, for in such a case it would be necessary for the plaintiff to show that the person through whom he claimed was one of the contracting parties.

(1) 25 A. 90 ; A. W. N. (1902) 207.

We think this objection although a technical objection is one which ought to prevail. However we do not find it necessary to decide this question on any mere technicality. We have already adverted to the fact that the first plaintiff got a footing in the village for the first time in the year 1894, that is, some 7 or 8 years after the settlement had been made.

If it be the fact, and it does appear to be the fact, that these plaintiffs first got a footing in the village by purchase some 7 or 8 years after the Settlement was made we do not think that they are entitled to enforce a contract which was entered into at the time of the Settlement assuming that the record in the *waji'b-ul-arz* is a record of contract. These people were no parties to the contract and we do not think they ought to be allowed to enforce it.

We have come to the conclusion, therefore, that this appeal ought to be allowed and we allow it accordingly. We set aside the decree of the Court below and restore the decree of the Court of first instance. The defendants-appellants are entitled to their costs both here and in the lower Appellate Court. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL NO. 193 OF 1922.

October 20, 1923.

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

TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM—RESPONDENTS I

versus

FIRM OF MAYADAS DOWLATRAM—RESPONDENTS II.

Arbitration- Appointment of arbitrator—**Uberrima fides**, *necessity of—Arbitrator related to one party, effect of*—**Ex-parte** *award, when can be set aside—Time for filing award, extension of—Arbitration Act* (IX *of* 1899) *S.* 12.

In case of an arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure, which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. [p. 523, col 1.]

The fact that the arbitrator is related to one of the parties as his first paternal cousin does afford a real likelihood of an operation of prejudice on his part and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. In such a case as the above it is not necessary, in seeking to have the award set aside, to prove actual bias or partiality on the part of the arbitrator or that the existence of the relationship had any operation on his mind [p. 523, col. 1.]

An award passed *ex parte* will be set aside only if the absent party can convince the Court that he had sufficient cause for his non-appearance. [p. 523, col 2.]

Whitehouse v. *Kahn Kahn & Co.*, 27 **Ind. Cas.** 185 ; 8 **S. L. R.** 110, followed

In exending time for making an award under s. 12 of the Indian Arbitration Act, the Court must take into consideration all the circumstances of the case and decide if the arbitrator should be granted such indulgence. [p. 524, col. 1.]

Petition under the Indian Arbitration Act to file an award, and objections thereto.

Mr. *Dipchand T. Ojha*, for the Respondents I.

Mr. *Kimatrai Bhojraj*, for the Respondents II.

JUDGMENT:—This is an application by the arbitrator Tikamdas Walabdas for an order that the time for making the award be extended by the Court under section 12 of the Indian Arbitration Act and for an order that the award to stand filed and be enforced as a decree under the provisions of that Act.

The reference to arbitration on which the award is based, is dated 21st January 1921 and is signed by one Doulatram Metharam, whom I shall refer as respondent No. 1, as attorney of the Trustees of the firm of Metharam Doulatram as the first party and one Doulatram Mayadas, whom I shall refer as respondent No. 2, on behalf of the firm of Mayadas Doulatram as the second party. The reference provided that the first party was claiming a sum of about Rs. 40,000 from the second party and that the second party disputed that so much was due by him.

The arbitrator has passed an award, dated 21st March 1922 for Rs. 49, 640-4-0 inclusive

of interest up to the date of the award in favour of the first party. It recites that the arbitrator held a sitting on the 17th March 1922 at his office in terms of his notice when respondent No. 1 was present on behalf of the first party and that the second party was absent, and that he proceeded with the matter *ex parte* and passed his award on consideration of the evidence produced before him.

Certain persons, other than respondent No. 2, were served with notices under O. XXX, b. 3, Civil Procedure Code as the responsible partners of the firm of Mayadas Doulatram. The parties have, however, agreed that the liability of persons other than respondent No. 2 may not be determined in the present proceedings and that the present inquiry be confined to the objection raised by respondent No. 2 which may be summarized as under:—

1. That respondent No. 1 has improperly procured the reference and the award as he failed to disclose the fact that he and the arbitrator were first cousins, and that the arbitrator has misconducted himself in entering upon such a reference without disclosing his relationship.

2. That the arbitrator has misconducted himself in not granting an adjournment to respondent No. 2 on the ground of his illness.

3. That the arbitrator was not in Karachi on 17th March 1922, the day fixed for hearing, and that the arbitrator should, under the circumstances, have given a further notice to respondent No. 2 before proceeding with the case.

4. That, the arbitrator has misconducted himself by awarding more than the amount claimed.

5. That, under any circumstances, this is a fit case for the Court to refuse to extend time for making the award.

The first objection. It is admitted that the arbitrator and respondent No.1 are first cousins being the sons of two brothers. It is also admitted that the respondent No. 1 is the chief person concerned in the claim. He carried on business in the name and style of Metharam Doulatram and that behaving failed in business has, with the concurrence of his creditors, appointed certain trustees who have in their turn appointed him as their attorney. The trustees have no personal interest in the matter. Respondent No. 2 states in his evidence that he came to know of the existence of the relationship between respondent No. 1 and the arbitrator after the award. The only witness examind on behalf of respondent No. 1 is the arbitrator, Tikamdas. Ex. 11, respondent No. 1 himself not having gone into the witness box. Tikamdas does not allege that he informed respondent No. 2 of the relationship either before or after the reference or that respondent No. 2 knew about it. He, however, states that he and respondent No. 1 carried on business in partnership about nine years ago, and that at that time the firm of Bharpurmal Mayadas, which subsequently adopted the name of Mayadas Doulatram has a commission agency account with his firm, and that respondent No. 2, his brothers and father knew then that respondent No. 1 was working as his partner. He has not produdced the account-books of his firm to show that the firm of Bharpurmal Mayadas or the firm of Mayadas Doulatram had an account with his firm or the extent of their dealings and states that the old books have been destroyed.

Respondent No. 2 has denied that his firm had any dealings with the firm of the arbitrator and has denied knowlege of the fact that respondent No. 1 did work for the arbitrator. I cannot hold on this evidence that respondent No. 2 did know that the arbitrator and respondent No. 1 were partners at any time. Even if it be assumed that they did work as partners, I cannot infer therefrom that respondent No. 2 knew that they were both closely related as well, or that the arbitrator would be interested in respondent No. 1, because nine years ago both worked as partners.

Respondent No. 2 belongs to the Punjab, and it is not at all likely that he would agree to refer such a large claim for Rs. 40,000 to the arbitration of respondent No. 1 who belongs to a different caste and a different place in Sind.

I am of opinion that it was incumbent on respondent No. 1 and the arbitrator to, disclose the existence of such close relationship between them to respondent No. 2. As said by Maclean, C.J., in *Kali Prosanno Ghose* v. *Rajani*

Kant Chatterjee (1): "In case of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure, which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made." In the case referred to above failure to disclose the fact that the arbitrator was the retained pleader of the plaintiffs was held to invalidate the award. In *Mahomed Wahiduddin* v. *Hakiman* (2) failure to disclose the indebtedness of the arbitrator to the party in whose favour the award was passed was held to invalidate the award. In *Turnbull* v. *Piperton* (3) (Canada) referred to in Vol. II of the British Empire Digest, page 549, the Court held that the fact that the arbitrator was a brother of one of the parties to the proceedings affords a real likelihood of an operative prejudice on the part of the arbitrator.

Whatever may be the effect of such relationship among other people, so far as the Hindus in Sindh are concerned, the fact that the arbitrator is related to one of the parties as his first paternal cousin does afford a real likelihood of an operative prejudice on his part and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. It is not necessary for respondent No. 2 to prove actual bias or partiality on the part of the arbitrator or to prove that the existence of this relationship had any operation on his mind, which is "for the most part incapable of evidence and may remain unknown to every human being, perhaps even unknown to himself per Stuart, V. C., in *Kemp* v. *Rose* (4). The rulings in *Bykunt Nath Mookerjee* v. *Prionath Ghose* (5) where the party objecting to the award knew of the arbitrator's relationship, or the rulings referring to the contracts for works or for supply of goods where the Engineer of the employer is named as an arbitrator in the Submission Clause contained in the contract and agreed to as a person not indifferent to the subject-matter of the dispute as in the case of the *Secretary of State for India* v. *Arathoon* (6) or *Jackson* v. *Barry Bail Co.* (7) have no bearing on the present case. A party who agrees with open eyes to abide by the decision of a person who, he knows, is not an indifferent person, cannot subsequently object to the award, unless he proves as a fact a good deal more than the existence of this relationship such as actual partiality.

As there is no evidence that respondent No. 2 knew of the existence of this relationship either before the reference or before the award, I am of opinion that the award must fail on this ground alone.

The second and third objections. There is no substance in the second and the third objection. By Ex. 6 the arbitrator had given clear notice to respondent No. 2 of his intention to proceed *ex parte* if he failed to make arrangements to appear on 17th March 1922. The arbitrator had a just cause to proceed with the matter. He had already granted several adjournments on the ground of illness. Though the arbitrator did not proceed on the day fixed, there was no obligation on him to issue a fresh notice for the date on which he actually held his sitting. No doubt in proceeding *ex parte* the arbitrator took the risk of his award being set aside by the Court if the respondent No. 1 could convince the Court that he had sufficient cause for his non-appearance. See *H. C. Whitehouse* v. *Messrs Kahn Kahn & Co.* (8). Respondent No. 1 has failed to show such cause.

I was not impressed with the manner in which either respondent No. 2 or his brother Dayaram gave evidence. There appears to have been some attempt on their part to delay the arbitration proceedings. Dayaram, Ex. 10, admits that he knew about the dealings which were the subject-matter of the reference and in a previous letter dated 28th July 1921

(1) 25 C. 141 at p. 144; 13 Ind. Dec. (N. S.) 97
(2) 29 C. 278; 6 C. W. N. 235.
(3) (1915) 8 W. R. 82 Cannada.
(4) (1858) 114 R. R. 429 at p. 435; 1 giff. 258; 4 Jur. (N. S.) 919; 32 L. T. (O. S.) 31; 65 E. R. 910.
(5) 22 W. R. 447.
(6) 5 M. 178; 2 Ind. Dn. (N. S.) 131.
(7) (1893) 1 ch. 238; 2 R. 207; 68 L. T. 472.
(8) 27 Ind. Cas. 135; 8 S. L. R. 110.

adjournment was asked for to enable him to appear at the hearing. He was not ill and could have attended. In his evidence he has stated that he could not attend on 17th March as his brother was dangerously ill. In his letter of 13th March 1922, however, he did not allege that his brother was dangerously ill or that he was prevented from attending the hearing by such illness, I disallow both these objections.

The fourth objection. Mr. Kimatrai has contended that respondent No. 1 only claimed a sum of about Rs. 40,000 in the reference. This is the maximum amount which he considered himself entitled to. If interest at the rate of nine per cent. is added on for fourteen months, the period which elapsed between the date of the reference and the award, the total sum due by respondent No. 2 would be Rs. 44,200 and not Rs. 49,640-4-0. The arbirtrator is guilty of partisanship in awarding to respondent No. 1 a sum of Rs. 5,440 more than his claim. There is a good deal of force in his contention specially as the arbitrator is related to the respondent No. 1. The correspondence leading up to the reference and the account-books of respondent No. 1 are, however, not before the Court. It is not impossible that the words "about Rs. 40,000" were used in the reference as indicating the approximate amount and not the maximum amount claimed by respondent No. 1. In the absence of evidence explaining the circumstances under which the words "about Rs. 40,000" were inserted in the reference, I am not prepared to hold as a fact that the arbitrator is guilty of partiality, though I consider that the award is open to grave suspicion and that I should take this circumstance into consideration in exercising my discretion under section 12 of the Indian Arbitration Act.

The fifth objection. The award has been admittedly made out of time. The arbitrator applied for an indulgence of the Court to extend the time for making the award and thereby to validate it. The Court must take into consideration all the circumstances of the case and decide if the arbitrator should be granted such indulgence: Cf. *Pamanmal Hemandas v. Hotanbai* (9). Though there is no conclusive evidence to accuse the arbitrator of partiality, his award is open to grave suspicion and I am not satisfied that it is a just award. There is another circumstance which shows that the Court should be more astute in granting the indulgence asked for by him. He has made a deliberately false statement in the award that he proceeded with the matter at Karachi on 17th March 1922, the date fixed by him for hearing, when respondent No. 1 was present and respondent No 2 was absent. This statement has been proved to be false by the postal acknowledgment, Ex. 7, which shows that he received the letter of Dayaram, brother of respondent No. 2, at Shikarpur on 18th March 1923 when it had been redirected from Karachi. Mr. Dipchand T. Ojha has admitted that the arbitrator was not at Karachi on the 7th March. The arbitrator has also admitted that he came back to Karachi on the 19th March after a stay of about fifteen days at Shikarpur. It is not certain if the arbitrator did hold a sitting after his return to Karachi and, if so, what transpired at such a sitting. The award is for a very large amount. Respondent No. 2's case has not been placed before the arbitrator. If extension of time is not granted respondent No. 1 is very probably not without a remedy and may be able to enforce his claim so far as it is just, as there is no express recital in the reference that respondent No. 2 admits that a certain amount is due by him and that the reference should operate as an acknowledgment under section 19 of the Limitation Act.

I think that, taking into consideration all the circumstances of the case, I should decline, in the exercise of my judicial discretion, to extend the time applied for.

I set aside the award both on the ground of misconduct of respondent No. 1 and the arbitrator in not disclosing their relationship to respondent No. 2 and on the ground of the award having been made out of time.

I order that the Trustees do bear the costs of Doulatram Mayadas, and that other persons who were served as the responsible partners of the firm of Mayadas Doulatram do bear their own costs.

S. D. *Award set aside.*

(9) 28 Ind. Cas. 85; 8 S. L. R. 269.

SATYA RANJAN NAG *v.* HABITICH CHANDRA PAL

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1918 OF 1921.
January 20, 1924.

Present :—Mr. Justice Suhrawardy.

SATYA RANJAN NAG—DEFENDANT—APPELLANT
versus
KABITICH CHANDRA PAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Decree passed against some defendants—Review-decree against other defendants—Former decree, whether affected—Decree against which appeal should be filed.

A suit was decreed against some defendants and was dismissed as against others. One of the former preferred an appeal against the decree. During the pendency of the appeal, the decree was modified on review at the instance of the plaintiff and the suit was decreed against the remaining defendants also. The appellant was not a party to the review proceedings and the judgment and the decree, so for as they related to him, were not affected by the review :

Held, that the only decree against which the appellant could appeal was the first decree which was passed against him and that he was not bound to appeal against the decree passed on review as he was not a party to or in any way concerned with that decree.

Case-law discussed.

Appeal against the decree of the Subordinate Judge, Dacca, dated the 4th July 1921.

Babu Gopal Chandar Das (with him *Babu Nikunja Behari Ghose*) for the Appellants—Somedates are necessary for the disposal of this appeal. The suit was for a right of way. It was decreed against some of the defendants on 15th April 1920. The decree was signed on the 22nd April 1920. An appeal was prefered on the 27th May. An application for review was filed by the plaintiff on the 15th June 1920. It is important to note that in the review application the present appellant was not a party. The review application was granted and the decree was modified, but that modification did not in any way touch the present appellant or the decree so far as he is concerned. When the appeal came on for hearing objection was raised that the appeal was not competent as it was preferred from the original decree and not from the modified decree. My submission is that the view of the lower Court was wrong. It is very important to note that in the review application the present appellant was not made a party. No notice was served on him at all and as such the reivew proceedings have no effect on the appellant's rights of appeal. *Brijbasi Lal* v. *Saliq Ram* (1) and *Kanhaiya Lal* v. *Baldeo Parsad* (2) have no application whatsoever. In those the review application made all parties. Now to take advantage of this review against others, to curtail the appellant's right of appeal, was against all principles of law.

Dr. Dwarka Nath Mitter (with him *Babu Narayan Chandra Kar*) for the Respondent.—The difference which my learned friend wants to make out, is really trivial and with much importance. Cited *Kanhaiya Lal* v. *Baldeo Parsad* (2). Moreover, the decree as such was not divisible at all. In an indivisible decree when it has been upset on review, the appellant should have preferred an appeal from the new decree. Instead of that the old decree is being appealed against. This is unwarranted by all.

Mr. *Das*, in reply, cited O XX, r. 7 ; O. IX, r. 13.

JUDGMENT.—The facts of this case are peculiar and give rise to an important question of law. The plaintiffs-respondents brought a suit against the appellant and several others for declaration of right of way. The suit was decreed against the appellant. but dismissed against the defendant Nos. 6, 7, 8 and 10 on the ground that summonses were not properly served on them. The appellant, who was the defendant No. 2 in the suit, preferred an appeal against the decree to the lower Appellate Court while the plaintiffs filed an application for review before the trial Court against that portion of the order of that Court which purported to dismiss the suit against the defendant Nos. 6, 7, 8 and 10. A few dates will be of importance in considering the question raised. The judgment was delivered on the 15th April, 1920 and the decree signed on the 22nd April 1920. The defendant No. 2 preferred an appeal to the lower Appellate Court on the 27th May 1920. The application for review by the plaintiff was granted by the trial Court on the 15th June 1920. The effect of it was that the order of dismissal of the suit against the defendant Nos. 6, 7, 8 and 10, was set aside and the suit against them also was decreed. This has resulted in a slight alteration in the judgment of the Munsif as well as in the decree so far as it related to defendant Nos. 6, 7, 8 and 10. The other

(1) 28 A. 210; A. W. N. 1905, 1265.
(2) 14 Ind. Cas. 472; 34 A. 282; 9 A. L. J. 188.

portion of the judgment and the decree in which those defendants were not interested were not altered. The appeal before the lower Appellate Court came on for hearing on the 4th July 1921. It was objected by the plaintiffs-respondents that the appeal could not proceed because the decree was modified on review and the appeal should have been against the altered decree, namely, the decree as it stood on the 15th June 1920. I may mention here that the plaintiffs have also appealed against the decree of the first Court on the ground that the suit against the defendants Nos. 6, 7, 8 and 10 was wrongly dismissed. The defendant No. 2 also objected at the hearing of the appeal that the plaintiff's appeal should not have been entertained as it was not preferred against the decree as modified by the review. Whether the defendant was right in his objection or not is not a question which should *not* affect the decision of the present appeal. The learned Subordinate Judge on appeal held that the appeal was incompetent inasmuch as the decree as amended on the 15th June had superseded the original decree and the appeal ought to have been preferred against the decree as amended. The Court of Appeal below has for its view re lied upon the cases of *Brijbasi Lal* v. *Salig Ram*, (1) *Kanahiaiya Lal* v. *Baldeo Prasad* (2).

It is argued on appeal that the view taken by the lower Appellate Court is wrong inasmuch as the amendment of the decree or the alternation made in it on the 15th June 1920 did not effect the appealing defendant. The defendant No. 2 (the appellant before us) was not made a party in the review proceedings. Under O. XLVII, r. 4, the opposite party had to be served with notice of the application for review and the opposite party in that application were the defendants Nos. 7, 8, and 10. The present appellant was not rightly made a party in the review proceeding because no relief was sought against him. It is argued on behalf of the respondent that the decree is indivisible and, however slight the alteration may be, and whether it affected the right of the appellant or not, the decree so subsequently altered must be taken to be the decree in the suit against which an appeal would lie under section 96, Civil Procedure Code. It appears that in this particular case the facts are totally different from those in the cases which have decided that the decree modified on review is the proper decree in the suit against which an appeal ought to be preferred. In the Allahabad cases above cited the application for review was directed against all the parties to the suit and the modification made in the decree affect all the parties to the suit. It may, therefore, be correct to say that the decree as modified on review was the decree in the suit. This view has been adopted also in this Court in case of *Pyari Mohan Kundu* v. *Kalu Khan* (3) But in the present case the circumstances were so peculiar as, in my opinion, to make the decision in the above cases wholly in applicable to the present case. Here, so far as the determination of the right between the plaintiff and the defendant No. 2 was concerned, the decree passed on the 22nd April 1920 was final between the parties and the amendment made in the decree on review did not touch that part of the decree which related to the appellant. It would, therefore, seem apparent that the decree, so far as defendant No. 2 (the appellant) was concerned, is the decree which was passed in the first instance by the trial Court. This question may be looked at from another point of view. If the question of limitation arises in the execution proceedings, from which date will the time be counted, whether as against defendant No. 2 it would be calculated from the date of the original decree or from the date of the modification made in the decree? It is not necessary for me to decide this question, but, on the view that I take, it seems to follow that, so far as defendant No. 2 is concerned, the period ought to be calculated from the date of the original decree. Some light on this subject may be obtained by a reference to the decision of the Full Bench in the case of *Benimadhav Mitter* v. *Matangin Dasi* (4). There the question directly arose as to what is the date of the decree. By section 205 of the Code of 1882 it was provided that the decree should bear the date of the day on which the judgment was pronounced. The section corresponds to O. XX, r. 7 of the present Code. The Full Bench held that though that is the date of the decree under the law, the date from which the period has to be computed for the purpose of the appeal from the decree must be the date on which the decree was signed. In the present case the decree still bears the date 15th of

(3) 41 Ind. Cas. 497; 44 C. 1011.
(4) 18 C. 104 F. B. Ind. Dec. (N. S.) 568.

April 1920, that being the date when the judgment was pronounced I submit that if a party who is not affected by subsequent proceedings wants to appeal against the decree the period must be computed from the date when the judgment was pronounced or the decree signed. I am prepared to go so far as to hold that if the present appellant had preferred on the last day an appeal from the decree as modified on the 15th June 1920 computing the period from that date the appeal would have been out of time.

It is contended by the respondent that the decree is indivisible. I do not think that there can exist no circumstance in which the decree could be divided. I can mention circumstances in which it is possible to divide up a decree. Take, for instance, a decree passed *ex parte* against A and B. A applies for re-hearing but B does not. The decree is not such as to be governed by the proviso to O. IX, r. 13. The effect of the revival of the suit on the application of A will be to set it aside in so far as it went against him. But the decree as against B will remain unaffected. Suppose the suit proceeds and the suit is decreed as against A also. Now, if A wants to appeal he must do it against the decree passed subsequently. But if B wants to prefer an appeal from the decree as against him, he cannot take advantage of the modification of the decree and the subsequent decision of the suit; but he has to prefer an appeal within the period of limitation reckoning from the date on which the *exparte* decree was made. So that it is possible that in one suit there may be different decrees against different parties from which different periods will be computed. Another instance may be found, where a suit is decreed against A and B. A appeals making the plaintiff the respondent to the appeal (the other defendant B not being a necessary party to it for the determination of the question raised in the appeal), and that decree against A on appeal is modified. The result will be that there will be two decrees one of the first Court against B and one of the Appellate Court against A. If the plaintiff wants to put into execution these decrees he must compute his period from the date of the decree of the Appellate Court as also from the date of the decree in the original suit. That a decree can be vacated or varied either in part or in its entirety is beyond dispute. In the case of *Bhubaneswari* v. *Ajodhya* (5) Mookerjee, J., observed that an application for review of judgment may be granted in part. It depends upon the circumstances of each case whether the whole suit should be reopened or whether it should be tried only in part. The same view has been adopted in the recent case of *Gour Krishna Sircar* v. *Nilmadhab Shaha* (6), in which all the cases on the point have been collected. The result of the view I take of the law in this case is that the judgment of the lower Appellate Court is wrong, and must be set aside.

The result, therefore, is that this appeal is allowed, the decree of the lower appellate Court set aside and the case remitted to it to be re-heard. The appellant is entitled to his costs in this Court.

Z. K. *Appeal allowed.*

(5) 11 Ind. Cas. 102 ; 15 C. L. J. 339.
(6) 73 Ind Cas. 34 ; 3 O. C. L. J. 484 ; (1923) A. I. R. (C) 113.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 13 OF 1919.

January 31, 1921.

Present :—Mr. Batten, A. J. C.

R. B. INDRARAJBHAU—APPELLANT—NON-APPLICANT

versus

SITARAM—RESPONDENT—APPLICANTS.

Civil Procedure Code (Act V of 1908) O. XLVII, r. 7 (1) (c)—Limitation Act (IX of 1908) s. 5, Sch. I, Art. 178—Review—Discovery of fresh evidence—Extension of limitation—Sufficient cause—Evidence discovered late:

Where a review is sought on the ground of discovery of fresh evidence, the fact that the evidence was discovered very late and could not, in spite of the exercise of due diligence, have been discovered earlier, may be a good ground for extending the period of limitation for applying for review under section 5 of the Limitation Act.

Gopal Narbar v. *Hanmant Ganesh*, 6 B. 107 ; 6 Ind. Jur. 313 ; 3 Ind. Dec. (N. S.) 529 ; *Bai Nemathu* v. *Bai Nematullahu*, 46 Ind. Cas. 14 ; 42 B. 295 ; 20 Bom. L. R. 484, distinguished.

R. B. INDRARAJBHAU *v.* SITARAM

Appeal against order of the District Judge, Bhandara, dated 10th March 1919.

Dr. *H. S. Gour*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge granting a review of judgment in suit No. 2 of 1915. The suit was brought by Sitaram against Brijlal for possession of the two villages of Pardibandh and Kindgipar. Sitaram claimed the villages on the ground that he was the nearest reversioner of one Chaitram who was the last male holder of the villages and who held them as protected thekadar. R. B. Indraraj Singh who was the superior proprietor, being the *Zemindar* of the estate in which the villages lie, was also impleaded as a defendant. Sitaram failed to produce satisfactory evidence in proof of his relationship with Chaitram and his claim was dismissed by the then District Judge on the 27th of June 1915. On the 31st of October 1916 Sitaram applied for a review of the judgment on the ground that he had discovered new and important documentary evidence which would conclusively establish that he was the nearest *sagotra sapinda* of the deceased Chaitram. The review was granted and as a result Sitaram has won his case. R. B. Indraraj Singh did not oppose the application for review which was, however, opposed by Brijlal. Both Indraraj Singh and Brijlal have appealed against the order granting the review, the appeal of Brijlal being Miscellaneous Appeal No. 23 of 1919. The judgment in this case governs that appeal. In his affidavit accompanying his application for review Sitaram stated that during the pendency of the suit in spite of his effort he could not discover any documentary evidence to establish his relationship with Chaitram. He goes on to say that on the 28th October 1916 he was told by Kisan *alias* Bapu that some documentary evidence had been brought in a suit brought by Indraraj Singh against Brijlal (this suit was brought by Indraraj Singh against Brijlal for possession on two grounds that he was the superior proprietor and that he was a nearer relation of Chaitram then Brijlal was), Sitaram accordingly left his village on the 28th October 1916 and reached Bhandara on the 29th October where on enquiry he found that the information given him by Bapu was correct. On the 30th, Monday, he applied for copies of the papers from the Deputy Commissioner's office and got copies of the papers and a copy of the genealogy the same day and filed his review application on Tuesday the 31st. It is obvious that after getting the information there was no delay at all on the part of Sitaram in making the review application. The grounds of appeal are based on the delay prior to the 28th October 1916. The documents produced on which the review was granted were all records of the proprietary settlement made in 1863. Of the four documents the most important is a genealogical tree which entirely support Sitaram's case. There can be no doubt that the result of the granting of the review has been to decide the case according to the real facts. It is not denied in appeal that the documents were of the utmost importance and that if the other essentials for the granting of a review were present the importance of the documents warranted the action taken. The normal limitation for an application for review is 90 days from the date of the decree. The last natural date for filing the review application would thus have been 19th September 1916 but the application was, as a matter of fact, made 13½ months later. No copy of the decree was filed, and there was no time to be deducted under section 12 of the Limitation Act. It being admitted by Sitaram that he made no attempt to search Settlement *misl* during the progress of his suit or after the case was decided against him because of the want of documentary evidence, it is urged in appeal that he showed no due diligence at all either during the progress of the suit, or after its dismissal on ground which should have put him on enquiry at once for documentary evidence. Indraraj Singh brought his suit against Brijlal, Suit No. 23 of 1915, after the dismissal of Sitaram's suit all the four documents were filed dy Indraraj Singh in Suit No. 23 before the end of 1915. It is urged that as Indraraj Singh had taken the trouble to consult the Settlement *misl* Sitaram should have taken the same trouble himself as the two villages for which he was suing were the same as the villages sued for by Indraraj Singh and that Sitaram cannot ask to take advantage of a discovery by one of the defendants in his own suit which discovery he ought to have made himself. It is further urged that it was the obvious thing to do for Sitaram to consult

the Settlement *misl.* of the first Settlement since genealogies and statements as to relationship are usually to be found in such records.

Stated in this way, it looks as if there had not been due diligence on the part of Sitaram. But there are additional facts which put a different complexion on the matter. The evidence of Mr. Gangadhar Balwant Gokhale who was the pleader of R. B. Indraraj Singh in the suit brought by him gives important details. After the failure of Sitaram's suit, on the evidence of some of the witnesses in the case it struck Mr. Gokhale that Indraraj Singh himself might be a nearer relative to Chaitram than Brijlal was, and he got from Indraraj Singh the names of villages in the *Zemindaris* held by Dodhi families, and in the Settlement Records of Umri he found the relevent papers including the genealogy. Now the only two villages in which Sitaram is interested are Pardibandh and Kindgipar. Umri had also belonged to the family, but is stated in this Court and not denied that Chaitram's mother surrendered Umri 8 years ago. There was nothing to help Sitaram in the records of Pardinandh and Kindgipar; the genealogy, etc., were produced at the time of the Umri Settlement because there was a dispute about that village, and, as far as we know, there was no dispute about other villages. Mr. Gokhale appeared for Indraraj Singh in the suit by Sitaram in which Indraraj Singh was joined as a formal party, and it never struck Mr. Gokhale until after that suit was over that the Settlement Records of some village might possibly throw light on the situtation, and even then it involved much research to get the information. Indraraj Singh did not oppose the review application, and he has throughout been financing Sitaram. It is not quite clear what interest Brijlal now has in the matter as Indraraj Singh has since ousted him by suit. It also appears that it was Mr. Gokhale who gave Bapu the information which Bapu passed on to Sitaram. Sitaram is illiterate. Brijlal who is literate admits that he himself had no idea that evidence as to relationship could be found in the Settlement Records.

It is argued for the appellants that as the new evidence was not discovered by Sitaram's own diligence, but accidentally, he showed no due diligence at all within the meaning of r. 1 of O. XLVII. I am, however, of opinion, under the circumstances, that Sitaram could not be expected to know that documentary evidence as to relationship was to be found in the Settlement Records of Umri, and that it cannot be said that with due diligence he could have discovered the evidence before it was disclosed to him. I hold that Sitaram has strictly proved that the new evidence was not within his knowledge and could not be produced by him when the decree was passed, within the meaning of r. 4 (2) (b) of O. XLVII. It appears to me that if ever there was a case for review, this was one.

There remains the question whether the lower Court acted rightly in granting the review application after the expiration of the period of limitation or whether it acted without sufficient cause, see r. 7 (1) (c) of O. XLVII.

There are very few reported cases of the application of section 5 of the Limitation Act to review applications. The cause of the delay in applying for review was identical with the ground for review, namely, that the new evidence had not been discovered before. In *Gopal Narhar* v. *Hanmant Ganesh* (1), the mere fact that the application for review was made 18 months beyond limitation was not the only ground for rejecting the application; it was rejected mainly on the merits though the lateness of the application was also taken into consideration. The case sought to be supported by the new evidence was a new case. In *Bai Nematbu* v. *Bai Nematullabu* (2) the delay was after the discovery of fresh evidence and was excused on other grounds than the delay in discovering the fresh evidence. But there is no warrant for supposing that the sufficient cause mentioned in section 5 of the Limitation Act may not include the late discovery of the new evidence on which the application for review was granted. I will not go so far as to say that where there are good grounds for granting review on the discovery of new evidence, those grounds will always be also sufficient for admitting the application after the period of limitation, provided that there has been no delay in making the application after the

(1) 6 B. 107; 6 Ind. Jur. 313; 3 Ind. Dec. (N S.) 529.

(2) 46 Ind. Cas. 14; 42 B. 295; 20 Bom. L. R. 434.

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discovery. But I do hold that the grounds for granting review on account of the discovery of fresh evidence may in certain cases be a ground for also extending time under section 5 of the Limitation Act, and this case is, in my opinion, eminently such a case, especially as limitation about the villages in suit was still progressing when the application for review was made.

For these reasons the appeal is dismissed with costs. Counsel's fee Rs. 25.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND APPEAL No. 262 OF 1924.

Court fee matter.

February 15, 1924.

Present:—The Hon'ble Mr. Justice Dass and The Hon'ble Mr. Justice Ross.

DASARATE MESHY AND OTHERS—APPELLANTS

versus

JAY CHAND SUTRADHAR AND OTHERS—RESPONDENTS.

Court fees—Two alternative reliefs prayed for—Court-fee payable.

Where two reliefs are identical in actual money value but different in respect of the Court-fee leviable in each, then the Court-fee is payable on the relief carrying the higher Court-fee.

Kashi Nath Narayan v. *Govinda*, 15 B-82 ; 8 Ind. Dec. (N.S.) 56, referred to.

Mr. *S. K. Mitra*, for the appellants.

Government Advocate for Crown.

STAMP REPORTER'S REPORT.—This was a suit for certain reliefs in the alternative. One relief sought was for possession of Schedule IV land and the alternative to this relief was a declaration that defendant No. 5 was a tenant under the plaintiffs for the said land. As an alternative to the above reliefs a prayer for partition of Schedule I land *minus* the Schedule II land was made. The suit was valued at Rs. 49 and a Court-fee of Rs. 3-12-0 was paid on the plaint. The suit was dismissed. The plaintiffs appealed and valued their appeal to the lower Appellate Court at Rs. 49 and paid a Court-fee of Rs. 3-12-0 in the lower Appellate Court. The appeal having been dismissed they have preferred this second appeal valued at Rs. 49 and stamped with a Court-fee of Rs. 3 12-0. The Court-fee paid in each of the three Courts is insufficient. It is a settled law that where the plaintiff sues in the alternative for one of two reliefs the larger of the two reliefs sought determines the amount of the stamp: *Kashinath Narayan* v. *Govinda* (1) and *Mukhlal Gir* v. *Ramdheyan Rai* (2) a Patna case. The stamp for the relief for possession in the present suit is Rs. 3-12-0 only. The stamp for the relief for the declaration or the partition is Rs. 15. Therefore, the relief for the declaration or for the partition is larger than the relief for possession. Therefore, the Court-fee leviable in each Court is Rs. 15. Rs. 3-12-0 having been paid, the plaint, the memo of appeal to the lower Appellate Court and this memo of second appeal are insufficiently stamped by Rs. 11-4-0 each, total Rs. 33-12-0. This is due from the plaintiffs-appellants.

If the appellants can show that the plaint was filed before 24th August 1922 the deficit on the plaint will be Rs. 6-4-0 only and the total deficit due from them will be Rs. 28-12-0.

Order of Registrar.—This is a Court-fee matter.

The learned Vakil disputes the Stamp Reporter's note arguing that, because the value of the relief for partition cannot anyhow exceed the value of the relief for exclusive possession, the relief for partition is not the higher of the two reliefs and that, therefore, the principle that Court-fee is payable on the higher of two reliefs does not apply in this case. If this were so, then the appellant would escape paying Court-fee on the relief for partition and I cannot interpret *Kashinath Narayan* v. *Govinda* (1) in this way. I prefer to interpret it as implying that where two reliefs are identical in actual money value, but different in respect of the Court-fee leviable on each, then Court-fee is payable on the relief carrying the higher Court-fee ; this is in accordance with the practice of this Court and with Desai's Court-Fees Act page 95, 5th Edition, and the cases cited there.

(1) 15 B. 82 ; 8 Ind. Dec (N.S.) 56.
(2) 44 Ind. Cas. 148.

I, therefore, hold that Rs. 15 is the Court-fee leviable on this memorandum of second appeal. Rs. 3-12-0 having been deposited, the memorandum of appeal is insufficiently stamped by Rs. 11-4-0. There is a similar deficiency on the memorandum of appeal to the lower Appellate Court as also on the plaint.

If the deficit Court-fees be not paid in on or before the 23rd instant place before the Bench for orders.

Order of Court.—The view taken by the learned Registrar is perfectly right. The deficit Court-fee must be made good within a fortnight from to-day, failing which the appeal will stand dismissed without further reference to the Bench.

S. D. *Reference answered.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 786 OF 1922.

November 22, 1923.

Present:—Mr. Justice Kanhaiya Lal.

RAJRANGISINGH—PLAINTIFF—APPELLANT

versus

SHEO BARAT—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901) *ss.* 20, 31—*Occupancy holding—Mortgage created by tenant—Death of tenant—Resumption by landlord—Mortgagee, position of.*

Where on the death of an occupancy tenant without heirs, the landlords become entitled to resume the occupancy holding they can only do so subject to the rights created by the deceased tenant which the landlords failed to challenge within the period allowed by law. So that, if the holding is in possession of a mortgagee from the tenant, whose mortgage was not challenged by the landlords within one year of its creation, the landlords cannot resume possession of the holding without paying off the mortgagee. On the other hand, the mortgagee cannot set up a title by adverse possession against the landlords.

Second appeal against the decree of the First Additional District Judge of Gorakhpur, dated the 25th of January 1922.

Mr. *Harnandan Prasad*, for the Appellant.

Messrs. *Jang Bahadur Lal* and *S. P. Sinha*, for the Respondent.

JUDGMENT:—The dispute in this appeal relates to an occupancy holding which belonged to Bhukal, who died leaving a widow Mt. Lachminia In 1314 F. Mt. Lachminia mortgaged the said holding with possession in favour of the defendant-respondent, Sheo Barat-ahir, for Rs. 49 on an agreement to redeem the same in Baisakh 1316 F. she did not, however, pay the mortgage money. In March 1913 Mt. Lachminia died. The plaintiffs and another person named Nath Baksh, who are the co-sharers of the village in which the occupancy holding in question was situated, then sued for the ejectment of the mortgagee in the Revenue Court, alleging that the mortgage was invalid and that the mortgagee held the land as a non-occupancy tenant. The trial Court found that the mortgage in question was executed to pay arrears of rent due to the co-sharers by Mt. Lachminia, and that the mortgagee had paid the rent for three years as *nazrana* to Nath Baksh in order to obtain his consent to the mortgage. It was also found that Nath Baksh attested the mortgage in evidence of his recognition of its validity and that the then plaintiffs were estopped from suing for the ejectment of the mortgagee without paying the mortgage-money. On appeal that decision was upheld. In the course of his judgment the learned Commissioner who heard the appeal observed that it was unlikely that the mortgagee would have paid the rent for three years in a lump sum to occupy fields on a tenure that was liable to be terminated at any moment by the death of Mt. Lachminia and that the view taken by the learned Assistant Collector as to the nature of the agreement entered into was reasonable. He further observed that the receipt of rent for three years by the *Zemindar* carried with it an agreement that the position of the mortgagee should be that of a mortgagee holding on terms, which, although they did not actually confer occupancy rights, precluded the *Zemindar* from ejecting him.

In the present suit, which has been filed by some of the then plaintiffs, it is contended that they were not bound by the action of Nath Baksh and that the mortgage was invalid and not binding on them. An attempt is now being made to treat the mortgagee as a trespasser from the time of the death of Mt. Lachminia. The Court of first instance found that

the plaintiffs could not eject the mortgagee without paying the money due on the mortgage inasmuch as Nath Baksh had consented to the mortgage and the other co-sharers had allowed the mortgage to remain unchallenged for 78 years even after the death of the mortgagor. It awarded the plaintiff a decree accordingly for possession subject to the payment of Rs. 49 to the mortgagee on account of the money due on the mortgagee The lower Appellate Court, however, treated the decision of the Revenue Court as precluding the plaintiff altogether from seeking the ejectment of the mortgagee and estopping him from seeing to eject the mortgagee as if he were a mortgagee (*sic*) or trespasser.

The latter view cannot, however, be upheld The decision of the Revenue Court *qua* the status of a tenant is binding on the Civil Court ; but the effect of the decision of the Revenue Court was not to give the mortgagee a permanent tenure but to recognise his rights as such mortgagee in consequence of the consent which Nath Baksh had accorded to the mortgage by the acceptance of the rent for three years from the mortgagee at the time of the mortgage. Section 20 of the U. P. Tenancy Act (Act III of 1901) declares that the interest of an occupancy tenant is not transferable except by a voluntary transfer between the co-sharers of the tenancy. Section 31 lays down that every transfer made by a tenant in contravention of that Act shall be voidable at the instance of the landholder and the latter can sue for the cancellation of the same and for the ejectment of the tenant and his transferee. The period of limitation provided for such a suit is one year from the date of such transfer. Nath Baksh, one of the co-sharers, is found to have expressly assented to the mortgage by accepting rent from the mortgagee and attesting the mortgagee. He was probably acting on behalf of the entire co-parcenary body, and even if he has not so acting the right of the others co-sharers to challenge the validity of the mortgage expired with the lapse of the period of limitation provided for that purpose, The decision in the Revenue Court did not have the effect of investing the mortgagee with complete immunity from ejectment except for the period the mortgage subsisted. When Musammat Lachminia died without leaving any heirs the co-sharers became entitled to resume the occupancy holding subject to such rights as had been created by *Musammat* Lachminia in her life time. They are not entitled to larger rights than those which Mt. Lachminia herself possessed at the time of her death and they can only get back possession on paying the money due on the mortgage, the validity of which they omitted to challenge during the time allowed by law. It is as little open to the co-sharers to treat the mortgagee as a trespasser in the face of the decision which was arrived at in the previous ejectment-proceeding as it is for the mortgagee to set up adverse possession in the face of that mortgage.

The appeal is, therefore, allowed and the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout. The time for the payment of the mortgage-money will be extended till the end of Baisakh mite.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 180 OF 1922.

November 14, 1923.

Present :—Mr. Prideaux, A. J. C.

MAHADEO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SONBA—DEFENDANT—RESPONDENT.

Lambardar-*Occupancy rights, surrender of—Co-sharers, claim by, in respect of their shares, Delay, effect of—Discretion of Court—Appellate Court, interference by.*

When a tenant surrenders his occupancy rights to a co-sharer *Lambardar*, the other co-sharers if they wish to recover their shares in the fields surrendered, on payment of a proportionate share of the expenses of acquisition, must prefer their claim without unreasonable delay. Such a claim is a merely equitable one and is within the discretion of the Court to grant or to refuse, and unless there is something wrong with the manner in which that discretion has been exercised, it is unusual to interfere with it in appeal.

When such a claim was preferred more than three years after the date of the surrender and the *Lam-*

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bardar had, in the meantime, spent money on the land and leased it out to a tenant;

Held, that the delay was unreasonable and that the lease granted by the *Lambardar* was binding on the co-sharers.

Appeal against the decree of Additional District Judge, Chanda, in appeal No. 80 of 1921 decided on 23rd December 1921.

Mr. *V. R. Pandit*, *R. B.*, for the Appellants.

Mr. *D. W. Kathalay*, for the Respondent.

JUDGMENT.—The defendant in this case is the co-sharer *Lambardar* of Mouza Wandli in the Warora Tahsil, while the plaintiffs Nos. 1 and 2 are co-sharers in same village, each owning a four-anna share. One Bhadu was the tenant of occupancy field No. 1, area 30-35 acres and rental Rs. 15 of the above Mouza. He surrendered it to the defendant under a deed of surrender dated 20th April 1917. Plaintiff's story is that the defendant refused to give them their half share in the field in spite of their willingness to contribute their quota towards the reasonable expenses of the acquisition of the field. The defendant contended that he had paid to Bhadu Rs. 592 on a bond in consideration of which the field was surrendered. Other pleas were raised which are unnecessary to be considered in this second appeal.

The first Court's finding may be summarised as follows. Bhadu surrendered the field for the consideration of Rs. 592. Plaintiffs refused to keep the half of the field and contribute their share of the expenses. The defendant leased the field to one Jagannath before he received the notice from the plaintiffs telling him not to deal with the land. The defendant spent some money on improving the field but what the exact amount was was not established. The suit resulted in the trial Court in a dismissal, it being further held that the lease granted by the *Lambardar* was binding on the plaintiff and that the plaintiffs had made unreasonable delay in bringing the present suit.

Though the lower Appellate Court did not agree with the first Court in all its conclusions, still, on the authority of *Ramdayal* v. *Gulabia Bai* (1), it held that there had been unreasonable delay by the plaintiffs in bringing the suit and confirmed the dismissal.

(1) 4 N. L. R. 129.

The argument in this Court has principally been that what has been decided in the above quoted case is that a claim must be advanced without unreasonable delay, and if the co-sharers tell the actual person who has accepted the surrender or the co-sharer purchaser of the field that they intend to demand their share, and if such information is conveyed within a reasonable time, the principle enunciated in *Ramdayal* v. *Gulabia Bai* (1) has been complied with. It is contended that the delay does not mean delay in bringing the suit. In this case the delay between the plaintiffs' knowledge of Bhadu's surrender and the bringing of the suit is some three years and eight months. The claim is a claim in equity within the discretion of the Court to grant or refuse, and I think must be advanced without unreasonable delay. It is laid down in many cases that the discretion to be exercised in the claim in equity is a judicial discretion, and unless there is something wrong in the manner in which the discretion has been exercised, it is unusual to interfere with such discretion. Here, the plaintiffs, though they may have told the defendant that they meant to claim their right, allowed the defendant *Lambardar* to spend money on the land and gave him time within which he leased it to a tenant; and I think it has been rightly held that, if the plaintiffs did intend to enforce their rights in a Civil Court, they should have done so earlier.

I decline to interfere with the discretion exercised by the two Courts below. The result is that this appeal fails and is dismissed with costs. The appellants will pay the respondent's costs.

Z. K. *Appeal dismissed.*

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SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 12 AND 48 OF 1921.

November 26, 1923.

Present.—Mr. Kincaid, J. C. and Mr. Aston, A. J. C.

FIRM OF JOSSOMAL VALIRAM—APPELLANTS

versus

No. 12. CHELLARAM BHOJRAJ—RESPONDENT.

No. 48. VIRJI PREMJI—RESPONDENTS.

Appeal—Findings of fact—Evidence—Findings of fact—Interference by Appellate Court—Trial Judge's verdict whether should be lightly disregarded.

On appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But, generally speaking, it is undesireable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of the conflicting witnesses. Nor should his pronouncement with respect of their credibility be put aside on mere calculations of probabilities by the Court of Appeal. There is no restriction on the descretion of the Appellate Courts in the consideration of the evidence but where the issue is simple and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded.

The Bombay Cotton Manufacturing Coy., Ltd v. *Raja Bahadur Shivlal Motilal*, 29 Ind. Cas. 229 ; 17 Bom. L. R. 455; 19 C. W. N. 617; 17 M. L. J. 408 ; 28 M. L. J. 593; 21 C. L. J. 528 ; 2 L.W. 521; 39 B. 886; (1915) M. W. N. 788 ; 42 I. A. 110 (P.C.), relied upon.

Appeal from the judgments and decrees of the Additional Judicial Commissioner, dated the 13th December 1920 and 5th May 1921, respectively.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Respondents, absent and *ex-parte*.

JUDGMENT.—Appeals 48 and 12 of 1921 have been both argued together by Mr Kimatrai, who appeared for the appellants, the firm of Jessomal Valiram, in both cases.

The facts are common, namely, that one Jessomal owned a building in which Virji, the respondent in appeal No. 48, and Chellaram, respondent in appeal no 12, had leased tenements. Jessomal wished to evict these two tenants and brought suits against them in this Court of Additional Judicial Commissioner. His grounds were three, namely : (1) alleged non-payment of rent ; (2) alleged need of the premises for his own *bona fide* use, and (3) misbehaviour of the tenants to such an extent as to create a nuisance. The learned Additional Judicial Commissioner disbelieved the evidence led by Jessomal. He held that the tenants had tendered such rent as was due from them, that the premises had never been required by Jessaram for his own *bona fide* personal use, and that the defendants never misused the premises in such a way as to create a nuisance. He, therefore, dismissed both suits.

Against these two decrees Jessaram has lodged the present appeals, Mr. Kimatrai argued them on his behalf. The respondents were not represented.

The learned pleader very frankly informed the Court that he did not propose to press point No. 3. We have, therefore, only to consider the two other points argued by the learned pleader. Now, in the first place, it must be remembered that the matters on which the learned Additional Judicial Commissioner's decision turns were matters of fact and in no way matters of law. It has long been the practice of the Appellate side of the High Court of Bombay not to interfere, save in very rare cases, with the findings of fact of Judges of the High Court sitting on the Original side. This practice was approved and departure from it condemned in the case of the *Bombay Cotton Manufacturing, Co., Limited* v. *Raja Bahadur Motilal Sivlal* (1). The observations of their Lordships of the Privy Council were as follows:—

"The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But, generally speaking, it is undesirable to interfere with the findings of the fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting

(1) 29 Ind Cas. 229 ; 17 Bom. L. R. 455 ; 19 C. W. N. 617 ; 17 M. L. T. 408 ; 28 M. L J. 593 ; 21 C. L. J. 528 ; 22 L. W. 521 ; 39 B. 886; (1915) M. W. N. 788 ; 42 I. A, 110. (P. C.)

their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect of their credibility be put aside on mere calculations of probabilities by the Court of appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of the evidence. They only wish to point out that, where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded."

Following the principle laid down by the Judges of the Privy Council for the guidance of the Higher Indian Courts, we are not disposed to interfere with the findings of fact arrived at after careful consideration by the learned Additional Judicial Commissioner.

We dismiss both the appeals and comfirm the findings and decree of the lower Court.

P. B. A. *Appeals dismissed.*
S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 80 OF 1922.

November 26, 1923.

Present:—Mr. Baker, Offg. J. C. and Mr. Hallifax, A. J. C.

RADHABAI—APPELLANT—DEFENDANT—*versus*
PANDURANG AND OTHERS—PLAINTIFFS RESPONDENTS.

C. P. Tenancy Act (XI of 1898)—Lambardar—*Tenancy created by* Lambardar, *whether can be challenged—Consideration for lease, failure to pay, effect of.*

It is impossible to challenge a tenancy purporting to have been created by the *Lambardar* more than a quarter of a century ago, except on the allegation that it never was in fact created and that the transaction was a mere pretence on paper and that the ostensible tenant has never had possession of the land. If the *Lambardar* did in fact create the tenancy, the question of the actual payment of the consideration for the lease does not arise.

Messrs. *W. H. Dhabe, and K. A. Potay,* for the Appellant.

Dr. *H. S. Gour and* Mr. *V. R. Pandit, R. B.,* for the Respondents.

JUDGMENT.—This appeal by Radha Bai, the third defendant in the case, like that of the fifth defendant Bansidhar (F. A. No. 86 of 1922), must fail in respect of the grounds which it has in common with that of the first defendant Jageshwar Pant (F. A. No. 88 of 1922), but it is hardly contended that it is not bound to succeed otherwise. The portion of the property in dispute is occupancy fields in Vihirgaon and a house and *kotha* and a well situated in one of them. The numbers and areas of the fields are 9 (3-23), 70 (10-48), 93 (10-16) and 100 (29-36). Little or nothing has been said about the title to the house and well and it is apparently agreed that they go with the field in which they are situated.

Fields No. 93 and No 100 with two others formed an absolute occupancy holding which Jageshwar Pant bought for Rs. 2,000 on the 27th of May 1904, and on the 24th of November 1905 he conferred, or at least purported to confer, occupancy rights in them on Radha Bai on a rental of Rs. 46 which was that previously paid by the absolute occupancy tenant by a deed which recites that Radha Bai had paid him a *nazarana* of Rs. 155, or two-and-a-half times the rental. The lease is Exhibit P. 72 and by mistake shows field No. 93 as field No. 91. The entry of the two fields as *khudkasht*, which was made in 1904-05, was allowed to stand till 1908-09, but was corrected in 1909-10, and since then Radha Bai has been shown as the occupancy tenant. The other two fields, No. 9 and No. 70, were similarly made over to her by Jageshwar Pant by a deed dated the 11th of March 1912 on a rental of Rs. 24 for a *nazarana* of Rs. 60.

It is impossible to challenge tenancies purporting to have been created as long ago as these except on the allegation that they never were in fact created and each transaction was a mere pretence on paper and the ostensible tenant has never had possession of the land. The question of actual payment of the consideration for the lease does not arise, as if the Lambardar did in fact make Radha Bai a tenant it does not matter whether she paid him anything or not, nor indeed would it make

any difference if he made a false statement of receipt of payment in the deed. As to possession, there is the strong evidence of the village papers, which does not stand alone, to show that Radha Bai has had possession of the fields and enjoyed the income of them ever since she was made an occupancy tenant and there is no evidence whatever to the contrary.

All that could be urged on behalf of Pandurang here was that the absence of good faith in the original transaction was proved by the admission of Jageshwar Pant in his position that he gave the fields to Radha Bai to save them from the clutches of his son. Now, Pandurang was only 11 years old in 1904, not more then 19 in 1912, so that even if his father had said such a thing it would be no more probable than all the rest of the mass of imbecilities of which his deposition consists. But he did not say it. What he said was, that the fact that the fields stood recorded in the name of his mistress Radha Bai would not save them from the clutches of his son.

The tenancy rights in the four fields and the right in the well and the house and *kotha* are clearly not a part of the property liable to partition. The decree of the lower Court will, therefore, be modified by the removal from it of the list attached to it as Schedule P. 2. The respondent Pandurang will pay all the costs incurred by the appellant Radha Bai in this and in the lower Court. The remaining respondents will pay their own costs in this Court.

The Pleader's fee payable to Radha Bai, in the schedules of costs of both Courts, will, however, be calculated on Rs, 2,000 only. The sum of Rs. 18,000 stated in the petition of appeal as the value of the relief sought, and so accepted in the decree of the lower Court for the calculation of the pleader's fee, is that of the quarter share in the property of which partition has been decreed in favour of Pandurang. But Radha Bai is concerned with nothing but the tenancy rights in four fields of about fifty acres and a well and a house and *kotha*. The value of this property is stated in the plaint to be Rs. 2,000 and though that is very probably the value of the full proprietary rights in it, for want of further information, we can only take it as the value of the relief claimed and obtained by Radha Bai in this appeal.

A cross-objection was filed by the plaintiff Pandurang, but as it was not mentioned in argument, and we cannot even understand it without explanation, the only order we can pass is that it is dismissed and the respondent Pandurang must pay all the costs incurred in connection with it.

Z. K. *Decree modified.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 55 OF 1922.

October 12, 1923.

Present:—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Waller.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

N. RAJABADHAR PILLAI (MINOR) BY GUARDIAN P. DORAIKANNU PILLAI —RESPONDENT.

Hindu Law—Joint Family—Managing member, rights and duties of—Misappropriation, what constitutes—Partition—Right of residence, nature of.

Under the Hindu Law, a managing member is not bound to give a general account of his dealings and, in the absence of fraud or misappropriation, he cannot be called upon to justify his past transactions. He is not bound to keep general accounts and co-parceners cannot complain if he, in his discretion, favours in his expenditure one of the co-parceners at the expense of the other.

In this matter there is no difference between the position of an infant co-parcener and another.

Capital monies proved to have come into the hands of a manager must be considered as available for partition in the absence of evidence showing what has happened to them.

In this connection, misappropriation by a manager means nothing more than the expenditure by him of the money on other than justifiable family expenses.

But when assets are traced into the hands of the managing member, he is bound to account for them on partition whether the co-parceners are minors or majors It is not enough for him to say that he has no longer got these assets.

The right of members of a joint family to residence in a particular house is not a right *in rem*. It is true that while it is being used as a family house, they have a right to reside there. But on partition, it is clearly a matter for the tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not.

OFFICIAL ASSIGNEE OF MADRAS *v.* RAJABADHAR PILLAI

Quaere, whether members of a joint family have a right on partition to any particular separate room in a family house.

Balakrishna Aiyar v. *Muthuswamy Aiyar*, 8 Ind. Cas. 878; 32 Mad. 271; 15 M. L. T. 145; 19 M. L. J. 70; *Kodali Kristnayya* v. *Kodali Guruvayya*, 41 M. L. J. 503 and *Tammi Reddi* v *Gengu Reddi*, 70 Ind. Cas 146; 45 Mad. 281, (1921) M. W. N. 742; 14 L W. 668 followed.

Appeal from the decree of the Honourable Mr. Justice Krishnan, dated the 21st March 1922.

Mr. *T. L. Venkataramier*, for the Appellant.

Messrs. *P. Venkataramana Rao*, *N. K. Mohanarangam Pillai* and *N. Damodaram Naidu*, for the Respondent.

JUDGMENT.

The Chief Justice.—This is an appeal from the judgment of Krishnan, J., in a partition suit from so much of his decree as directed that the first defendant should account for a sum of Rs. 6,500 shown to have come into his hands as a part of the joint family assets. The 1st defendant was the manager of a joint Hindu family governed by the Mitakshara Law, the other persons interested being a minor brother, and their mother and sister who were entitled to rights of maintenance. The 1st defendant has become an insolvent and the Official Assignee of Madras on behalf of his creditors represents his interest. The facts, so far as they are relevant, are that Rs 6,500 which formed part of the ancestral property were deposited in a Bank and, some years ago, drawn out by the 1st defendant. Of that amount Rs. 2,500 were deposited with Messrs. Beardsell & Co., as security for the honesty of the 1st defendant who was entering the service of that firm as Cash-keeper. The balance has disappeared. There was a suggestion that it was used by the first defendant for purposes of his own marriage or other legitimate family expenses. But this was negatived by his mother who stated that she had found the necessary money for the marriage and by the fact that the sums were drawn out sometime after the marriage, and no evidence was forthcoming of any other necessary family expenditure which could not be met out of the income. The 1st defendant was not called as a witness. It was suggested that he was helping his relations as against his creditors which might account for the Official Assignee not calling him as a witness. But all his affairs were in the hands of the Official Assignee who had every opportunity of examining the insolvent and ascertaining the true facts. The money was drawn by the 1st defendant in 1914. In 1918 he was found to have committed defalcations in his office of Cash-keeper to Messrs. Beardsell & Co., amounting to Rs. 15,000. It is possible that the balance of the money so drawn out by the 1st defendant was invested in some other manner. At the time, he told his mother that he was lending a large part of it to a Muhammadan, a business man; but there is no evidence that this loan is still outstanding, and it is much more probable that it was ultimately used to meet the defalcations is Messrs. Beardsell & Co., or to meet the 1st defendant's losses in some unfortunate speculations which led to his making away with this large amount of Beardsell's money.

The learned Judge has held that the 1st defendant has received these moneys and has not accounted for them except as to the Rs. 2,500 mentioned. He has held, further, that it is a rule of Hindu Law that a co-parcener upon partition is not entitled to call upon the managing member to render an account of his past management so as to debit him with any loss caused to the joint property by his management but can only get his share in the properties available for division at the time of partition, and for this proposition he quotes *Balakrishna Aiyar v. Muthuswamy Aiyar* (1) and *Kodali Kristnayya v. Kodali Guruvayya* (2). He points out that there is an exception to this rule, when a person is able to establish misappropriation on the part of the manager. He also held that there is another exception, namely, that if a co-parcener is a minor, the manager can be made to account generally in respect of the *corpus* of the estate, at any rate, where there are no adult members except the manager; and as the plaintiff in this case was at all material times a minor, he holds that the first defendant must bring into account this sum of Rs. 6,500.

I agree to the result arrived at, but I do not agree with the reasons given. That a managing member is not bound to give a general account of his dealings, that in the absence of fraud or misappropriation, the managing

(1) 8 Ind. Cas. 878; 32 M. 271; 5 M. L. T. 145; 19 M. L. J. 70.

(2) 70 Ind. Cas. 146; 41 M. L. J. 503; (1921) M. W. N. 742; 14 L. W. 668.

member cannot be called upon to justify his past transactions, that the manager is not bound to keep general accounts and that co-parceners cannot complain if the manager in his discretion favours in his expenditure one of the co-parceners at the expense of the others are matters, I think, beyond controversy: nor do I find any authority in support of the proposition that in this matter there is any difference between the position of an infant co-parcener and another. In fact, on an examination of the cases establishing this proposition, it will be found that in most of them there were persons who were minors at the date of the partition or had been minors at the time of the expenditure by the manager. But in respect of assets proved to have come into the hands of the manager, in my judgment, he has to account. It is not enough for him to say that he has no longer got those assets; nor do I think it right to say, once it had been proved that the assets came into his hands, that the co-parcener has also to prove that they remained in his hands at the date of the partition; in my judgment, capital monies proved to have come into the hands of a manager must be considered as available for partition, in the absence of some evidence showing what has happened to them. It is not necessary in this case to discuss what would be sufficient evidence. It may be that the proof of family necessities which would involve an expenditure greater than the income would lead to the presumption that the assets have been properly expended on behalf of the family. But, in this case, there is nothing of the sort, and I think that the proper inference to be drawn is that these monies have been misappropriated by the managing member. In this connection, I think that misappropriation means nothing more than the expenditure of the money on other than justifiable family expenses. Rs. 2,500 were clearly misappropriated. It was not a legitimate family purpose to place that money with Messrs. Beardsell & Co., as security for the good behaviour of the managing member But it remained joint family and, when he caused the loss of that money to the family by his misconduct as an employee of Messrs. Beardsell & Co., in my judgment, he clearly misappropriated the money. As regards the balance of Rs. 4,000 it was traced into his hands. It was proved that it was deposited in a Bank and that he drew it out. There is no evidence that he spent it on family necessity or that there was any family necessity for which such a sum of money would have been required, and in my judgment, under those circumstances, when the assets are traced into the hands of the managing member, he is bound to account for them on partition, whether the co-parceners are minors or majors, and in this case the first defendant, and the Official Assignee representing him, have entirely failed to do so. If authority were required for these propositions, I think, it is to be found in the account that was ordered in *Balakrishna Aiyar* v. *Muthusami Aiyar* (1) and in the clear judgment on the point of Phillips and Krishnan, JJ., in *Kodali Kristnayya* v. *Kodali Guruvayya* (2), particularly of Krishnan, J., at p. 509, where he states the law correctly. It was suggested that *Tummi Reddi* v. *Gengu Reddi* (3), was an authority to the contrary. But, as I read the judgment, particularly on p. 287, it supports the view expressed above.

The result is that this appeal must be dismissed with costs.

Waller, J :—I agree that this appeal must be dismissed with costs. The rule of Law, as stated by Krishnan, J., is, that a co-parcener can get a share only in such properties as are actually available at the time of partition. If this means that when a manager is asked to account for missing property it is a sufficient answer on his part to point out that it no longer exists, I cannot accept it as an adequate statement of the law The ruling in *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1) shows that it is open to a co-parcener to call upon the manager to account for specific items of property which are alleged to have come into his hands. Though he is not entitled to ask for a general account of the management he is entitled to an account of the property at the time he asks for partition. And by that is meant not the property as it actually exists, but as it ought to be. This is the view taken in *Kodali Kristnayya* v. *Kodali Guruvayya* (2) and there is nothing to the contrary in *Tummi Reddi* v. *Gengu Reddi* (3).

In the present case it is clear that the manager had to account for Rs. 6,500, the sum of money he probably appropriated to his

(3) 70 Ind. Cas 337 ; 45 M. 281 ; 42 M. L J. 570; 30 M. L. T. 328 ; 16 L. W. 55 ; (1922) A. I. R. (M) 236.

own use. In any event, it has not been proved that he spent it for any necessary or legitimate family purpose. He must, therefore, make good plaintiff's half share.

(Continuation of the judgment pronounced in open Court this day.)

The Chief Justice: —Another point arises under the judgment of Krishnan, J. The second and third defendants, being the mother and sister of the co-parceners, he directs that they should have a maintenance of Rs. 15 a month, and that the daughter should have a sum of Rs. 2,000 for her marriage. He also holds that they should be allotted each a room in the house item 1, that is, the family house, for their residence. Now, it is objected that the last part of the order will seriously interfere with the advantageous partition, namely, the sale of the house, which is the only valuable family property that there is if it is to be sold subject to a right of these two ladies each to have one room in that house. It is argued, on the other hand, that they have an absolute right to them, it being called a right *in rem*. In my judgment, it is quite wrong to say that the members of a joint Hindu family have rights *in rem* to residence in a particular house. It is true that, while it is being used as a family house, they have a right to reside there, but I have serious doubts whether they have a right to any particular separate room ; but, on partition, it is clearly a matter for the tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not. Some other provision can be made if there are more houses than one to choose from. It may be for the general advantage of the family that provision should be made in money instead of in kind. I think that, so much of this judgment as purports to hamper the Official Referee's discretion in effecting this partition by giving these two ladies an indefeasible right to occupy a certain part of this house is wrong, and that the matter must go before the Official Referee to decide what is best to be done unfettered by any such discretion.

Waller, J : I agree.

V. N. V. *Appeal dismissed.*

S. D.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 82 OF 1922.

July 13, 1923.

Present :—Sir Pramada Charan Banerji, Acting Chief Justice, and Mr. Justice Piggott.

Syed ATA HUSAIN—PLAINTIFF—APPELLANT

versus

RAMMAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 21—Occupancy holding—Mortgage—Sub-lease by mortgagee—Mortgagee, whether entitled to recover rent from sub-lessee.

Plaintiff, who was the mortgagee of an occupancy holding, sub let it to the defendant. In a suit by the plaintiff to recover rent from the defendant the latter pleaded that he was a tenant of the original occupancy tenant and had paid the rent to him :

***Held* (1) that the mortgage in favour of the plaintiff was illegal being in contravention of the provisions of the Agra Tenancy Act, and conferred no title on the plaintiff ;**

(2) that the defendant having paid the rent to the original occupancy tenant the latter must be deemed to have resumed the holding ;

(3) that, therefore, the plaintiff was not entitled to recover any rent from the defendant.

Appeal under section 10 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Stuart, dated the 3rd April 1922.

Mr. *Bhagwati Shankar*, for the Appellant.

Mr. *Kumuda Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent brought in the Revenue Court by the plaintiff Ata Husain against Ramman Lal, defendant, and others. The rent claimed was for the years 1324, 1325 and 1326 Fasli. The land in respect of which the rent was claimed formed the occupancy holding of one *Musammat* Katwari. The plaintiff alleges himself to be the mortgagee of the holding from Mt. Katwari, and he said in his plaint that the defendant was his sub-tenant and was, therefore, liable to pay him rent The defendant Ramman Lal denied that the relationship of landlord and tenant existed between the plaintiff and him. He asserted that he had taken the land from Mt. Katwari and that he had paid the rent claimed to the latter. There can be no doubt that Mt. Katwari was incompetent to mortgage her occupancy holding and that the

alleged mortgage in favour of the plaintiff is void in law. Therefore, the plaintiff has no right to the land in suit.

The lower Appellate Court held this to be one of the grounds on which the plaintiff's suit was bound to fail. That Court further found that the defendant had paid the rent sued for by the plaintiff to Mt. Katwari and that the defendant was not the plaintiff's tenant. That Court dismissed the suit.

The plaintiff appealed to this Court and his appeal was dismissed by a learned Judge of this Court.

Two contentions have been raised before us. The first is that, even if the plaintiff has no title, the defendant took the land from him and, therefore, could not deny his title as defendant's landlord, and the second contention is that the plaintiff has obtained a decree against the defendant for his ejectment from this holding, and that the effect of that decree is that the defendant must be deemed to be the plaintiff's tenant.

As we have already said, the mortgage alleged to have been made in the plaintiff's favour being in contravention of the provisions of the Agra Tenancy Act, is a void mortgage and, therefore, the plaintiff has no title to the land in respect of which rent is claimed. Mt. Katwari, the mortgagor, was competent to resume possession of the land, although she could not bring a suit in Court for recovery of possession unless she made good to the plaintiff the money which she had received from him. At the same time, if Katwari dispossessed him the plaintiff could not come into Court to enforce his right as mortgagee and to eject her from the property. The fact, as found by the lower Appellate Court, of Mt. Katwari having realized the rent from the defendant is equivalent to Mt. Katwari having resumed possession of the land, and if she resumed possession of the land the plaintiff has no remedy as against her so far as the land is concerned. If he had no remedy against Katwari, he could not have any remedy against the defendant who has paid the rent to her, and on this ground the plaintiff's claim was bound to fail.

Again, the passing of a decree for the ejectment of the defendant cannot affect the rights of *Musammat* Katwari, and if she realised the rent from the defendant and thus took back possession of the holding which she had mortgaged to the plaintiff, the ejectment proceedings against the defendant cannot prejudice her rights and by reason of payment of rent to her the defendant has been relieved of liability to pay rent to the plaintiff.

From any point of view, therefore, the plaintiff who has taken an illegal mortgage cannot receive any remedy at the hands of the Court. If a decree were passed against a tenant under such circumstances, it would enable an occupancy tenant whom the Legislature intended to protect, to circumvent the law and allow a mortgagee from him to take possession of his holding. Further more, in the present case there was an allegation by the defendant that he has not taken the land from the plaintiff. That allegation was not repudiated by the plaintiff, nor was any issue raised in the Court of first instance on that point. Therefore, we cannot assume that the land had been let to the defendant by the plaintiff. If the defendant had already been cultivating the land before the mortgage to the plaintiff was made, the plaintiff who has really no title under his mortgage, cannot seek to realize the rent from him if he refuses to pay it. The appeal is, therefore, in our opinion, untenable, and we dismiss it with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 7 OF 1924.

February 11, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

GOURI SHANKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAKSI DUBE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Adjustment of suit—Agreement, executory, whether adjustment.

GOURI SHANKAR *v.* BAKSI DUBE

A decree cannot be passed in accordance with an adjustment which depends upon a future contingency which may or may not happen.

An agreement between the parties to a suit that if the plaintiff eats food cooked by a particular person the whole suit may be decreed, is merely executory and does not amount to an adjustment of the suit within the meaning of O. XXIII, r. 3 of the Civil Procedure Code.

Appeal against the decree of the District Judge of Fyzabad, dated the 19th February 1923.

Mr. *E. R. Khidwai*, for the Appellants.

Mr. *Haider Husein*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit for the recovery of possession of certain shares in two villages on the ground that the shares in suit belonged to one Gajadhar and to his brother, Padarath; that the last holder of the property was Mt. Dilasi, widow of Gajadhar; that Mt. Dilasi died on the 11th October 1921 and that thereby the inheritance devolved on plaintiffs Nos. 2 and 3 as the nearest reversioners of Gajadhar and Padarath. The plaintiff No 1 is the transferee from plaintiffs Nos. 2 and 3 of an interest in the subject matter of the suit. In the defence raised by the defendants the legitimacy of plaintiffs Nos. 2 and 3 was disputed. Certain transfers made by the widow were also set up as binding on the plaintiffs, the transfers having been made for legal necessity. It was also denied that Mt. Dilasi held the property in the character of a Hindu widow or that it devolved upon her from her husband and from Padarath by way of inheritance. These pleadings resulted in a large number of issues. The Court proceeded to record evidence on those issues. One of the issues in the case was in relation to the question of the legitimacy of plaintiffs Nos. 2 and 3. While the evidence was being recorded, Banse, defendant No. 1, and the pleader of Bipat, defendant No. 2, made a proposal to the effect that if the plaintiff No. 1 ate food prepared by the plaintiff No. 3 the plaintiff's claim should be decreed in whole.

It appears that on the date when the above-mentioned proposal was made the defendant No. 2 was absent. The case was adjourned to another date to enable the defendant No. 1 to appear in Court and express his own wishes in respect of that proposal. He appeared on the 10th February 1923 and accepted the proposal mentioned above. *Kachcha* food was accordingly prepared and in the presence of the Court and the defendants and their respective pleaders the plaintiff No. 1 took the food prepared by the plaintiff No. 3.

It appears, however, and the Court below has accepted this fact, that before the food was actually eaten by the plaintiff No. 1, the pleader for the defendant No. 2 informed the Court that his client would not abide by the agreement entered into previously, and that the case might be heard and decided on merits. The Court of first instance took the view that it was not possible for the defendant to resile from the position which he had previously accepted In result, that Court decreed the plaintiff's suit on the sole ground of the agreement mentioned above.

The defendants were dissatisfied with the decree of the Court of first instance. They, therefore, appealed to the Court of the District Judge of Fyzabad. That Court has set aside the decree of the Court of first instance and remanded the suit for determination according to law. The order of the lower Appellate Court is impugned in appeal before me by the learned Counsel for the plaintiffs. He argues that the agreement was an adjustment of the suit within the meaning of r. 3 of O. XXIII of the Code of Civil Procedure, and, therefore, the Court of first instance had rightly based its decision upon that agreement.

I am of opinion that the decision of the lower Appellate Court is right and should be maintained. An agreement of the nature of which the agreement under consideration was cannot be construed as an adjustment of a suit. It was open to the plaintiff No 1 to refuse to take the food prepared by the plaintiff No. 3 even at the last moment when it was served before him for being eaten and if he had done so it follows that the suit could not have been adjusted by the agreement under consideration. At the most the agreement was merely executory and it could only have been on the happening of the contingency anticipated by the agreement that the suit would have been adjusted in terms of it. If the adjustment is to depend upon a future contingency which may or may not happen, I am of opinion that that is not an

adjustment of the suit according to which a decree could be passed.

There is one matter, however, which I desire to mention before I take leave of this case. As already observed, one of the issues in the case raised the question of the legitimacy of plaintiffs Nos. 2 and 3. I have no doubt in my mind that the fact that the agreement under consideration was made and that it was acted upon would be relevant evidence on the decision of that issue and the trial Court would be justified in treating it as such.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 89-B OF 1921.

November 26, 1923.

Present:—Mr. Predeaux, A. J. C., and Mr. Kinkhede, A. J. C.

Mt. KRISHNABAI—PLAINTIFF—APPELLANT

versus

DHONDO RAMCHANDRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Admission in pleadings, construction of—Conditional admission—Trust—Trustee repudiating trust, whether bound to surrender possession.

It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in a pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. [p 544, col. 2; p. 555, col. 1.]

If a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission [p. 544, col. 2.]

Baikantha Kumar v. *Chandra Mohan Chowdhury*, 1 B. L. R. A. C. 193; 10 W. R. 183; 1 Ind. Dec. (N. S) 208, and *Motabhoy Mulla Essabhoy* v *Mulji Haridas*, 29 Ind. Cas. 223; 39 B 399; 17 M. L. T. 401; 29 M. L. J. 589; 18 A. L. J. 599; 19 C W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 42 I. A. 103 (P. C.).

A trustee acting under a trust which he knows or subsequently discovers to be void or invalid, is not bound to surrender the possession of the trust property before he can be allowed to repudiate it by giving evidence to explain away his admissions arising from his conduct as a so-called trustee. [p. 545, cols 1 and 2.]

Srinivasa Moorthy v. *Venkatavarada*, 84 Mad. 257, distinguished.

Appeal from the decree of the Additional District Judge, Amraoti dated 7th February 1921, in Civil Suit No. 10 of 1920.

Mr. *M. Gupta*, for the Appellant.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—The plaintiff Krishna Bai, widow of Ganeshdas, of Anjangaon Surji, brings this suit for a declaration that a trust-deed executed by herself and her husband's adopted son Motilal with respect to the property of Ganeshdas was a nullity for several reasons set forth in paragraphs 6 and 8 of the plaint. The trust-deed is dated the 26th June 1916 and was presented for registration by Motilal Ganeshdas on the 21st July 1916. It was registered on the 30th August 1916 in office as against Motilal, and at the house of Krishna Bai at Anjangaon so far as Krishna Bai was concerned, presumably because she was a *parda nashin* lady who, according to the custom of her community, could not be compelled to attend the Sub-Registrar's Office. Ganeshdas died on the 26th December 1915 and Motilal died on the 7th July 1917. It is alleged that at the time of Motilal's death his son Misrilal was 4 years old, that is, he had come into existence during the lifetime of Ganeshdas and was also in existence on the date of the trust-deed. Misrilal died on the 26th August 1919 at the age of 6. The property dealt with by the trust-deed is alleged in the plaint to be ancestral so that Misrilal could acquire an interest in it as soon as it passed by succession on Ganeshdas's death. Thus, Motilal and Misrilal were joint owners of the property and on Motilal's death Misrilal became the sole owner thereof by survivorship. The plaintiff's contention is that, on Misrilal's death on the 26th August 1919, she inherited the property as an heiress to her grandson, that she had no interest in the property on the date of execution of the trust deed and, consequently, the deed is not binding

as against her in her capacity of an heiress of Misrilal. She also contends that, just as it was open to Misrilal to repudiate the *factum* and *validity* of the trust, it was open to her also to repudiate it in her capacity of an heiress of Misrilal. In paragraph 9 of the plaint she stated that she was unwilling to deliver possession of the property and to fulfil the trust. Being in possession, she has claimed only the relief of declaration that the deed is null and void and of no effect as against the estate possessed by her as Misrilal's heir. The suit was filed on the 10th July 1920 the plaintiff basing her cause of action upon the rights which accrued to her on Misrilal's death on the 26th August 1919 and upon their infringement by the defendants' assertion from time to time that the trust was valid and enforceable.

The defendants Nos. 1, 2 and 3 are the co-trustees along with plaintiff appointed under the deed. Among the several pleas urged by the defendants Nos. 1 and 2 only one plea urged in paragraph 9 of the defendant No. 1's written statement dated 4th October 1920 which gave rise to issue No. 9 is relevant to the decision of this appeal. The Court of first instance has upheld the plea and dismissed the suit on that ground alone, although there were several other issues framed in the case. The plea is to the following effect: "The defendant submits that the plaintiff entered into possession of the property in the lifetime of Motilal by virtue of her position as trustee when she admittedly had no right to the property or its possession and is even now in possession as such. As the plaintiff definitely states in paragraph 9 of the plaint that she is unwilling to surrender possession and divest herself of her character as trustee, she cannot maintain the present suit under law as she is estopped from doing so." In support of this plea defendant No. 1, in paragraph 14 of his written statement, prominently mentions certain acts or conduct on the part of plaintiff showing an acceptance of the trust by her, and asserts that plaintiff is thereby precluded from disclaiming the trust thus accepted. Defendant No. 2 adopted defendant No. 1's pleas. Defendant No. 3 does not appear to have contested the plaintiff's claim. In the plaintiff's written reply dated the 27th October 1920 we find the following answer to the defendants Nos. 1 and 2's aforesaid plea raised in paragraph 9: "Plaintiff did not get possession of trust property during Motilal's life-time. He may have taken leases in her name. She acted as trustee after his death. But having discovered that the trust is void she can repudiate the same She is not estopped. As regards the acts set forth in paragraph 14 her reply is contained in paragraphs 18, 19, 20 and 21 wherein she denies having been present at the meeting of the trustees on 8th January 1917 and says she made her mark to some proceedings which were brought to her. She admits that she did act as trustee in Miscellaneous Case No. 27 of 1918 but contends that she was not estopped from saying that the trust is void."

Issue No. 9 runs thus: –

"Having obtained possession of trust property even after Motilal's death, as is admitted by plaintiff, can she maintain this suit without surrendering possession of that property to the other trustees?"

The case was fixed for arguments on this issue by Mr. Parande who heard part of the arguments and adjourned the case to 21st December 1920 for further arguments. On this adjourned hearing the case came on before Mr. R. D. Pande, Additional District Judge, who has thrown the suit out as not maintainable, following certain observations of their Lordships of the Privy Council in *Shrinivasa Moorthy* v. *Venkata Varada Aiyangar* (1) to the effect that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.

The plaintiff has come up in appeal to this Court and urged the following grounds:—

"1. That the plaintiff as a person who was already in possession of the property forming the subject-matter of the trust before the trust was created could sue to obtain a declaration that the deed of trust is voidable at her instance as obtained by fraud without relinquishing possession of the said property.

(1) 11 Ind. Cas. 447; 34 M. 257 at p. 265; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M.W.N. 375; 14 C. L. J. 64; 21 M.L.J. 669; 10 M. L. T. 268; 38 I. A. 129 (P.C.).

"2. That the lower Court has failed to observe that, besides suing in her own right on the ground of fraud, the plaintiff has sued as heir to her grandson, Misrilal, who was no party to the creation of the trust and who as a co-parcener with his father Motilal in the property covered by the deed of trust had the right to set it aside as beyond the powers of his father, the property being ancestral family property."

The third ground which related to costs was not argued before us.

It is argued before us that the suit was wrongly dismissed on the prelimiary point without ascertaining the necessary facts. It is contended that the question whether, on Motilal's death, the plaintiff came into possession as a trustee or as an heir of Misrilal was a question of fact and that if the pleadings are construed as a whole there was no unqualified admission by plaintiff from which it could be inferred that she admitted having entered into possession of the property as a trustee. On the other hand, several passages were brought to our notice from the plaint to show that what plaintiff admitted was that she obtained possession of the property in virtue of her right of succession to her grandson. In the argument, the validity of the trust on the ground that the property was ancestral, was also challenged and it was urged that this and several other questions covered by other issues were questions of fact which required determination on the merits. It will be noticed that the parties are at variance also on the question of Misrilal's capacity to take interest by birth in the property covered by the deed and, therefore, to chellenge the trust It was further argued that if the so called trust was void or could not be legally created, none came into existence, and, therefore, nothing which the plaintiff did would in law fix her with the character of *a trustee as such* or signify her acceptance of the so-called trust, and, conesequently, there would be no necessity for disclaiming what was legally a non-existent trust or even for surrendering possession, as a condition precedent to its repudiation by plaintiff. Lastly, it was argued that, in any case, the plaintiff was entitled under law to give evidence for showing that the so-called admissions of hers were in ignorance of her legal rights and for explaining away her conduct. We think there is great force in each of these contentions and we are convinced that the case has been wrongly decided without ascertaining the real facts and giving the plaintiff an opportunity to explain her conduct or admissions.

The Additional District Judge takes it as the basis of his judgment that it was admitted for the plaintiff that she had taken possession of the property *as a trustee* but that this was after Motilal's death, and that the position of a trustee was admittedly accepted by plaintiff after Motilal's death and she managed the property and realiasd the assets *as such*. He, therefore, concludes from this that it was not open to the plaintiff to repudiate the trust unless she surrendered possession over the property taken in her possession or under her management *as a trustee*. In our opinion the Additional District Judge has misconstrued the pleadings as regards the so-called admissions of plaintiff contained therein. A pleading includes a plaint, and, therefore, in construing admissions in a pleading a Court ought to look to the plaint and the pleadings as a whole. This is an ordinary rule of interpretation of pleadings. The principle upon which this rule as to accepting the admissions in a pleading as a whole seems to be based, is that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission. *Baikanthanath Kumar* v. *Chandra Mohan Chowdhury* (2). Their Lordships of the Privy Council in *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, (3) observed as follows.

"It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either

(2) 1 B. L. R. A. C. J. 183 ; 10 W. R. 189 ; 1 Ind. Dec. (N. S.) 208.

(3) 29 Ind. Cas. 228 ; 39 B. 899, at P. 409 ; 17 M. L. T. 402 ; 28 M. L. J. 589 ; 18 A. L. J. 529 ; 19 C. W. N. 718 ; 21 C. L. J. 507 ; 17 Bom. L. R. 460 ; 2 L. W. 524 ; (1915) M. W. N. 522 ; 42 I. A. 103 (P. C.).

be accepted subject to the condition or not accepted at all."

Judging the pleadings in the light of this rule of interpretation and of the observations of their Lordships of the Privy Council, we are at a loss to find any unqualified admission by plaintiff in her plaint to the effect that she entered into possession of the property as a trustee and managed it in that capacity. Her so called admissions in paragraphs 6, 18 and 19 of her written reply set forth above are also not unqualified or unconditional because she, side by side with them, clearly challenges the trust as being void and of no effect. We do not think the admissions could be considered to be unconditional. If the judgment is to be based upon such admissions we must take the admissions as a whole subject to the condition, or not accept them at all. No case of an unqualified acceptance of the trust by the plaintiff can, therefore, be construed out of the the so-called admissions in the pleadings, and, therefore, no question of her surrendering possession of the property as a condition precedent to her maintaining the present suit arises on the present state of the record.

The case reported in *Shriniwasa Moorthy* v. *Venkata Varada Aiyangar* (1) was decided after going into evidence of the various acts of the person who, after having acted as one of the co-executors, subsequently wanted to repudiate the trust on the ground that the property was ancestral and, therefore, could not be bequeathed. It was found as a fact concurrently by both the lower Courts that the property was not joint property but was acquired by the testator and, therefore, the testator had full power to dispose of it by Will as he might have done *inter vivos*. To the facts so found their Lordships of the Privy Council applied the law and held that the trust was valid and the co-executor who had shown his acceptance of a valid trust could not repudiate it afterwards, without obtaining discharge. With due respect, we are inclined to hold that that case is no authority for the proposition that a trustee acting under a trust which he knows or subsequently discovers to be void or invalid, is bound to surrender the possession of the trust property before he can be allowed to repudiate it by giving evidence to explain away his admissions arising from his conduct as a so-called trustee. It is, therefore, necessary to find the facts first and then apply the law of estoppel if the facts warrant such application.

(7) Under these circumstances, we set aside the dismissal of the suit and remand the case for trial on the merits. The costs of this appeal will be paid by the respondents, while those of the first Court will abide the result.

Z. K. *Suit remanded for re-trial.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 289 OF 1915.

May 28, and June 7, 1918.

Present :—Mr. Justice Roe, and Mr. Justice Coutts.

Babu KAMTA PRASAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu NANKU PRASAD SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 55 (5) (b)—Sale of mortgaged property by mortgagor—Money left with purchaser to redeem mortgage—Purchaser whether personally liable to mortgagee.

The purchaser of a mortgaged property had given a verbal undertaking to the mortgagor-vendor to pay off the mortgage and collaterally with that undertaking a clause had been inserted in the sale-deed to the effect that the mortgagor-vendor had "left in deposit with the purchaser" the sum necessary to redeem the mortgage. The mortgagee sued on the basis of the mortgage and obtained a decree making the purchaser personally liable after the sale of the property :

***Held*, that as the plaintiff was no party to the sale-deed he could not take advantage of the undertaking given by the purchaser to the mortgagor and his suit was, therefore, liable to be dismissed.**

Janma Das v. *Ram Autar Pande*, 18 Ind. Cas. 804; 84 A. 63; 16 C. W. N. 97; 11 M. L. T. 76; 9 A. L. J. 87; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 39 I. A. 7 (P. C.), followed.

Khawaja Muhammad Khan v. *Husain Begam*, 7 Ind. Cas. 287; 32 A. 410; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 318; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 688; 20 M. L. J. 614; 37 I. A 152 (P. C.), distinguished.

KAMTA PRASAD SINGH v. NANKU PRASAD SINGH

Deb Narain Dutt v. *Ram Sadhan Mandal*, 20 Ind. Cas. 680 ; 41 C. 137 ; 18 C. L. J 603 ; 17 C. W. N. 1143 ; and *Dwarka Nath Ash* v. *Priya Nath Malki*, 86 Ind Cas. 792 ; 22 C. W N. 279 ; 27 C. L. J. 48, not followed.

Messrs. *Syed Hasan Imam*, *Kulwant Sahay* and *Sivanandan Ray*, for the Appellants.

Messrs. *Manuk*, *G. D. Singh*, *Jalgobind Pd. Singh*, *Debendra Nath Das* and *Achalendranath Dass*, for the Respondents.

JUDGMENT

Roe, J.—This appeal arises from a decree of the Subordinate Judge of Patna making the appellants personally liable for any sum that may be found due to the respondents after the sale of certain property in satisfaction of the respondents' mortgage. The appellants were not the mortgagors but had, as purchasers from the mortgagors of the mortgaged properties, given a verbal undertaking to the mortgagor to pay off the mortgage and, collaterally with that undertaking, a clause had been inserted in the deeds of sale to the effect that the mortgagor vendors had "left in deposit with the said purchasers" the sum necessary to redeem the property. The case is in no respect distinguishable from that of *Jamna Prasad* v. *Ram Autar Pande* (1). The learned Subordinate Judge has apparently attempted to distinguish it on the ground that the plaintiff has been prevented by fraud from pursuing the mortgaged property. I can see no rational basis for this suggestion. Not only has the plaintiff here not been prevented by fraud from pursuing the mortgaged property, he has actually pursued it and brought it to sale. The learned Judge's suggestion is hopelessly inconsistent with the decree made, that the defendants shall not be held personally liable until the mortgaged property has been successfully pursued. The learned Judge then relies upon the cases of *Khawaja Muhammad Khan* v. *Husain Begam* (2) and *Debnarain Dutt* v. *Ram Sadhan Mandal* (3), and at the Bar the case of *Dwarka Nath Ash* v. *Priyanath Malki* (4), has been quoted. The case of *Khawaja Muhammad Khan* v. *Husain Begam* is authority only for the proposition that, where property is secured for the payment of a grant, the sole beneficiary may enforce the security though not a party to the contract. If, indeed, the cases of *Debnarain Dutt* v. *Ram Sadhan Mandal* and *Dwarka Nath Ash* v. *Priya Nath Malki* are inconsistent with that of *Jamna Das* v. *Ram Autar Pande* we could not follow them. The learned Subordinate Judge has stated it as a fact that the plaintiff was no party to the agreement engrossed in Exhibits 2 and 3 the deeds of sale—and no other finding would have been possible, for, it was the defendant's case not only that he had no agreement with the plaintiff Nankhu Persad Singh, but also that Nankhu Persad Singh had no interest in the transaction, the mortgage being in fact given on a loan made by a party not on the record, Amar Singh.

The true position is patent on a reference to section 55 (5) (*b*) of the Transfer of Property Act : "The buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale and shall pay the amount so retained to the persons entitled thereto." The clause inserted in the deeds of sale is no more than an admission of the buyer's statutary rights and the oral contract to pay, no more than an admission of the buyer's statutory liability. The buyer's liabilities to the seller in this regard have been fully stated by the Judicial Committee in the cases of *Muhammad Siddiq Khan* v. *Muhammad Nasirullah Khan* (5) and *Izzat-un-nissa Begum* v. *Pertap Singh* (6), and it is clear from the case of *Jamna Das* v. *Ram Autar Pande* that, in the absence of a direct contract with the encumbrancer, the seller has no liability towards him. I would decree this appeal with costs and direct that the suit as against the appellants be dismissed with costs.

Coutts, J.—I agree.

Appeal allowed.

(1) 18 Ind. Cas. 804 ; 34 A. 63 ; 16 C. W. N. 97 ; 11 M. L. T. 76 ; 9 A. L J. 87 ; (1912) M. W. N. 32 ; 15 C. L J. 68 ; 14 Bom. L. R. 1 ; 21 M. L. J. 1158 ; 39 I. A. 7 (P C.)

(2) 7 Ind. Cas. 237 ; 32 A. 410 ; 14 C. W. N. 865 ; 7 A. L. J. 871 ; (1910) M. W. N. 818 ; 8 M. L. T. 147 ; 12 C. L. J. 205 ; 12 Bom. L. R. 688 ; 20 M. L. J. 614 ; 37 I. A. 152 (P. C.)

(3) 20 Ind Cas. 680 ; 41 C 137 ; 18 C. L. J. 603 ; 17 C. W. N 1143.

(4) 86 Ind. Cas. 792 ; 22 C. W. N. 279 ; 27 C. L. J. 483.

(5) 21 A. 223 ; 3 C. W. N. 201 ; 26 I. A. 45 ; 7 Sar. P. C. J. 472 ; 9 Ind. Dec (N S.) 851, (P. C.).

(6) 8 Ind. Cas 793 ; 31 A. 583 ; 13 C. W. N. 1143 ; 10 C L. J. 313 ; 6 A. L. J. 817 ; 11 Bom. L. R. 122 ; 6 M. L. T. 277 ; 19 M. L. J. 682 ; 36 I. A. 203, (P. C.).

GULZAR SINGH *v.* SHEO NATH

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 63 OF 1922.

January 25, 1924.

Present:—Mr. Wazir Hasan, A. J. C. and Mr. Neave, A. J. C.

Sardar GULZAR SINGH, DECEASED, BY HIS SON *Sardar* DALJIT SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEO NATH, DECEASED, BY HIS SON MADHO RAM AND TWO OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Construction of document—Mortgage or sale—Test—Precedents, value of.

A deed of transfer which was ostensibly a sale provided for a right of redemption within a certain period on payment of the money advanced, and in the event of default of payment within that period the sale was to become absolute. In the event of redemption, the person exercising the right was liable to pay interest on the principal sum at the rate mentioned in the deed;

Held, that the transfer was a mortgage by conditional sale within the meaning of section 58 (*c*) of the Transfer of Property Act. [p 549, col. 1.]

Each document must be construed with the aid of the language used therein and such other surrounding circumstances as may be relevant to the question of construction, and precedents can be referred to only in so far as they lay down any general principle of interpretation. [p. 549, col. 1.]

One test which may be applied in determining whether a transaction is a mortgage or not is, whether the remedies are mutual and reciprocal and the transferee has all the remedies a mortgagee is entitled to. [p. 549, col. 2.]

Case-law discussed

Appeal against the Subordinate Judge, Bahraich, dated the 28th June 1921.

Messrs. *Niamat Ullah*, *Haider Husain* and *P. C. Gupta*, for the Appellants.

Mr. *R. K. Srivastava*, holding the brief of Pandit *G. N. Misra*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Bahraich dated the 28th June 1921. We have also before us the cross-objections filed by the defendants-respondents in respect of that portion of the decree with which they are aggrieved. The original plaintiff No. 1, Sardar Gulzar Singh, died during the pendency of the appeal in this Court. His minor son, Sardar Daljit Singh, is his legal representative in these proceedings through his next friend Mt. Indarpal Kunwar. The other plaintiff in the suit, out of which this appeal has arisen, was Sardar Autar Singh, the younger brother of Sardar Gulzar Singh. The suit was for the recovery of possession of village Kapraul, Pargana Fakharpur, in the District of Bahraich.

Sardar Jagjot Singh was the grandfather of Sardar Gulzar Singh. Under the deed dated the 19th November 1913 executed by Sardar Jagjot Singh, possession of the village in suit passed into the hands of the defendants. The precise nature of the transaction evidenced by that deed is a matter in controversy between the parties. The plaintiffs claim that it was a mortgage. The defendants, on the other hand, allege that it was a sale with a right of re-purchase in the heirs of Sardar Jagjot Singh. The relief for possession asked for by the plaintiffs was primarily by a decree of cancellation of the deed of the 19th November 1913 and, in the alternative, subject to such payment of mony as the Court might deem fit to make in the circumstances of the case.

The Court below has refused to cancel the deed and has held that it is not a deed of mortgage and that it is a deed of sale with a right of re-purchase. The decree under appeal is consequently founded mainly upon the terms and conditions of the deed of the 19th November 1913. The plaintiffs are awarded possession of the village in suit on payment of Rs. 33,620 with the condition attached, that if the said payment is not made within two months from the date of the decree, the plaintiffs' suit shall stand dismissed with costs. Treating the deed in question as one of mortgage, the plaintiffs deposited a sum of Rs. 31,700 in Court under section 83 of Act IV of 1882 on the 24th February 1920 in satisfaction of the defendants' claim in respect of the property in suit. The defendants refused to accept the payment with the result that the present suit was brought on the 19th May 1920 for the reliefs indicated above

GULZAR SINGH *v.* SHEO NATH

The Court below has found that the amount tendered was insufficient and consequently any interest due to the defendants on the principal sum did not cease to run from the date of the tender.

Whether the deed of the 19th November 1913 is interpreted as a deed of mortgage or as a deed of conditional sale, the plaintiffs' right to recover possession of the village is not affected. The deed provides for that right to subsist for a period of 20 years. It will thus be seen that the question of interpretation of that document has a bearing only on the defendants' liability to account for the rents and profits of the property in suit in the character of a mortgagee. The first matter, therefore, for determination is the nature of the transaction of the 19th November 1913. It is a short document and it would be convienent to reproduce it in full.

"I am Sardar Jagjot Singh, son of Kuar Pishaura Singh, caste Jat, resident, of village Pipri, Ilaq Chahlari, Pargana Fakharpur, Tahsil Qaiserganj, District Bahraich.

"Whereas village Kapraul, demarcation No. 463, stands from before mortgaged with possession to Sheonath Avasthi, now I do hereby sell the said village in lieu of Rs. 50,000 as detailed hereunder to Sheonath Avasthi, son of Shankar Prasad Avasthi, deceased, resident of village Sukarpur, District, Pargana and Tahsil aforesaid, and deliver proprietary possession from to-day. The details are that I have allowed Rs. 30,000 as a set off to the aforesaid *mahajan* towards the price of the village Kapraul amounting to Rs. 50,000 on account of two registered deeds, one for Rs. 20,000 in respect of village Kapraul and the other for Rs. 10,000 in respect of village Dhannauli; and as for the realization of the balance of Rs. 20,000 remaining due from the vendee *mahajan* it has been settled between me and the *mahajan* as set forth below. At present the settlement of village Kapraul stands at Rs. 1,212-15-0 per annum. The aforesaid *mahajan* will, every year, continue paying me, for a period of 20 years, the sum of Rs. 1,000 per annum, *i.e.*, Rs. 500 every sixth month; and the remaining Rs. 212-15-0 I have relinquished in favour of the aforesaid *mahajan* towards the deficiency in the amount of interest, *i.e.*, 4 annas per cent interest payable by me on the sum of Rs. 14,000. The aforesaid *mahajan* will continue paying me only Rs. 1,000 per annum. Other *sewai* items and the Government revenue assessed at present in respect of the said village, or which may be assessed by the Government in future, will be paid by the aforesaid *mahajan*; I and my heirs having nothing to do with the same. Secondly, if my heirs wish to redeem the aforesaid village within the period of 20 years, then they will have to pay the interest from to-day, the 19th November 1913, on the entire amount as recorded in the registered deed, *i.e.*, 6 as.on the sum of Rs. 14,000 instead of 4 as. recorded and 8 as. per cent. on the entire remaining amount and having paid the entire principal and interest within the period of 20 years, have the village redeemed whenever they please. After the expiry of 20 years, they will not have the power to redeem. The decision as to the *sir* land of the other Thakurs (sic) amounting to 100 *bighas* will rest with me.

"Wherefore this sale deed *miadi* has been recorded so that it may serve as an authority.

(Sd.) JAGJOT SINGH,
Autograph.

Dated 19th November 1913."

Our construction of the foregoing document is, in disagreement with the opinion of the lower Court, that it is a deed of mortgage by conditional sale and not a deed of sale with a right of re-purchase. It begins with the sale of the village in suit for a sum of Rs. 50,000 out of which Rs. 30,000 are set off against the mortgage-money due from the executant on two previous deeds and the balance is made payable to the executant by means of instalments of Rs. 1,000 a year, every instalment is to arise out of the annual profits of the property calculated at Rs. 1,212 and the balance of Rs. 212-15-0 is abandoned in favour of the creditor in consideration of the low rate of interest charged under one of the two previous mortgages. In the event of redemption by the heirs of the executant within the period of 20 years, the party redeeming is made liable to pay interest from the date of the document at the rate of six annas per cent. per mensem on the sum of Rs. 14,000 instead of four annas, the rate which was agreed upon under one of the previous deeds of mortgage (Ex. A9) and further at the rate of eight annas per cent. per mensem

"on the entire remaining amount." On payment of the principal and interest thus calculated and within the period stated above the redemption of the village in suit is to follow: the right to redeem is extinguished if it is not exercised within the said period. The deed is christened as a *bai muda*, which means that the sale is to become absolute on the expiry of the period stated above.

The terms of the deed as given above clearly fall, in our judgment, within the definition of a mortgage by conditional sale in section 58, clause (*c*), of the Transfer of Property Act (IV of 1882). The transfer under consideration is ostensibly a sale with a right to redeem within a period certain on payment of the money advanced and, in the event of default of payment within that period, the sale is to become absolute. It follows that the equity of redemption in the property in suit will subsist all through in spite of the expiration of 20 years till a decree for foreclosure is made in a suit brought by the mortgagee or till the confirmation of the sale in pursuance of a decree for redemption in a suit brought by the representatives of the mortgagor. This effect will follow from the provisions of sections 60 and 67 of the Transfer of Property Act. Both the parties to the contract have, therefore, coextensive remedies: one has the remedy of a suit for foreclosure and the other of a suit for redemption. Further, in the event of redemption the persons exercising that right are saddled with the liability to pay interest on the principal sums at the rates mentioned in the document under consideration. This liability is, in our opinion, a reliable ground for the decision that the relationship of creditor and debtor was created between the transferee on the one hand and the representatives of the transferor on the other.

It is generally fruitless to refer to precedents on the question of construction of a document. Each document must be construed with the aid of the language used therein and such other surrounding circumstances as may be relevant to the question of construction. They may, however, be referred to in so far as they lay down any general principle of interpretation. In the case of *Goodman* v. *Grierson* (1), Lord Manners made the following observation: —"The fair criterion by which the Court "is to decide whether this deed be a mortgage "or not I apprehend to be this: — Are the remedies mutual and reciprocal? Has the defendant "all the remedies a mortgagee is entitled to?" These questions we have already answered in the affirmative. Another case on the point is the decision of their Lordships of the Privy Council in the case of *Balkishen Das* v. *W. F. Legge* (2). In delivering the judgment of the Privy Council, Lord Davey said, in respect of the decision in the case of *Bhagwan Sahai* v. *Bhagwan Din* (3), that "their Lordships decided that case on the language of the deeds then in "question" and with regard to the documents in question in that case his Lordship was of opinion that they contained important indications of the intention of the parties that they evidenced a transaction of mortgage by way of conditional sale. In the case of *Jhanda Singh* v. *Wahid-ud-Din* (4) Lord Atkinson, on the question of the interpretation of the documents in that case, observed: —"It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances." The transaction was held to be one of an absolute sale and not a mortgage. The case before us resembles closely in important aspects the case of *Muhammad Hamid-ud-din* v. *Fakar Chand* (5).

The next point urged by the learned Advocate for the appellants is, that the deed of the 19th November 1913 should be cancelled altogether for the reason that the appellants have the right to rescind the contract. This right is founded on two grounds: (1) that the transferee has failed to fulfil his promise of

(1) 12 R. R. 82; 2 Bull. and B. 274.

(2) 22 A. 149 (P. C.); 4 C. W. N. 158; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

(3) 12 A. 387 (P. C.); 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992.

(4) 36 Ind. Cas. 38; 38 A. 570; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 159; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284 (P. C.).

(5) 58 Ind. Cas. 717; 42 A. 437; 18 A. L. J. 478; 2 U. P. L. R. (A.) 341.

payment of yearly instalments of Rs. 1,000, and (2) that he failed to pay the Government revenue in respect of the village in suit which he had undertaken to do under the terms of the document in question. In view of our finding that the document of the 19th November 1913 is a deed of mortgage the consequences of the default on the part of the mortgagee in payment of the annual instalments and of the Government revenue will be considered in the accounting which must be made between the parties on the footing of the relationship of the mortgagor and the mortgagee existing between them. The plaintiffs are, therefore, not entitled to rescind the contract embodied in the document in question.

Two questions of fact were argued at the hearing of the appeal. The Court of first instance has found that the defendants paid to the plaintiffs a sum of Rs. 2,200 towards the instalments due under the deed of the 19th November 1913. This finding is challenged by the appellants. On the other hand, the respondents challenge, in cross-objections, the finding of the Court below that a further sum of Rs. 4,300 is not proved to have been paid by the defendants to the plaintiff towards the same instalments. They also do not accept the finding of the lower Court that the payment of the Government revenue by the defendants is not proved. These questions may now be disposed of.

The finding as to the payment of Rs. 2,200 towards the instalments mainly rests upon three documents which purport to be receipts (Exs. A-5, A 6 and A-7). Both A-5 and A-6 are of the same date, 21st December 1918, and each is for a sum of Rs. 1,000 and purports to be a receipt for deposit made with the executant Gulzar Singh by Kanauji Lal Mahajan in the case of Exhibit A 5 and by Madho Prasad Mahajan in the case of Exhibit A-6. A-7 is a similar receipt for Rs. 200 executed by Autar Singh, the younger brother of Gulzar Singh, and is dated the 22nd June 1919. Each document contains a promise on the part of the executant that the money will be repaid when it is demanded and the deposit receipt taken back. We are unable to hold that these receipts prove the payment of any sum in satisfaction of any part of the instalments due under the deed of the 19th November 1913. The mortgagees are moneylenders. It is impossible to believe that they do not keep account-books. They have produced none. The presumption, therefore, is that if they had produced them the evidence furnished by those account-books would have gone against them. It was argued on behalf of the appellants that Exhibits A-5, A-6 and A-7 relate to separate and independent loan transactions between the parties. The language of these Exhibits is not consistent with that hypothesis either. In any case, the onus was on the defendants to prove the payments alleged to have been made by them. In our opinion they have failed to discharge that onus.

With reference to the finding of the lower Court against the respondents in respect of the further sum of Rs. 4,300 we are of opinion that the finding is correct. Except the *ipsi dixit* of the defendant Kanauji Lal in the witness-box, there is no evidence in support of the contention urged against the finding of the trial Judge. We, therefore, accept that finding as correct.

The next question of fact relates to the payment of the Government revenue by the defendants as stated above. Here, again, there is no evidence in support of the defendants' contention except the statement of Kanauji Lal. We accept this finding also of the Court below.

The appellants also claim that a sum of Rs. 1,460 be debited against the respondents as representing the amount of *nazrana* realized by them from the tenants of the property in suit. The Court below has rejected this claim and we see no sufficient ground for disagreeing with the opinion of that Court on this point. The evidence in support of it mainly consists of tenants, who are shown to be under the influence of the plaintiffs. The defendant No. 2, however, admits to have received a sum of Rs. 69 under that deed. This sum must, of course, be shown in favour of the plaintiffs in the accounts.

In view of the terms of the deed of the 19th November 1913, we do not think it to be equitable to call upon the defendants to render an account of their receipts and expenditure in relation to the property in suit. We find no justification for placing on them a greater liability than what was agreed upon between the parties to the contract of the

19th November 1913. The accounts must, therefore, be made on the footing of Rs. 1,000 annual profits. The appellants have abandoned before us their claim for the sum of Rs. 212-15-0 annually against the respondents as it was originally relinquished in their favour under the deed in question.

The accounts between the parties will, therefore, stand thus on the 24th of February 1920.

Amount due to the respondents.

		Rs.
1.	Principal ...	30,000
2.	Interest (*a*) on Rs. 14,000 at 4 per cent. per mensem from 19th November 1913 up to 24th Feburary 1920 (date of application under section 83 of Act IV of 1882) ...	2,632
	(*b*) on Rs. 16,000 from 19th November 1913 to 24th February 1920 at 8 annas per cent. per mensem ..	6,016
	Total ...	38,648

II. Amount due to the appellants under the deed of the 19th November 1913.

	Rs.
(*a*) Rs. 500 payable six monthly from 19th November 1913 to 24th February 1920 ...	6,000
(*b*) Interest on the above at 8 annas per cent. per mensem ...	1,086
(*c*) Government Revenue and cesses from 19th November 1913 up to 24th February 1920 ...	1,575
(*d*) Interest on above ...	209
(*e*) *Nazrana* ...	69
Total ...	8,939

The amount due to the appellants must be duducted from the amount due to the respondents. The balance reached is Rs. 29,709. This amount is less than the sum of Rs. 31,700 deposited by the appellants under section 83 of Act IV of 1882 on the 24th February 1920. The interest, therefore, must cease to run altogether from that date on the sum of Rs. 30,000 while the interest allowed to the appellants in the account and the several amounts due to them, as mentioned above, should be brought down from the date of the deposit to the date of the decree of this Court. The account stands thus:—

	Rs.
(*a*) Rs 500 payable six monthly from 25th February 1920 to 24th January 1924 ...	4,000
(*b*) Interest on the above, plus Rs. 6,000 at 8 annas per cent. per mensem ...	1,874
(*c*) Government Revenue and cesses from 25th February 1920 to 24th January 1924 at Rs. 150 annually ...	525
(*d*) Interest on above, plus Rs. 1,575 from 25th February 1920 to 24th January 1924 ...	445
Total ...	6,844

Deducting Rs. 6,844 out of Rs. 29,709 the net amount due to the respondents is Rs. 22,865 which will be made payable by the appellants to the respondents within six months from this date, if they have not already paid the whole or any portion of it.

We, therefore, allow the appeal and pass a decree for redemption in favour of the appellants. The decree will be prepared in terms of O. XXXIV, r. 7, of the Code of Civil Procedure. The appellants are entitled to their costs in both the Courts on a claim for redemption.

The cross-objections are dismissed. No order as to costs.

Z. K. *Appeal allowed.*

ALI KHAN *v.* MALIK MAIDAN

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 153 OF 1921.

October 30, 1923.

Present:—Mr. Pipon, J. C.

ALI KHAN AND OTHERS—DEFENDANTS—PETITIONERS

versus

MALIK MAIDAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Village sites—Proprietors, rights of—Village becoming town, effect of—Administrative act, declaring certain area to be town, effect of—Presumption—Kulachi in Dera Ismail Khan District, whether town—Evidence Act (I of 1872), s. 110.

An administrative act including an area within the limits of a Municipality or a Notified Area does not necessarily operate to destroy the pre-existing character of that area, and such administrative act is not in itself sufficient to make the area so included a sub-division of a town; but such inclusion is strong evidence of the urban character of that area. [p. 553, col. 2.]

The fact that an area is urban immoveable property for purposes of pre-emption is not in itself conclusive proof that the village proprietary tenure of sites no longer exists in that area, but it does give rise to a presumption to that effect. [p. 553, col. 2.]

It is possible for an area in course of time completely to change its character, and what was originally a village may become a town. [p. 556, col. 2.]

Where a village has become definitely and unmistakeably a town, even the most shadowy title of a ground landlord may disappear altogether, leaving in operation the ordinary presumption that possession of a site implies ownership of that site unless the contrary is proved. [p. 557, col. 1.]

Case law discussed.

That portion of Kulachi which is within the City walls has become a town. [p. 557, col. 1]

Application for revision against the order of the Divisional Judge, Derajat, dated the 30th May 1921.

Mr. *Saad-ud-din Khan, K. B.*, for the Petitioners.

Lala Roshan Lal, for the Respondents.

JUDGMENT.—The material facts of this case are these. The plaintiff, Malik Maidan, is a Jat occupying two houses in Kulachi, in the D. I. Khan District. He claims to be the owner both of the superstructure and of the sites of the houses. The first two defendants, Jamal Khan and Mst. Fatima, who is the widow of Jamal Khan's brother Khanizaman, are members of the proprietary body of the Jafarzai section of the Gandapur tribe. They asserted a title of ownership in the sites of the two houses occupied by the plaintiff. By a deed of exchange, dated the 3rd of March 1919 they transferred their alleged rights as ground landlords to the remaining defendants, namely Hafiz Umardaraz Khan, a leading member of the Gandapur tribe, and his sons. The plaintiff sued for a declaration that the first two defendants were not owners of the houses in question, that the transfer was null and void, and that it could not affect plaintiff's interest. It was admitted by the defendants that the plaintiff was the owner of the superstructure, but it was alleged that in the case of one house the permission of Jamal Khan as ground landlord had been obtained for the purchase of the materials, and that in the case of the other, though the plaintiff's occupation was of old standing, the site had originally been taken on loan from the ancestors of Jamal Khan. It was also alleged by the defendants that certain customary dues known as "*jhagri*" had been realized from the plaintiff. The plaintiff has succeeded in obtaining the declaration sought for in the two Courts below. They have concurred in finding that he has never paid any "*jhagri*" dues to any ground landlord, and that he is the owner not only of the superstructure, but of the sites of the houses.

I do not intend to disturb the finding of fact that the plaintiff has never paid these dues. I have taken up this case on the Revisional side on the application of the defendants under section 84 (*b*) of the North-West Frontier Province Law and Justice Regulation on the ground that an important question of law and custom is involved. It is necessary to state clearly what this question is. It is contended before me by the defendant's Counsel that there has been a misconception in the Courts below of the real position to which the suit relates. He argues that, even if it be conceded that the plaintiff has a permanent right of residence in the houses with full powers to transfer, and that even if he pays no form

of rent or of customary dues, it is still impossible that he, a non-member of the Gandapur proprietary body, but a member of the class usually known as "*hamsayas*", can be a ground landlord as against the members of the Gandapur proprietary body. It is contended that the proprietorship of a site, although it may be encumbered with every kind of privilege by the occupier, has, nevertheless, a certain ultimate value, such value at least which would attach to the right of reversion an case of abandonment. While it is an admitted principle of law arising from section 110 of the Evidence Act that occupation of a site in a town raises a presumption of ownership, the learned Counsel contends that the area in which this house is situated is not a town, but a village, and that the decision of the case must hinge largely upon the determination of this question. He quotes paragraphs 223, 224, 236 and 238 of Rattigan's Digest of Customary Law as showing that, in the case of a village site, the presumption is that a non-member of the proprietory body has not a right of ownership. He also points to numerous precedents in this Province for the same view. It is contended, on the other hand, by plaintiff's Counsel that this aspect of the case was not specifically raised in the two Courts below, and that, in any case, Kulachi is a town in which the presumption created by section 110 of the Evidence Act must necessarily apply, and that Kulachi is entirely removed from the conditions which govern the ownership of sites in agricultural villages. It appears to me necessary, therefore, as the question is one of considerable importance, to come to a definite finding as to whether the area in which these houses are situated is a town or a village as affecting the presumption of site ownership.

It is argued for the plaintiff that we have in Kulachi all the usual features of a town. It has been declared a Notified Area under the Municipal Act and has the Headquarters of a Tahsil, a Police Station, an Anglo-vernacular Middle School, a masonry bazaar and a population of 10,000 (I see that the population according to the Census of 1921 is actually 7,811.) *Harjallu Mal* v. *Nathu Ram*, (1) is quoted in this respect. I do not, however, attach very much importance to the above features taken alone. So far as regards the argument based upon the existence of a Tahsil Headquarters, Police Station, a school and large population, there are undoubtedly areas in this Province which may boast of substantially the same features, but which, nevertheless, may still be regarded as retaining the quality of villages. As regards the inclusion of Kulachi within the limits of a Notified Area, I have pointed out in a ruling published as J. R. 113 in the case *Sherali* v. *Kalandar Khan* what I believe to be a sound view of the law, namely, that an administrative act including an area within the limits of the Municipality (or Notified Area) does not necessarily operate to destroy the pre-existing character of that area, and that such administrative action is not in itself sufficient to make the area so included a sub-division of a town; but that, at the same time, the inclusion is strong evidence of the urban character of that area. The ruling quoted was on a question of pre-emption. It would, no doubt, be going too far to say that the fact that an area is urban immoveable property for purposes of premption is in itself conclusive proof that the village proprietary tenure of sites no longer exists. At the same time, it may be stated with confidence that there is a presumption to this effect. Now, cases have been before the Courts in which pre-emption in Kulachi has been based solely upon the law governing urban immoveable property. I have been shown no cases in which the inhabited area of Kulachi has been treated, for purposes of pre-emption, as village immoveable property.

A point which has not been dealt with by the two Courts below, but which has come to light during this revision, is that a portion of Kulachi is enclosed by a City wall, but certain sections or *Kirris*, as they are called, lie outside the wall. It is admitted that the present section, Kirri Jafarzai, is one of the sections which lie inside the wall. This point is material in considering one portion of the evidence. In the *wajib-ul-arz* of the Settlement of 1878 a distinction is drawn between what is described as "*khas qasba kiabadi*" and "*baqi kirrijat bairuni*". The *wajib-ul-arz* begins by the rather curiously worded clause "*Khas qasba ki ababi mutaalaq diwani hai. Is men Kharid o-farokhtzamin wa makanat har ek ko*

(1) 51 P. R. 1907; 98 P. L. R. 1907; 108 P. W. R. 1907.

ALI KHAN *v.* MALIK MAIDAN

ikhtiyar hai." It continues :—"*baqi kirrijat bairuni ki milkiyat malikan darj ho kar mutallaq mal likhi gai hai*". Then follow certain provisions which undoubtedly recognize at least some form of interest by "*malikan*", (which evidently means the village proprietary body) in building sites. Among oth·r things it lays down that in case a building is destroyed and the owner of the building does not rebuild it, the site shall beconsidered the property of the "*malikan*". It is contended by the defendants Counsel that this clause discloses a complete recognition of some interest in the sites by the proprietary body. Plaintiff's Counsel, on the other hand, argues that all the provisions relating to the interest of the proprietary body in these sites are confined to the *Kirris* or sections which lie outside the walls of the town. An examination of the document leaves no doubt in my mind that this latter view is the correct one. The expression " *mutaalaq diwani* " is certainly curious, and it is argued for the defendants that it cannot possibly be held to imply any thing affecting site ownership, for even in a purely village area disputes as to houses and sites would be a matter for Civil and not Revenue Courts. I have not the least doubt, however, that there is, in this *wajib-ul-arz*, a very obvious attempt to lay down a clear distinction between portions of the area. The interpretation of the words "*mutaalaq diwani*" has already come before the Courts on a previous occasion. In the appeal *Ghulam Sarwar* v. *Tola Ram* decided by the Divisional Court. Derajat, on the 10th of October 1907. the Divisional Judge, Mr. Bolton, remarked :—Kulachi is a *qasba* and not a village, and under Rattigan's Customary Law (paragraph) 236 the sites in *qasba* are presumed to belong to the owners of houses existing thereon. Respondents are admitted to have been the owners of the buildings on this site. Moreover, in the papers the Kulachi site is entered as '*abadi deh mutaalaq diwani*' which is interpreted as meaning that " the occupiers own their sites." It may be admitted that the words quoted, as they stand, do not, in themselves and taken alone, necessarily bear the interpretation which has been put upon them. I consider, however that the context completely demonstrates the fact that, so far as the *wajib-ul-arz* is concerned, the conditions which were laid down respecting the ownership of sites in *Kirris* outside the town wall, were intended not to apply to the town inside the wall, and I think that it is difficult to put any other construction upon the document. There are other revenue documents which have been referred to in this case. One is the " *misal bandobast* of 1878. In this the ownership of the whole site is described as " *abadi deh muttalaq diwani,*" and the cultivating column shows " *maqbuza bashindagan deh.*" There then follows an explanation to the following effect :—"No record has been prepared by houses, regarding possession, etc., between occupants of houses, nor has any record of house rights been drawn up in the Settlement papers. Therefore, when any dispute of this kind is instituted, the Court will settle it by its own decision." This document does not materially assist the case. It is argued for the defendants that in it, at any rate, all sections of Kulachi are lumped together, and no distinction is drawn between those inside and those outside the City wall So far as this question is concern ed, more importance obviously attaches to the *wajib-ul-arz* as the more detailed document. It is also argued for the defendants that the " *misal bandobast* " does contemplate some difference between owners and mere occupiers, but I am unable to see that it bears this construction. Another document on the record is the "*Khasra abadi*" of the present Settlement which was put in by the defendants in the Appellate Court only. Plaintiff's Counsel has objected that the document was improperly admitted by the Appellate Court, as under O. XLI, r.27, Civil Procedure Code, a record of the reasons for admission was necessary, and that no reasons have been recorded. This contention is undoubtedly correct, as the sole order on the record in this respect is " to be attached to the file." It may be as well, however, in these proceedings for me to consider briefly whether this document has any real bearing upon the case. It is one drawn up at the Settlement with a view to recording the rights in plots within the town or village sites which are actually cultivated. The defendant's Counsel lays stress on the entry of persons as cultivating tenants-at-will, the column of proprietorship merely showing " *abadi deh.*" In one case the son of the present plaintiff is shown as a tenant-at-will of this character. It is contended that such tenants must

necessarily be tenants of some persons and that, therefore, the expression "*abadi deh*" when used in the column of ownership, implies a recognition of the existence of the original proprietary body of the tribe, or of branches of that proprietary body as ground landlords of the area covered by a village. As this record was not produced in the trial Court and has been improperly admitted to the record of the Appellate Court, the plaintiffs has had no opportunity of producing evidence in respect of particular entries. I do not consider, however, that it is necessary for me to direct any further inquiry upon this point. Its value as showing that persons cultivating land are necessarily tenants of the proprietary body as *general* ground landlords is not very great. There must necessarily be some origin, however remote, for the ownership of sites. It seems to me quite possible to recognize that, in the case of cultivated plots, the title to the site may still vest in the original proprietary body without necessarily affecting the question of the title to the sites of house property at all. Owing to the document not having been produced in the first instance, there is no possibilty of identifiying each of the cultivated plots or of discovering how and when the recorded tenant came into occupation.

Other evidence, however, besides the documents referred to above, is relied upon by the defendants in support of their position. It is contended that, if it can be shown that at some period the title to the proprietary body in building sites has been recognized, this right, in however attenuated or encumbered state it may now exist, cannot possibly be extinguished altogether. The learned Counsel for the defendants has called attention to the case of the village of Serai Saleh in the Hazara District. In a published ruling of this Court, J. R. 96 of 1917, it was fouud that the occupiers of houses in Serai Saleh had rent-free rights of residence with unrestricted rights of transfer. It was held, nevertheless, in a recent appeal before this Court decided on the 31st of July 1923 by Mr. Fraser as Judicial Commissioner (Civil Appeal 105 of 1921, *Muha. Farid Khan* v. *Ram Kishan* (2) that, in spite of all these encumbrances, the proprietary body of Serai Saleh had, nevertheless, an ultimate right of reversion to sites in the case of a widow holding a limited interest who had made an invalid alienation. Certain cases are then referred to as showing that in Kulachi also some interest by the proprietary body has been recognized. The first of these is *Bakhtiyar Khan* v. *Ishar and Mangu, etc.*, decided by the Extra Assistant Commissioner D. I. Khan on the 22nd of February 1857. The case related to the section Kirri Jafarzai with which we are now concerned. It was settled in that case by arbitration that the site belonged to the plaintiff and that the Hindu occupiers were owners of the superstructure, paying 1-as customary due on every marriage or male birth. This appears to be the same due as is now described as "*jhagri*", though the latter word is not actually used in the case. Another case is one decided by the Deputy Commissioner, D. I. Khan on the 30th of September 1864, in which it was held that the site belonged to a branch of the Gandapur tribe, and that the occupier had rights of residence only. The dispute referred to a house in Kirri Barakhel and not in Kirri Jafarzai, but the Barakhel Kirri is also inside the town wall and is said to be in the centre of the town. Another case is that of *Mst. Gulbibi*, wife of *Guldad Khan*, (a Gandapur proprietor) v. *Chandan Khan and others* decided by an Extra Assistant Commissioner on the 25th of May 1879, ragarding four vacant sites, It has not been shown in what section the sistes were situated. This case is, in my opinion, of some importance. The claimant alleged that she had been realizing "*jhagri*" dues. The judgment refers to the similarity of the tenure of sites in Kulachi with that of residential plots in D. I. Khan and Leiah. In the case of D. I. Khan at least it could not be argued that there is any question of proprietership by an original agricultural body. The order recites that "*jhagri*" is very little realized, and either may be given or not given. It also contains the following words upon which great stress has been laid for the plaintiffs :—"No rights of ownership in a house accrue to the person who receives '*jhagri*' as against the person who gives it." It has been pointed out by defendants' Counsel that the trial Court in the present case remarked in its judgment that, if Jamal Khan or Hafiz Umardaraz Khan had been able to realize "*jhagri*" from one or two persons, this was due to their influence as *Raises* and did not make the due one payable by the *hamsayas* as a matter of right. It is

said, therefore, that realisation of "*jhagri*" in some cases at least has been established. It is to meet this argument that the words which I have quoted above in the 1879 case are emphasized as showing that the payment of "*jhagri*," even if proved, has no connection with the ownership either of site or of superstructure. In my opinion these previously decided cases show that, up to 1879 at least, the Gandapur proprietary body in the whole of Kulachi town had, from time to time, claimed an interest in sites occupied by buildings; that their claim was a shadowy one, but that from time to time they had succeeded in realizing certain dues from persons occupying houses, but that these realisations bore no direct relation to the occupation of particular sites, and constituted mainly a general recognition of the power and influence of the original proprietors. It may be noted that there appears no instance later than 1879 of any general interest in sites by the Gandapur proprietors being judicially recognised. On the contrary, in the case decided by the Divisional Court in 1917 and referred to above, which related to the Barakhel Kirri in the centre of the enclosed town, it was very definitely contended that the Gandapur proprietors had the right of reversion in the site of a *serai* when the building ceased to be occupied by a *serai*, and it was equally definitely held that, as the site in question was in a town and not in a village, there was no such right of reversion. It is again urged for the defendants that one of the plaintiff's own witnesses, Allahyar, admitted in evidence that Jamal Khan was the owner of all unoccupied sites. This, no doubt, is important, but as I shall show below, I do not consider that the actual ownership of unoccupied sites necessarily proves that the ownership of occupied sites still vests in the proprietary body. Evidence has also been produced from the Registration records to show that the present transferror Jamal Khan has made various sales of sites in the Jafarzai section. One of these was in 1912 and three in 1918. Here, again, it may be remarked that the ownership of a particular site does not necessarily prove a general proprietary interest in the whole area. We do not know how the title of particular sites was acquired and, even if it be conceded that it was derived from an original title held by the tribal proprietary body, this is not conclusive proof that a right of proprietorship still subsists throughout the whole area. It may further be said that it is difficult to distinguish between genuine transfers of actual property and comparatively recent speculative attempts to reassert a title which in 1917 had been in one case judicially held to be non-existent. There is little doubt that the transfer in 1919, with which we are now concerned, was in the nature of a pure speculation made with a view to re-asserting a title of this kind.

The question which I have to determine is whether on the above evidence there is reason to hold that the case of Kulachi is parallel to that of Serai Saleh and whether, however attenuated the title of the proprietary body may be in sites of houses of which the superstructure is owned by the occupiers, there is at least some title existing. The question may be expressed, as I have already expressed it, in another way, as one between the presumption arising from section 110 of the Evidence Act in the case of a town and the presumption arising from established custom in the case of a village. It appears to me necessary in the first instance to recognize the fact that it is possible for an area in course of time completely to change its character, and that what was originally a village may become a town. This has been fully recognized in the case-law on pre-emption. In respect of site ownership under paragraph 236 of Rattigan's Digest there are quoted under Exception (1) the following rulings of the Punjab Chief Court; *Kala Khan* v. *Saru* (2), *Ramji Das* v. *Hamir Chand* (3), *Mewa Singh* v. *Hakam Ali* (4) as showing that in villages that have grown into towns or *qasbas* the proprietor of the house is held to be the proprietor of the site on which it is built. Although an examination of those rulings certainly shows that they hardly bear the construction which has been placed upon them, and that they relate rather to the question not of actual ownership, but of freedom to transfer rights of residence, I think, nevertheless, that the principle that development into a town may even operate to destroy original rights of site ownership is one which must actually be recognized, and there seems to me evidence to show that this is what has occurred in the town of Kulachi, so far at least as

(2) 48 P. R. 1881.
(3) 9 P. R. 1882.
(4) 87 P. R. 1884.

regards the portion which is enclosed in the city wall. The relations between original ground landlords and occupiers of houses have passed through various stages in villages in this Province. In some cases original ground landlords have been able to preserve a comparatively unencumbered title. In others they have preserved a right to customary dues without power of eviction. In others they can control transfers, though no rent is realized. In, *e.g.*, Serai Saleh, practically nothing is left except an ultimate right of reversion in a rare contingency. There seems to me nothing inconsistent in recognizing that, where a village has become definitely and unmistakeably a town, even the most shadowy title of a ground landlord may have disappeared altogether, leaving in operation the ordinary presumption that possession of a site implies ownership of that site unless the contrary is proved. A clear distinction must be made between the *origin* of the proprietary tenure of sites and its subsisting character. It seems to me difficult to accept the extreme contention that if, once such proprietorship can be proved to have existed at all, nothing can prevent its surviving in some form or other. It further appears to me that the fact that unoccupied sites vest at the moment in members of the original proprietary body while it may be evidence of the origin of ownership of all sites, has no necessary effect upon the existing ownership of particular sites. There is every thing to show that the character of Kulachi, so far as regards the portion enclosed within the City wall, is wholly dissimilar from the character of a village such as Serai Saleh. It has at this moment all the characteristics which can be predicated of a town. It is a town for the purposes of pre emption, it is a town for the purposes of administration, and it has judicially been held to be a town for the purposes of the very question to which this suit relates, namely the rights of reversion in building sites. It would, no doubt, be perfectly open to a member of the proprietary body to show that he was the owner of any particular site, and even that he derived his title to that site from the original poprietary tenure existing at the foundation of the village. In a case, however, such as the present, where a member of the village proprietary body has not succeeded in proving a specific title to a specific plot, the presumption which must guide the Courts is that arising from section 110 of the Evidence Act and not that arising from customary law, inasmuch as we are now dealing with a town and not with a village. It is perfectly possible that the original rights of the Gandapur proprietary body may still exist in respect of sites situated in the "*Kirris bairunjat*," or settlements outside the town wall. So far as regards those sections which are situated within the town wall, I hold that they constitute a town and not a village, and that no presumption of title, attenuated or otherwise, to the ownership of a particular site can be admitted as overriding the general presumption which arises under section 110 of the Evidence Act from the rent-free possession of a house in a town, and that the latter presumption covers the site as well as the superstructure.

The present case turns wholly upon the presumption of site ownership. There is nothing proved, except that presumption, which would bar the plaintiff from obtaining a declaratory decree affecting his ownership of the site as well as the superstructure. In view of my finding that the presumption in this area is that the owner of the house is also owner of the site, I consider that the decree was rightly passed. I, therefore, dismiss this application for revision with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 176 OF 1922.

February 18, 1924.

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

MADAN MOHAN BURMAN AND ANOTHER —CLAIMANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Calcutta Improvement Appeals Act (1911)—*Market value of land—Evidence—Price paid in sales of land*

MADAN MOHAN BURMAN *v.* SECRETARY OF STATE

—Previous decision in Land Acquisition cases—Price of land with buildings—Relevancy.

In assessing the market-value of a piece of land the price paid in other transactions relating to land in the neighbourhood is admissible in evidence, as previous decisions in Land Acquisition cases are relevant in a subsequent case where the market-value of lands in the same neighbourhood is in issue.

Secretary of State for India v. *India General Steam Navigation and Railway Co.*, 4 Ind. Cas. 448 ; 36 C 967 ; 10 C. L. J. 281 ; 11 Bom. L. R. 1197 ; 14 C W. N. 134 ; 19 M. L. J. 645 ; 36 I. A. 200 (P. C.), followed.

In determining the value of a piece of land, the evidence as to the sale of land with a building thereon is not inadmissible.

Appeal against the decree of the President, Calcutta Improvement Tribunal, dated the 28th February 1922.

Babus *Provas Chandra Mitter, Charu Chandra Biswas* and *Manindra Kunvar Bose*, for the Appellants.

Babus *Dwarkanath Chakrabrurtty* and *Surendranath Guha*, for the Respondent.

JUDGMENT.—This is an appeal under the Calcutta Improvement Appeals Act, 1911, against the decision of the Calcutta Improvement Tribunal awarding compensation for land that has been acquired in connection with the operation of the Calcutta Improvement Trust. The President of the Tribunal held that the amount of compensation to be awarded in respect of the market-value of the land should be calculated at the rate of Rs. 6,500 per *cottah*. The two assessors held that the market-value should be taken as Rs. 7,000 per *cottah*, and the award was made in accordance with the opinion of the majority.

The claimant has appealed and the point of law pressed before us is that certain evidence was wrongly excluded. The learned President whose decision on points of law at the trial is binding on the assessors refused to allow the claimant to adduce evidence about the amount of compensation awarded to him in respect of the set back and the compensation awarded in respect of the acquisition of Premises Nos. 161, 162 and 163, Machuabazar Street, and No. 1, Upper Chitpur Road. The reason he gave was that in those cases the awards were made as the result of decisions given by the Civil Court in Judicial proceedings, and he held that the judgments were inadmissible under the provisions of the Indian Evidence Act relating to judgments and orders. We are unable to agree with him on this point. In assessing the market-value of a piece of land the price paid in other transactions relating to land in the neighbourhood must be of some value. What its value is it is for the Court of fact to determine ; but we hold that it cannot be rejected as inadmissible on the ground given in the judgment of the learned President. For the view we take we have the authority of the Judicial Committee of the Privy Council in the case of *Secretary of State for India* v. *India General Steam Navigation and Railway Co.* (1). In that case certain judgments of the High Court in other proceedings were relied on by the claimant. It was argued on behalf of the appellant to the Judicial Committee that these judgments were not evidence of the value of the land in dispute. Their Lordships, after stating in their judgment that the High Court in a very careful judgment had revised the earlier awards, dismissed the appeal, holding that no question of principle was involved in it. There cannot be a clearer authority that previous decisions in Land Acquisition cases are relevant in a subsequent case where the market-value of lands in the same neighbourhood is in issue.

Another piece of evidence which we hold has been wrongly rejected is Ex. 13 ; that relates to the sale of a piece of land in the neighbourhood in which there was a *pucca* building. We are unable to understand why this should not be relevant. It may be difficult to determine the value of the land apart from the building, but it is not necessarily so, and the claimant is entitled to put this evidence before the Court and ask the Tribunal, on a consideration of the evidence, to decide what portion of the purchase price represented the value of the land then sold. In rejecting this evidence the learned President referred to a decision

(1) 4 Ind. Cas. 448 ; 36 C. 967 ; 10 C. L. J. 281 ; 11 Bom. L. R. 1197; 14 C. W. N. 134 ; 19 M. L. J. 645 ; 36 I. A. 200 (P. C.).

of this Court. The case was not cited by him but we understand it to be the judgment of a Division Bench of this Court in the case of *Manindra Chunder Nandi* v. *The Secretary of State for India* (2). But an examination of the judgment in that case shows that no such principle was laid down as that in valuing waste land the evidence as to the sale of land with a building thereon was inadmissible. What was held in that case was that certain questions set out in the report were rightly disallowed. None of these questions relate to a sale of land with buildings thereon. So far as that ruling asserts any principle, it follows the case of *Harish Chandra Neogy* v. *The Secretary of State for India* (3), and there also we find nothing to support the decision of the learned President.

The learned Government pleader was unable to support the decision of the learned President as being correct in law. His contention was that the learned President's language was inaccurate and that, when he spoke of inadmissible evidence he meant evidence that was of no value. But we must interpret the judgment according to the plain meaning of the words used. It was further contended that we should not interfere because the claimant had been in no way prejudiced by the exclusion of this evidence. Sitting as a Court of Appeal, with our powers so limited that we cannot consider the evidence on the facts, we are unable to say that the claimant has not been prejudiced. It is pointed out that the majority of the Tribunal held that the land would be normally worth at least Rs. 9,000 per *cottah* and that this in itself shows that their award was unaffected by the exclusion of this evidence. But we are unable to say that if this evidence had been considered by them they might not have put the normal value at a higher figure than Rs. 9,000 and the actual value higher than Rs. 7,000 per *cottah*.

We must, therefore, allow this appeal, we set aside the award of the Tribunal and direct that the reference be re-heard after admitting the evidence which we hold to be wrongly excluded.

(2) 28 Ind. Cas. 412; 18 C. W. N. 884; 41 C. 967.
(3) 11 C. W. N. 875.

The appellants will get their costs of this appeal from the respondent. The costs in the lower Court both before and after remand will be at the discretion of that Court.

S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 164, 165 AND 166 OF 1921.

January 30, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Ryves.

Babu KANHAYA LAL—PLAINTIFF—APPELLANT

versus

HIS HIGHNESS THE MAHARAJA SRI PRABHU NARAIN SINGH BAHADUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 88, 87, applicability of—Agra Tenancy Act (II of 1901), s 165—Suit against Ruling Chief as co-sharer—Property in suit outside State territory—Suit, whether maintainable without consent of Government.

The provisions of ss. 83 to 87 of the Code of Civil Procedure apply to suits under the Agra Tenancy Act. [p. 560, col 1.]

The fact that a Ruling Chief may own immoveable property within the limits of British India and outside his own State territories, does not entitle the Courts to treat him, with respect to the latter property, as an ordinary private citizen. [p. 561, col. 1.]

Second Appeal from the decree of the District Judge of Allahabad, dated 1st November 1920.

Mr. *Narayan Prasad Asthana*, for the Appellant.

Mr. *Kamuda Prasad*, for the Respondents.

Judgment.—These three second appeals have arisen out of suits for profits under section 165 of the Tenancy Act. The property in respect of which the profits were claimed is

situated in the Allahabad District and it is admitted that His Highness the Maharaja of Benares is one of the co-sharers in each of the villages in respect of which these suits for profits were brought.

His Highness the Maharaja was made a defendant in each of the three suits and as against him both the Courts below have dismissed all the suits on the ground that no decrees could be passed against His Highness on the ground that the consent of Government had not been obtained to the institution of the suits against him. In other words, the Courts below applied the provisions of section 86 of the Code of Civil Procedure.

We have now before us three second appeals in which the plaintiff challenges the correctness of the decision of the Courts below. The case for the appellant (the appellant is the same in all three cases) is that, the Courts below were wrong in holding that, so far as these suits were concerned, the Maharaja was not liable to be sued without the previous consent of Government being obtained.

There can be no doubt whatever that His Highness is a Ruling Chief. We have before us the Treaty or Instrument of Transfer which was executed when the dignity of a Ruling Chief was conferred upon His Highness by the British Government.

The first clause of this Instrument declares that His Highness shall be the Ruling Chief of Benares from the first day of April 1911.

There can be no doubt that, so far as suits under section 165 of the Agra Tenancy Act are concerned, the provisions of the Code of Civil Procedure apply, as laid down in Chapter 13 of the Agra Tenancy Act (U. P. Act II of 1901), and a reference to the Chapter will show that the provisions of Chapter 28 of the old Code of Civil Procedure, Act XIV of 1882, were applicable in their full force to all suits and other proceedings under the Agra Tenancy Act. It follows, therefore, that the provisions of sections 83 to 87 of the present Code of Civil Procedure apply to suits under the Tenancy Act.

It, therefore, cannot be doubted that it was competent to His Highness the Maharaja in these suits to plead that he was not liable to be sued without the previous consent of the Governor-General in Council or of any other authority to whom the power of granting such consent has been delegated under section 86.

The matter would be perfectly clear except for one provision which is to be found in the Instrument of Transfer by which His Highness was constituted a Ruling Chief. Clause 26 of this Instrument provides in the first instance, that the right to repeal or amend in any way and at any time Bengal Regulation VII of 1828 or any other Regulation or Law in virtue of which the Raja of Benares enjoys any special privileges within the *Pergana* of Kaswar Raja which heretofore was included in the family domains but is excluded from the State of Benares constituted by this Instrument, is hereby expressly reserved to the Lieutenant-Governor of the United Provinces of Agra and Oudh. So far as this part of clause 26 is concerned, it clearly reserves a right to the Lieutenant-Governor of the United Provinces to withdraw from the Maharaja any special privileges which he had hitherto enjoyed in the *Perganah* of Kaswar Raja. Attached to this clause 26 there is a declaration which runs as follows:—

"Within the other estates now in possession of His Highness which are outside the State of Benares, he shall continue to have the status and responsibilities of a landholder under the ordinary law and within the *Perganah* of Kaswar Raja he shall assume that status and those responsibilities."

We may observe here that by U. P. Act No. VI of 1915 Regulation 7 of 1828 was repealed and the provisions of the Agra Tenancy Act and the United Provinces Land Revenue Act were made applicable in their entirety to all the property of the Maharaja situated in *Perganah* Kaswar Raja.

Mr. Narain Prasad who appears for the appellent here argues that, on the language of this concluding portion of clause 26, the Maharaja in these suits is not entitled to raise the plea that he has the status of a Ruling Chief and is, therefore, only liable to be sued in case the sanction of the Government has been obtained.

It is contended that this language properly interpreted means that, with respect to all lands situated outside the State of Benares, the Maharaja has waived his right to plead his status as a Ruling Chief and is subject to all

the responsibilities and liabilities of a land-holder under the ordinary law.

It is difficult to ascertain what is the correct meaning of this provision and it was in view of this difficulty of interpretation that the learned Judge of this Court before whom this case came in the first instance referred it for consideration by a Bench.

We are not, however, disposed to accept the plea of the appellant that the language of the concluding portion of clause 26 indicates that His Highness the Maharaja intended to waive any right to plead his status as a Ruling Chief in the case of suits which were brought against him in respect of property held by him in British India.

We think that, with respect to his liability to be sued in British India, it would be difficult to invest His Highness with a dual personality (1) that of a Ruling Chief, and (2) that of an ordinary citizen.

Clearly, section 86 of the Code of Civil Procedure contemplates the case of a Ruling Chief being sued with respect to interests which he has outside his own territory and within the limits of British India, and it seems to us that the fact that a Ruling Chief may own immoveable property within the limits of British India and outside his own State territories does not entitle the Courts to treat him with respect to the latter property as an ordinary private citizen. That meaning certainly could not be attached to the language of section 86 of the Act. If we look at sub-section (3) of section 86 we find that no Ruling Chief is liable to arrest under the Code, and, further, except with the consent of the Governer-General in Council, certified as aforesaid, no decree can be executed against the property of a Ruling Chief.

If we were to accept this argument and treat His Highness as having two personalities in the eye of the law, we should be obliged to hold that in his capacity as a private citizen he would be liable to arrest under the terms of sub-section (3) of section 86. We can hardly think that the language of section 86 contemplates a contigency of this kind and we are, therefore, of opinion that His Highness being undoubtedly a Ruling Chief was entitled in these suits to claim the benefit of section 86. We do not think we ought to hold that clause 26 of the Instrument of Transfer operates in the manner contended for by the learned Counsel for the appellant in these cases.

Admittedly, the suits with which we are now concerned do not fall within the purview of sub-section (5) of section 86. In the class of suits indicated in this sub-section no consent of course is necessary, but these suits were not suits brought by a tenant of immoveable property against His Highness the Maharaja as land-holder. They were, as we have stated, suits, brought by one co-sharer as against His Highness in his capacity as a co-sharer.

We hold, therefore, that His Highness was entitled to take the benefit of section 86 and to plead in bar of the suits the want of consent of the Governor-General in Council. In our opinion the appeals were rightly decided. We dismiss these appeals accordingly with costs including in this Court fees on the higher scale.

S. D. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1987 OF 1923.

February 5, 1924.

Present :—Mr. Justice Moti Sagar.

FAIZ MUHAMMAD—PLAINTIFF—APPELLANT

versus

LATIF—DEFENDANT—RESPONDENT.

Easements—Severance of tenements—Implied grant—Equity, justice and good conscience.

Where a person grants a portion of his property reserving a portion to himself, he grants with it all the easements and *quasi* easements, which had been formerly used, over the part reserved, by the part granted and which are necessary to the reasonable enjoyment of the part granted.

***Attar Singh* v *Jowahir Lal*, 60 P.R. 1888 followed.**

The doctrine of implied grant of easements on severance of tenements is in accord with justice, equity and good conscience.

FAIZ MUHAMMAD *v.* LATIF

Second Appeal from the decree of the Senior Subordinate Judge, Rohtak, dated the 27th June 1923

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of the case out of which this second appeal has arisen are simple enough, and the only question for determination is, whether the plaintiffs are entitled to the use of a certain staircase by which a certain shop owned by them in the town of Rohtak is bounded on the North. The shop originally belonged to the defendant and was admittedly transferred to the plaintiffs by a registered deed of sale, dated the 4th of July1922. The plaintiff's case is that when the shop was transferred the right of user in the staircase was also transferred, and that the defendant has no right to restrain them from making use of the same. The defendant, on the other hand, denies having parted with any rights in the staircase, and contends that the plaintiffs have no right to maintain this suit. The trial Court found in favour of the plaintiff but the learned Senior Sub-Judge came to a contrary conclusion and dismissed the suit.

The plaintiff has now come up in second appeal to this Court, and it has been urged on his behalf that the learned Senior Sub-Judge has taken an entirely erroneous view of the matter, and that the sale-deed executed by the defendant in their favour has been wholly misconstrued. After hearing the learned Counsel on both sides, I am of opinion that this contention is well founded and must prevail. The staircase has, all along, been used as a means of access to the upper storey of the shop and unless the right of its user was expressly reserved by the sale-deed, it must be presumed that there was an implied grant of the same when the shop to which that right was appurtenant was transferred in his favour. It is well settled that where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and *quasi* easements, which had been formerly used, over the part reserved, by the part granted, and which were necessary thereto.

In *Attar Singh* v. *Jowahir Lal* (1), it has been laid down that on the grant, by an owner of a tenement, of part of that tenement, as it is then used and enjoyed, the grantee of the part will acquire all those easements which are necessary to the reasonable enjoyment of the tenement granted. The doctrine of implied grant of easements upon severance of tenements is in accord with justice, equity, and good conscience, and there can be no doubt that it would be most inequitable to hold that, though the shop and the upper storey were transferred to the plaintiff, the means of access to the upper storey was withheld and not transferred.

Apart from the question of an implied grant, however, I am of opinion that the right of user in the staircase was expressly transferred to the plaintiff by the deed of sale executed by the defendant in his favour. The deed recites that the shop had been transferred to the plaintiff with all its appurtenant rights. The important words are :—*dukan mazkura bala komai jumla haq haquq dakhli wa kharji wa haq amad-o-raft wa asaish wa mori wa parnala wa jumla haqhaquq balai manzil wa malba har kisam manzil zerin wa manzil balai wa farokht kardiya.* These words, in my opinion, clearly indicate that the right of user in the staircase, which was necessary for a reasonable enjoyment of the building transferred had also been transferred. In my opinion, the learned Judge of the Court below has not properly construed the deed of sale, and the appeal must, therefore, succeed.

I accept the appeal and decree the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 60 P. R. 1888

DURGA PRASAD *v.* LACHMI NARAIN

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1216 OF 1922.

January 29, 1924.

Present :—Mr. Justice Kanhaiya Lal.

DURGA PRASAD—DEFENDANT —APPELLANT

versus

LACHMI NARAIN—PLAINTIFF—RESPONDENT

Easements Act (V of 1882), ss. 28, 33, 35—Extent of easement—Mode of enjoyment how fixed—Right to light and air—Damage, when substantial.

The mode of enjoyment of an easement must be fixed with reference to the purpose for which the right was acquired. [p. 563. col. 2.]

Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is considered substantial within the meaning of ss. 33 and 35 of the Easements Act, unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as he might have done previous to the disturbance. [p. 564, col. 1.]

Each case of an alleged disturbance of an easement of light and air must be decided on its own facts. [p. 564, col. 2.]

Where the defendant constructed his wall in such a manner as to block a window in the plaintiff's verandah which opened towards the defendant's land and the plaintiff sued for the demolition of the wall :

Held, that the obstruction of the window did not, in the circumstances of the case, involve any material interference with the access of light and air, and the plaintiff was not entitled to any relief. [p. 564, col. 1.]

Second appeal from the decree of the District Judge of Cawnpore, dated the 2nd May 1922.

Dr. *K. N. Katju* and Mr. *H. K. Kaul*, for the Appellant.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—The question for consideration in this case is, whether the defendant was entitled to construct his wall in such a manner as to block a window in the verandah of the plaintiff which opened towards the land of the defendant. The window had been in existence for more than twenty years. The Court of first instance refused to direct the demolition of the wall by which the window was blocked, holding that the construction had not had the effect of materially interfering with the access of light and air to the verandah of the plaintiff. The lower Appellate Court, however, thought that as the effect of the construction of the wall was to block the window entirely, the plaintiff was entitled to have the obstruction removed in order that the access of light and air through the window might remain unaffected. In doing so, it disregarded the conditions of the locality, inasmuch as the verandah of the plaintiff had sufficient access of light and air from the other sides and the blocking up of the window had made no difference whatsoever to the light and air which was obtainable to the verandah of the plaintiff otherwise.

Section 28 of the Indian Easements Act lays down that the extent of an easement, other than an easement of necessity, and the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired. The verandah in question has got a street in front, from which any amount of light and air can be obtained. It has got three or four doors behind and a window on the north, which would help the passage of air from one end of the verandah to another. The window in dispute was on the south and its obstruction cannot possibly involve a material interference with the access of light and air, so as to entitle the plaintiff to claim that it should be restored to its original condition.

The lower Appellate Court refers to the decision in *Khunni Lal* v. *Kundan Bibi* (1), but it is possible that the circumstances of that case may have justified an order for the removal of the obstruction. Section 35 of the Indian Easements Act lays down that, subject to the provisions of the Specific Relief Act of 1877, an injunction may be granted to restrain the disturbance of an easement, if an easement is actually disturbed, when compensation for such disturbance might be recovered; and section 33 of the same Act declares that the owner or occupier of a dominant heritage can institute a suit for compensation for the disturbance of the easement where the disturbance has actually caused a substantial damage to the plaintiff. Where the easement disturbed

(1) 29 A. 571; A. W. N. 1907, 175 ; 4 A. L. J. 477.

is a right to the free passage of light, passing to the openings in a house, no damage is considered substantial within the meaning of sections 33 and 35, unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done previous to the disturbance.

In *Peter Charles Ernest Paul* v. *William Robinson* (2) their Lordships of the Privy Council, referring to the case of *Colls* v. *The Home and Colonial Stores Limited* (3), pointed out that the legal test in such an action was whether the obstruction complained of was a nuisance or whether the owner of the dominant tenement was getting the uninterrupted access through his ancient windows of a quantity of light, the measure of which was what was required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.

In *Gajadhar* v. *Kishori Lal* (4), it was similarly held that the owner of a dominant tenement was entitled to an injunction except in such cases where he would be entitled to recover damages; or, in other words, where the disturbance in equity caused substantial damages to the plaintiff of the kind referred to in the explanation appended to section 33 of the Indian Easement Act.

The plaintiff has, therefore, no absolute right to protect his window against obstruction. He has a right to the access of sufficient light and air through his window, but if there is already a sufficient access of light and air to his house through the other openings therein and the obstruction caused to the window does not materially or in any measure interfere with the sufficiency of the access of such light and air, the plaintiff is not entitled to any relief.

The lower Appellate Court has omitted to find whether the obstruction of the window had the effect of materially interfering with the access of light and air to the verandah of the plaintiff or not, but the learned Munsif who inspected the locality points out that the verandah of the plaintiff is quite open in front, that is on the western side, where there is an open space forming the ground of the Pokhrayan market, that there is another window on the northern side and that there are some doors on the eastern side opening into the sitting-room of the plaintiff which bring in an abundant supply of light and air to the verandah. In fact, according to the map attached to the plaint, there is a street in front of the verandah and the plaintiff does not really suffer any injury by the blocking up of the window. Each case of an alleged disturbance of an easement of light and air must be decided on its own facts. On the facts disclosed in the present case the plaintiff is not entitled to any relief, as he has suffered no real injury. The appeal is, therefore, allowed and the claim of the plaintiff for the demolition of the wall, blocking up the window in question, is dismissed with costs here and hitherto.

S. D. *Appeal allowed.*

(2) 24 Ind. Cas. 800 ; 42 C. 46 ; 18 C. W. N. 938 ; 27 M. L. J. 117 ; 1 L. W. 561 ; 16 M. L. T. 204 ; (1914) M. W. N. 681 ; 12 A. L. J. 1166 ; 16 Bom. L. R. 803 ; 20 C. L. J. 353; 41 I. A 180 (P. C.).

(3) (1904) A. C. 179 ; 73 L. J. Ch. 484 ; 53 W. R. 80 ; 90 L. T. 687 ; 20 T. L. R. 475.

(4) 28 Ind. Cas. 962 ; 18 A. L. J. 385.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 133 OF 1922.

December 5, 1923.

Present :—Mr. Justice Phillps, and Mr. Justice Venkatasubba Rao.

KAUNA PANIKKAR AND OTHERS—APPELLANTS

versus

NANCHAN AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 91, 144 —Malabar Law—Tarwad—Alienation by karnavan—Suit to recover property, form of—Limitation.

The members of a Malabar *Tarwad* need not sue to set aside an invalid alienation by the *Karnavan* but can sue to recover possession on the strength of title and it makes no difference that the *Karnavan* purported to act not only as *Karnavan* but also as guardian of the minor members of the family.

DEBI BAKCHAND v. BARAKATUNISSA

Such a suit is governed neither by Article 44, nor by Article 91, but by Article 144 of Schedule I to the Limitation Act.

Chandu v *Kambi*, 9 M. 208 ; 8 Ind. Dec. (N. S.) 542 ; *Unni* v. *Kunchi Amma*, 14 M. 26 ; 5 Ind. Dec. (N. S.) 19 ; *Chappan* v. *Paru*, 15 Ind. Cas. 587 ; 37 M. 420 ; 13 M. L. T. 118 ; *Kovvuri Thirupathi Raju* v. *Kovvuri Venkataraya*, 40 Ind. Cas. 418 ; *Ganesa Aiyar* v. *Amirthasami Odayar*, 44 Ind. Cas. 605 ; (1918) M. W. N. 892 ; 23 M. L. T. 245 ; *Chingacham Vittil Sankaran Nair* v. *Chingacham Vittil Gopala Memon*, 30 M. 18 ; 1 M. L. T. 412, relied on.

Appeal from the decree of the Subordinate Judge, South Malabar, at Palghat, dated the 31st December 1921.

Messrs. *C. V. Anantha Krishna Aiyar* and *C. V. Mahadeva Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *N. R. Lakshmana Iyer*, for the Respondents.

JUDGMENT.—It has been held in *Chandu* v. *Kambi*(1), *Unni* v. *Kunchi Amma*(2), and followed in *Chappan* v. *Paru* (3), that the members of a *tarwad* need not sue to set aside an alienation by the *Karnavan* but can sue to recover possession on the strength of title. In the latter case, one ground for the decision was that the alienation though not binding on the *tarwad* might be binding on the *Karnavan*. In this view Article 91 of the Indian Limitation Act would not be applicable to the present case, but it is argued that, inasmuch as the *Karnavan* purported to execute the document not only as *Karnavathi*, but also as guardian of the minor plaintiffs, consequently the members are parties to the document, and as such are bound to set it aside before recovering the property. But can it be said that minors are parties in that sense? It has been held in the case of Hindu Mitakshara families that sons when minors are represented in a document through their guardian, they need not set it aside. (*Kovvuri Thirupathi Raju* v. *Kovvuri Venkataraju* (4) and *Ganesa Iyer* v. *Amirthasami Odayar* (5). The principle that underlies the construction put forward by Mr. T. R. Ramachandra Aiyar is that parties are bound by their own acts until they are set aside or cancelled but minors cannot act and, therefore, the mere addition of their names in the document cannot make the document their act which must be set aside. In this connection, we may refer to *Chingacham Vittil Sankaran Nair* v. *Chingacham Vittil Gopala Memon* (6). Article 44 does not apply here as the alienation does not purport to be one by a guardian alone, but also by a *Karnavathi*, who, under certain circumstances, has authority to alienate a part altogether from her guardianship of minors. As neither Article 91 nor Article 44 is applicable. Article 144 must be applied and the suit is within time. The suit will, therefore, be remanded to the lower Court for disposal, after allowing plaintiffs time to amend the plaint and pay additional Court-fee if necessary. Costs will abide the result. The Court-fee in appeal will be refunded.

V. N. V. *Suit remanded for re-trial.*
Z. K.

(1) 9 M. 208 ; 8 Ind. Dec. (N.S.) 542.
(2) 14 M. 26 ; 5 Ind. Dec. (N.S) 19.
(3) 15 Ind. Cas. 587 ; 37 M. 420 ; 13 M. L. T. 118.
(4) 40 Ind. Cas. 418.
(5) 44 Ind. Cas. 605 ; (1918) M. W. N. 892 ; 23 M. L. T. 245.
(6) 30 M. 18 ; 1 M. L. T. 412.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 76 OF 1921.

February 29, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

DEBI BAKCHAND AND ANOTHER—APPELLANTS
versus
MT. BARAKATUNISSA—RESPONDENT.

Contract Act (IX of 1872), s 16—Undue influence—Unconscionable bargain—Domination of will of borrower—Exorbitant rate of interest—Urgent need of borrower.

A borrower is not entitled to any relief unless he proves, first, that the lender was in a position to dominate his will, and, secondly, that the bargain was unconscionable within the meaning of clause (3) of section 16 of the Contract Act. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower.
[p. 566, col. 2.]

DEBI BAKCHAND *v.* BARAKATUNISSA

Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act. [p. 568, col. 1.]

Sundar Koer v. *Rai Sham Krishen*, 34 C. 150 ; 4 A. L. J. 109 ; 5 C. L. J. 106 ; 9 Bom. L. R. 304 ; 11 C. W. N. 249 ; 17 M. L. J. 43 ; 2 M. L. T. 75 ; 34 I. A. 9 (P. C.), relied upon.

The mere fact that the rate of interest is exorbitant is no ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower. [p. 568, col. 1.]

Appeal from the decision of the Subordinate Judge, Gaya, dated the 17th December 1920.

Messrs. *Sultan Ahmad* and *Kailaspati*, for the Appellants.

Sir Ali Imam, *S. M. Mullick* and *Md. Hasan Jan*, for the Respondent.

JUDGMENT.

Das, J:—This appeal arises out of a suit instituted by the appellants to enforce payment by sale of the mortgaged properties of the sum of money owing on a mortgage-bond, dated the 11th November 1912, executed by the defendant in favour of plaintiff No. 1 in the *farzi* name of plaintiff No. 2. By this mortgage-bond, the principal sum secured was Rs. 7,500 with the rate of interest at Re. 1-4-0 per cent. per month with yearly rests. The learned Subordinate Judge has come to the conclusion that the mortgage-bond was not read and explained to the defendant who is a *parda nashin* lady of rank and position and that the transaction was induced by undue influence within the meaning of section 16 of the Contract Act. He also held that the mortgage-deed was not attested in the manner required by section 59 of the Transfer of Property Act. He found, however, that full consideration was paid by the plaintiffs to the defendant ; and, in that view, while refusing to give the plaintiffs a mortgage-decree, he has given them a decree for the principal sum advanced with interest at as. 12 per cent. per month. The main appeal in this Court is on behalf of the plaintiffs who contend that the learned Subordinate Judge should have given them a mortgage-decree in accordance with the mortgage-bond of the 11th November 1912. The defendant has presented a cross-appeal and the point raised in the cross-appeal is that the learned Subordinate Judge erred in holding that consideration passed in respect of the transaction. The cross-appeal has, however, not been pressed before us and we are only concerned with the main appeal filed on behalf of the plaintiffs.

I will first consider the question whether the mortage-bond was attested in the manner required by section 59 of Transfer of Property Act. That section lays down that, where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attestd by at least two witnesses. The learned Subordinate Judge has taken the view that as the defendant is a *pardanashin* lady of rich Muhammadan family, it is improbable that the witnesses examined on behalf of the plaintiffs could have actually seen her executing the document. The plaintiffs have examined three witnesses on the point ; Chhedi Ram, their Gomasta, Ram Lal, who has their gomasta but who is now an independent trader, and Sudama Ram. Their evidence is to the effect that they knew the defendant as they had had occasion to sell cloth to her. It ought to be pointed out that the plaintiffs are cloth dealers and had occasion to sell cloth to the defendant, and that part of the claim in this suit arises out of transactions in cloth between the parties. The evidence of Chhedi Ram is as follows :—" I know defendant for the last 15 or 20 years. She is not *parda nashin* woman to me. Since my childhood I went to sell cloth to her from Chainsukh's shop on her requisition and she always took cloth from me and spoke to me and appeared before me." It seems to me that this evidence is inherently probable. It is not disputed before us that Chainsukh Mall, the father of plaintiff No. 1, had a cloth business and that he did send cloth to the defendant for sale and that the defendant did purchase cloth from Chainsukh's shop from time to time. His evidence is perfectly clear that he was present when defendant put her seal on the document. He says that Baratu, the son of the defendant, signed her name in the mortgage-bond at her request and that the defendant herself put her seal to the mortgage-deed and he adds that these were done in his presence and in the presence of the other attesting witnesses. Ram Lal says that he

was a *Munib* (gomasta) of the plaintiff's firm and that the defendant used to appear before him from behind a *parda* and that she could be seen behind the *p irda* and that he knew her by sight. His evidence is that Baratu signed the name of the defendant at her request and that the defendant put her thumb-mark in his presence with her own hand. The evidence of Sudama Ram is to the same effect.

It seems to me that the learned Subordinate Judge has rejected the evidence of these witnesses on grounds which appear to me to be speculative. Upon the finding that the consideration-money was actually paid to the defendant, there is no reason to assume that the plaintiffs who are men of business should not take care to have the mortgage-bond attested in accordance with law, and it seems to me that there is no reason to reject the testimony of these witnesses. The learned Subordinate Judge thinks that there are some contradictions in the evidence given by these witnesses. The mortgage-bond was executed so far back as 1912 and the case was heard in 1920. Such contradictions as there are in the evidence of these witnesses are only to be expected; but they do not, in my opinion, throw any doubt upon the question which is at issue between the parties, namely, whether the mortgage-bond was attested in accordance with law. I hold that the plaintiffs are entitled to succeed on this point.

The next question is, whether the mortgage-bond was procured by undue influence exerted by the plaintiffs on the defendant. In order to determine this question, it is necessary to deal with certain antecedent events. It appears that on the 7th November 1906 the defendant borowed Rs. 2,760 from Chainsukh Mal, the father of plaintiff No. 1, and executed a *zerpehsgi* lease in his favour. Rs. 2,500 out of the total sum advanced carried interest at the rate of 12 per cent. per month; the balance did not carry any interest. The term was from 1315 to 1323. The evidence shows that upon the death of Chainsukh Mal the plaintiffs found it difficult to manage the properties of which they were in possession under the *ticca patta* of the 7th November 1906. The defendant wanted a further loan, first, in order to satisfy a decree which had been obtained against her by one Gendan Singh; and, secondly, for other purposes. The plaintiffs were willing to advance the further sum required provided the defendant agreed to take into her possession the properties covered by the *ticca patta* of 1903 and paid interest on the sum that was already due to the plaintiffs and the further sum to be advanced at the rate of Rs. 1-8-0 to 2 per cent. per month. After certain negotiations it was settled that the properties which were the subject-matter of the *ticca patta* should be surrendered to the defendant and that she should pay interest to the defendants at the rate of ¾ per cent. per month. The consideration-money in respect of the mortgage-bond is made up as follows:—

Rs. 2,478-15-0 already due to the plaintiffs in respect of the advance of 1906.

Rs. 2,374 paid to Gendan Singh in satisfaction of a decree obtained by him against the defendant.

Rs. 2,647-1-0 paid to the defendant at the time of the registration of the mortgage-bond.

The defendant raised a wholly false defence in so far as she denied that she ever received any money either from Chainsukh Mal or from the plaintiffs; but the learned Subordinate Judge has found that the full consideration-money was in fact paid to the defendant.

The question of undue influence arises in this way; it is suggested that the defendant was in need of money. There was a decree against her for the sum of Rs. 2,374 and she wanted money for other purposes, and it is contended that, taking advantage of her position, the plaintiffs induced her to execute a bond in their favour agreeing to pay interest at the rate of Re. 1-4-0 per cent. per month. The main objection is as to the rate of interest and compound interest provided by the mortgage-bond; but it must be remembered that Chainsukh Mal charged a very low rate of interest because he was to have possession of certain valuable properties. No doubt, after the death of Chainsukh Mal, plaintiff No. 1 who is a minor and plaintiff No. 2 who is a *pardanashin* woman found it impossible to manage the properties and it suited them to deliver up possession of those properties to the defendant. The matter was one of bargain between the parties and the question of undue influence must, in my opinion, be decided on the terms

of section 16 of the Indian Contract Act. The first paragraph of the section lays down the principle in general terms and runs as follows: —"A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." The second and the third paragraphs of the section define the presumptions by which the Court is enabled to apply the principle. The second paragraph runs as follows:—

In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another,

"(*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

"(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress."

The third paragraph runs as follows:—"Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other." It has been held by the Judicial Committee that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act. See *Sundar Koer* v. *Rai Sham Krishen* (1). It has also been held that the mere fact that the rate of interest is exorbitant, (which it is not in this case) is no ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower. It is unnecessary to discuss the various cases which have been decided under section 16 of the Indian Contract Act. It is sufficient to ponit out that the borrower will not be entitled to any relief unless he proves, first, that the lender was in a position to dominate has will, and, secondly, that the bargain was unconscionable within the meaning of clause (3) of section 16 and, as has been pointed out, that it is only the concurrence of these two elements that can justify the Court in granting relief to the borrower.

Now, were the plaintiffs in a position to dominate the will of the defendant? As I have pointed out, urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act. On what circumstances are we to hold in this case that the plaintiffs were in a position to dominate the will of the defendant? Obviously, there is on fiduciary relationship between them. It is not a case where they held a real or apparent authority over the defendant. It is not suggested that the mental capacity of the defendant was temporarily or permanently affected by reason of age, illness or mental or bodily distress. The only ground suggested is that the defendant was already indebted to the plaintiffs and that she wanted to borrow a further sum of money, and it is contended that, upon these facts, it ought to be held that the plaintiffs were in a position to dominate the will of the defendants. Illustration (*c*) upon which realiance is placed is as follows:—"A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence". In order to make out a case under the illustration, it must be proved that the loan was contracted on terms which appear to be unconscionable. Now, in what way can it be said that the terms of the mortgage-bond are unconscionable? It is suggested that in respect of three matters the terms appear to be unconscionable; first, in that the defendant allowed the plaintiffs to surrender the lease of 1906; secondly, in that the interest was raised from 9 per cent. simple to 15 per cent. compound; and, thirdly, in that the plaintiffs got free use of water from the defendant's estate to their estate. So far as the first point is concerned, it seems to me that the transaction is this; the defendant was in

(1) 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 804; 11 C. W. N. 249; 17 M. L. J. 48; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

pressing need of money and she wanted a further loan from the plaintiffs. The plaintiffs, of whom one is a minor and the other a *parda nashin* lady, represented to the defendant that they were perfectly willing to make the advance if the loan of 1906 was paid off as it was impossible for them, after the death of Chainsukh Mal, to properly manage the properties which were in their possession as a security for the loan of 1906. It was for the defendant to accept these terms or to reject them. The question was between a minor and a *parda nashin* woman on the one hand and a *parda nashin* woman on the other The *ticca patta* must have been a source of some advantage to Chainsukh Mal, apart from the interest which he received from the advance made by him to the defendant, but Chainsukh was dead leaving a widow and a minor son. It was impossible for them to manage the properties with any advantage to them. It is true that the term had yet to run for another three years and they could not compel the defendant to take a surrender of the lease ; but the defendant wanted a further loan and it was, in my opinion, open to the plaintiffs to say that they were ready and willing to make a further advance on terms that the original loan was paid off. It appears to me that there is nothing unconscionable in the bargain made by the plaintiffs. They were at a disadvantage under the arrangement of 1906. They were bound to suffer that disadvantage unless defendant relieved them from it. The defendant herself was in need of a further sum of money. It was open to them, in these circumstances, to come to an arrangement on terms which were perfectly fair on both sides. The next point is that the interest was raised from 9 per cent. simple to 15 per cent. compound. It is quite true that, under the original *ticca patta*, the interest was at 9 per cent. per annum but then, as I have pointed out, possession of the properties was a source of considerable profit to Chainsukh Mal. It is quite true that after the death of Chainsukh Mal this advantage was no longer open to the plaintiffs ; but if the defendant wanted a further loan, it was, in my opinion, open to the plaintiffs to say that since the advantage which was open to Chainsukh Mal was not open to them, they would not make any advance to the defendant except on condition that she agreed to pay interest at the rate of 15 per cent. per annum with yearly rests. The interest charged upon the bond is not by itself unconscionable. It is the usual rate of interest charged on this class of transactions. It is urged that it is unconscionable because the loan which was satisfied by the transaction which is the subject-matter of the suit carried interest at the rate of 9 per cent per annum. In my opinion, when all the facts are properly understood, there would seem to be nothing unconscionable about the interest. The only other point is that the plaintiffs got free use of water from the estate of the defendant to their estate. This conclusion has been reached by the learned Subordinate Judge on the evidence of Fulchand, who says: —" I further wanted irrigation water for Jaipur;" but the mortgage-bond does not provide for any concession to the plaintiffs in this respect and if there was an independent agreement between the parties on this point, that has nothing whatever to do with the mortgage-bond. In my opinion, it has not been proved that the mortgage-bond was procured by undue influence exerted by the plaintiffs over the defendant.

[The rest of the Judgment is not reportable.—Ed.]

Ross, J.—I agree.

S. D. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 34 OF 1918.

March 25, 1920.

Present :—Mr. Fawcett, J. C., and Mr. Kennedy, A. J. C.

THE MANAGER, ENCUMBERED ESTATES IN SIND—APPELLANT

versus

THARUMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, scope of—Dead man made respondent—Legal representatives, whether can be brought on record — Person already on record in his own right—Memorandum of appeal, amendment of.

O. XXII of the Civil Procedure Code applies only to the death of a party to a suit or appeal. When,

therefore, a dead man is made a respondent to an appeal the Court has no jurisdiction to allow the names of his legal representatives to be substituted.

Veerappa Chetty v. *Tindal Ponnen*, 31 M. 86 ; 17 M. L. J. 551 : 3 M. L. T. 12, followed.

When a memo. of appeal is sought to be amended so as to make a person already on record a party not only in his own right but also as a legal representative of another person, an addition is merely made to his description and no prejudice to him arises under s. 22 of the Limitation Act.

Mr. *Rupchand Bila Ram*, for the Appellant.

Mr. *Motiram Ramchand*, for the Respondent.

ORDER.

Fawcett, J.C.—As Gehimal died before the appeal was presented, the case does not fall under O. XXII, Civil Procedure Code, which applies only to the death of a *party* to a suit or an appeal. A dead man was made a respondent, and the principle applies that the Court has no jurisdiction to allow the names of his legal representatives to be substituted : *Veerappa Chetty* v. *Tindal Ponnen* (1). His name must be struck out : O. I, r. 10 and section 107 (2), Civil Procedure Code.

O. XLI, r. 20, Civil Procedure Code cannot properly be applied to the present case.

But we think that, in the circumstances, the appellant should be allowed to amend the memo. of appeal so as to make respondent Tharumal a party not only in his own right, but also as a legal representative of Gehimal. He has already been joined and and an addition is merely made to his description so no prejudice to Tharumal arises under section 22, Limitation Act : cf. *Peary Mohan* v. *Norendra Nath* (2), *Kasturchand Bahirandas* v. *Sagarmal Shriram* (3) and *Muhammad Yusuf* v. *Himalaya Bank, Limited* (4) and the objection taken in *Mallikarjuna* v. *Pullayya* (5) does not, therefore, operate. The amendment is a just and proper one under O. VI, r. 17, Civil Procedure Code and should be made accordingly.

The absence from the record of Gehimal's two other brothers is not necessarily a fatal defect : cf. *Renga Srinivasachari* v. *Gnanaprakasa Mudaliar* (6) and *Prasanna Venkatachella* v. *Collector of Trichinopoly* (7). But we leave the question of the effect of their absence on the appeal an open one and this order is also without prejudice to any application that may be made to join them, subject to section 22, Limitation Act, if it applies. We note, however, that the fact that Gehimal's death was reported by bailiffs over a year ago would make it difficult to excuse the delay under section 5 of the Act.

Kennedy, A. J. C. : —I concur.

(1) 31 M. 86 ; 17 M. L. J. 551 ; 3 M. L. T. 12.
(2) 6 Ind. Cas. 404 ; 27 C. 229 ; 14 C. W. N. 261 ; 7 A. L. J. 125 ; 7 M. L. T. 63 ; 11 C. L. J. 220 ; 12 Bom. L. R. 257 ; 20 M. L. J. 171 ; 37 I. A. 27 (P.C.).
(3) 17 B. 413 ; 9 Ind. Dec. (N. S.) 269.
(4) 18 A. 198 ; A. W. N. (1896) 28 ; 8 Ind. Dec. (N. S.) 888 (F. B.).
(5) 16 M. 319 ; 5 Ind. Dec. (N.S.) 829.
(6) 30 M. 67 ; 2 M. L. T. 86.
(7) 33 Ind. Cas. 45 ; 38 M. 1064.

LAHORE HIGH COURT.

CIVIL REVISION NO. 759 OF 1923.

February 27, 1924.

Present :—Mr. Justice Moti Sagar.

FIRM RAMGOPAL-BHAGWAN DAS—DEFENDANT—PETITIONER

versus

PARMESHRI DAS—PLAINTIFF—RESPONDENT.

Landlord and tenant—Relinquishment—Vacant possession—Possession delivered to one of several joint landlords, effect of.

A tenant giving up the demised premises to his landlord is bound to give him vacant possession, and this obligation is implied in every case as one of the terms of the letting. [p. 571, col. 2.]

Where, however, there are more landlords than one and a partition has not been effected between them, possession delivered by the tenant to one landlord would be tantamount to delivery of possession to all. [p. 572, col. 1.]

Application for revision of the order of the Judge, Small Cause Court, Delhi, dated 27th August 1924.

FIRM RAMGOPAL-BHAGWAN DAS *v.* PARMESHRI DAS

Mr. *Shamair Chand*, for the Petitioner.

Lala Sardha Ram, for the Respondent.

JUDGMENT.—This was a suit for the recovery of five months' rent in respect of a one-half share of a certain shop in Bazar Khari Baoli, in the City of Delhi alleged to have been occupied by the defendants as tenants of the plaintiff. The shop originally belonged to two sisters, Must. Lado and Must. Gaindo, in equal shares, but it appears that the half share owned by Must. Gaindo was sold in execution of a decree against her and purchased by the present plaintiff. It is alleged that the defendants executed a lease in favour of the plaintiff in respect of this half share after the same had been purchased by him in the execution proceedings, but the lease has not been placed on the record and its execution is denied by the defendants. On the 7th June 1922, the defendants gave a notice to the plaintiff and to Must. Lado, the other co-sharer in the property, that they had vacated the demised premises and that the owners should take possession of the same. It was further stated in that notice that they would not be liable to pay rent any longer if the owners did not take possession. It appears that after the receipt of the notice Must. Lado took possession of the whole of the property and gave it on rent to a third person to the exclusion of the plaintiff.

On the 24th October 1922 the plaintiff brought this suit for the recovery of five months rent ending the 21st October 1922, alleging that the defendants having failed to deliver possession were still tenants in the eye of the law and that they were liable to pay rent to the plaintiff till such time as the latter was not able to recover possession of the demised premises. The learned Judge of the Court below was of opinion that the suit for rent was not competent inasmuch as a valid notice of relinquishment had been given by the defendants but that the latter were liable for damages. The suit having been decreed in full the defendants have now come up in revision to this Court and the first question to be determined is, whether the notice was or was not a sufficient notice of relinquishment. On this question the finding of the trial Judge, as already observed, is in favour of the appellants and this finding has not been challenged in arguments by the learned Vakil for the respondent. There can be no doubt that the notice was an absolute and an unqualified notice in terms and was, therefore, a good notice of relinquishment in law.

The next question to be considered is, whether possession of the demised premises had been surrendered to the plaintiff. So far as the law upon this question is concerned, there can be no doubt that the tenant giving up the demised lands to his landlord is bound to give him vacant possession. It has been held in the well-known case of *Henderson* v. *Squire* (1) that where there is no express stipulation to that effect made at the time of the letting of the land it will be implied as one of the terms of such letting. In the present case the contention of the petitioners is that, so far as they are concerned, they left the premises at the unqualified disposal of the landlords and that if one of them allowed the other to take possession of the whole, they, the defendants, cannot in law be held responsible for his neglect. It is pointed out that the shop which is the subject-matter of dispute in the present case was really a single shop having two doors and that as partition had not been effected among the co-sharers it was impossible for the defendants to deliver separate possession. The learned Judge of the Court below has appreciated the difficulty under which the defendants were labouring in this respect, but has held that the difficulty was not insurmountable inasmuch as joint possession could have been delivered and the co-sharers could have been required to attend at a specified hour on an appointed day to take over such possession from the defendants. I do not see how this course could have been adopted. If, instead of two co-sharers, there were a hundered or more co-sharers living in different parts of the world it would be impossible for a tenant to relinquish possession of the demised premises until all the co-sharers had received notice to the effect that they were required to attend at a specified hour to take over joint possession. This course, in my opinion, would be most unreasonable and would result in subjecting the tenant to an altogether unnecessary hardship. The law only requires that vacant possession should be surrendered to the landlord. If

(1) (1869) 4 Q. B. 170 ; 10 B. & S. 188 ; 38 L. J. Q. B. 78 ; 19 L. T. 601 ; 17 W. R, 519.

there are more than one landlords and a partition has not been effected between them possession on the part of one landlord would be tantamount to possession of all. It is not denied that Must. Lado is in possession of the whole of the property, nor is it denied that the plaintiff is a co-sharer. In fact, a suit for partition of the property has already been lodged by the plaintiff against Must. Lado and is now pending in the Court of the Subordinate Judge at Delhi. There can be no doubt that if Must. Lado has taken possession and is realizing the rent in respect of the whole of the property, the character of her possession is that of a co-sharer and she would be liable to the extent of one-half to the plaintiff. In my opinion vacant possession of the demised premises having been delivered to one of the joint landlords and the notice being a sufficient notice of relinquishment the tenancy came to an end and the plaintiff had no cause of action to maintain a suit either for rent or for damages against the defendants.

I accept the revision and dismiss the plaintiff's suit with costs throughout.

Z. K. *Revision allowed.*

NAGPORE JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 36 OF 1923.

November 3, 1923.

Present:—Mr. Baker, O. J. C., and Mr. Hallifax, A. J. C.

SETH BALKISHAN NATHANI—APPLICANT.

versus

COMMISSIONER OF INCOME-TAX—NON-APPLICANT.

Income-Tax Act (VII of 1918), s. 12 (1)—Exemption, Scope of—Losses incurred by assessee as member of company or firm, whether must be taken into account in fixing total income—Interpretation of Statutes—Fiscal Statute.

All that is exempted by section 12 (1) of the Income Tax Act of 1918 is income which has already paid the tax as the income of a Company or firm which happens in cases where the income of the Company or firm exceeds Rs. 2,000. But if the income of a Company or firm does not exceed Rs. 2,000, a share in that income is not exempted from tax either by section 12 (1) of the Act or by the Income-Tax authorities, who add that share to the other income of the assessee as a part of his total taxable income, and not merely for the purpose of ascertaining the rate which he is liable to pay on the remainder.

Any losses incurred by an assessee as a member of a company or firm must, therefore, be taken into consideration in fixing the amount of his total income.

Technicalities in a fiscal statute should be strained, if at all, in favour of the subject and not against him.

Application for review of order in Civil Reference No. 28 of 1923, dated 18th January 1923.

Dr. *H. S. Gour*, and Mr. *G. L. Subhedar*—for the Applicant.

Mr. *Kekre, Assistant Commissioner of Income Tax*—for the Non-applicant.

Order.—In our order of the 18th June 1923, in Civil Reference No. 28 of 1923, we stated an opinion that under the Income Tax Act, 1918, any losses incurred by an assessee as a member of a company or firm are not to be taken into consideration in fixing the amount of his total income. The assessee has applied for a review of that order, and, having examined it again, we are of opinion that it was wrong. It was based on the mistaken idea that under section 12 (1) of the Act, no income derived from membership of a company or firm forms part of the taxable income of an assessee, though it is added to his taxable income for the purpose of determining the rate at which the whole is to be taxed. All that is exempted by that section is income which has already paid the tax as the income of a company or firm, which happens in cases where the income of the company or firm exceeds Rs. 2,000. But if the income of a company or firm does not exceed Rs. 2,000 a share in that income is not exempted from taxation either by section 12 (1) of the Act or by the Income Tax authorities who add that share to the other income

of the assessee as a part of his total taxable income, and not merely for the purpose of ascertaining the rate which he is liable to pay on the remainder.

The basis of our previous opinion was thus stated: "When the Company of which the assessee is a member is liable to the tax a separate tax is leviable on the income of the Company, and when the income of the Company is below the taxable limit, no such tax is leviable. In neither case are the profits or losses of the Company to be taken into consideration in fixing the taxable income of the assessee." This, as has been said, was a mistaken view of the facts, and the profits made by an assessee in one of several Companies or firms of which he is a member are taken as forming a part of his total taxable income of that Company or firm does not reach the taxable minimum. It seems to us hardly necessary to say that if the profits are added to the total taxable income, the losses, if there are any, must be deducted from it. That is nearly axiomatic.

The position taken up by the Income-Tax authorities in this matter is not even technically tenable and there is no support to be found for it in any part of Act VII of 1918; anyhow, technicalities in a fiscal statute must be strained in favour of the subject, if they are to be strained at all, and not against him. But even if the contention were technically possible, it is patently contrary to the most ordinary ideas of justice and equity. It is equivalent to saying that a man's income was what he made out of one profitable branch of his business, although he had incurred heavy losses in another branch of the same business, or to saying that his income was Rs. 5,000 if he made that amount on one contract, though he had lost Rs. 10,000 on another of exactly the same kind at the same time. Our previous statement of opinion on this reference is withdrawn and this is substituted.

Z. K.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 1 OF 1923.

December 11, 1923.

Present:—Sir Walter Salis Schawbe, Kt., Chief Justice.

KUNDASWAMI NAIDU—APPELLANT

versus

M. KANNIAH NAIDU AND OTHERS—RESPONDENTS.

Hindu Law—Breach of promise of marriage—Damages whether can be recovered—Costs—Exaggerated claim.

Under the Mitakshara Law, a Hindu father is justified in breaking off a contract of marriage for his daughter if a more suitable suitor is found; but in that event he is bound to pay damages to the other party to the contract who will be entitled to recover money actually thrown away as also damages to his credit and reputation by reason of the refusal.

Where a Court finds that the plaintiff's claim is to a large extent exaggerated and false and decrees only a portion of it, it ought not to award to the plaintiff the amount of full Court fees paid by him on the plaint. The amount awarded should be proportionate to the success of the plaintiff.

Umed Kika v. *Nagindas Narotamdas*, 7 B. H. C. R. 122, followed.

Kimji Vasonji v. *Narsi Danji*, 28 Ind. Cas 408; 39 B. 682 at p. 714; 17 Bom. L. R. 225, not followed.

Appeal against the order of the City Civil Court, Madras dated the 24th August 1922.

Mr. *P. G. Krishna Aiyar*, for the Appellant.

Mr. *V. Viswanatha Sastri*, for the Respondents.

JUDGMENT.—This is an appeal from the City Civil Court in an action for breach of promise of marriage. The action is not by either of the parties proposed for the marriage, but mainly by the brother of the proposed bridegroom against the father of the proposed bride. The contract was proved under which the first defendant agreed to give his daughter in marriage to the 2nd plaintiff who is 1st plaintiff's brother. It is well established that on breach of such a contract an action for damages lies. The Mitakshara itself provides that, if a more suitable suitor is found, a man will be justified in breaking off a marriage contract: but I think that it is quite clear that,

when that course is pursued, it is also provided that some form of damages can be provided against the father who so changes his mind. This is stated to be the law in *Umed Kika* v. *Nagindas Narotamdas* (1). There is a passage to the contrary in a decision of Beaman, J., in *Kimji Vasonji* v. *Narsi Dhanji* (2) which, I think, is inaccurate and is based, as pointed out in Mayne's Hindu Law at p. 118, on a misconception of Mitakshara. *Umed Kika* v. *Nagindas Narotamdas* (1) is authority for the proposition that, in such cases, the plaintiff is entitled to recover money actually thrown away and also damages to his credit and reputation by reason of the refusal. I should have myself felt a little doubtful as regards the second head of damages though this kind of damages is allowed in the well-known English form of action for breach of promise of marriage and allowed to the plaintiff concerned who is actually a party to the marriage contract but not the parents; but I see no reason for saying that the decision (1) to which that learned Chief Justice Westropp was a party is wrong. Under the circumstances, the learned Judge awarded in this case Rs. 50 as damages under that head and also Rs. 200 for damages actually sustained. The claim had been preferred for a very much larger amount. The learned Judge discounted the claim and disallowed a large part of the damages claimed on the ground that the plaintiffs had intentionally aggravated the damages by spending money, though they knew that the marriage would not take place; and he reduced, I think, the amount to what he considered to be the actual minimum amount expended by the plaintiffs without knowing of the other marriage. I must say that I am not certain that he has not, from that point of view, given a little too much, but to some extent it had to be a guess work, and I think he has given, if anything, a little too little on the other head. I think that it will not be right to interfere with the amount of damages he has awarded in this case. But I do not think he was right in awarding the full costs that he awarded. The claim was for Rs. 2,000 and a stamp had been paid on the plaint of Rs. 125 based on that valuation and the learned Judge found that the case for the plaintiffs was grossly exaggerated and intentionally exaggerated. I do not think that it is right, when a Judge adopts that view of the case, to award costs on a scale which includes the amount paid as tax to Government pased on the larger amount which had been falsely put forward. I do not think that the amount allowed as Vakil's fees was at all excessive in view of the case but I think that the amount recoverable for stamp must be reduced to its proper amount, namely, Rs. 18-12-0. This appeal has substantially failed and has succeeded on this minor point. I think the result must be that there will be no order as to the costs of this appeal.

V. N. V. *Decree modified.*

Z. K.

(1) 7 B. H. C. R. 122.

(2) 28 Ind. Cas. 408 ; 39 B. 682 at p. 714; 17 Bom. L. R. 225.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 48 OF 1921.

January 25, 1924.

Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

GAYA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GIRJA SHANKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Partition—Step-mother, share of—Widow, whether heir—Property acquired by member with assistance of joint funds, whether joint—Marriage and Janeo, *provision whether can be made for, in anticipation.*

Under the Mitakshara a step-mother is entitled upon partition of joint family property among her sons and step sons to get a share equal to that of a son. [p. 576, col. 1.]

Har Narain v. *Bishumbhar Nath*, 31 Ind. Cas. 907; 38 A. 88 ; 18 A. L. J. 1129, followed.

A Hindu widow is not an heir of her husband in the presence of his sons, and the share allotted to her on partition is not given to her as an heir but for maintenance. So that, when a co-widow dies, the share held by her devolves upon the sons of her husband only and does not go to enlarge proportionately the share held by a co-widow. [p. 576, col. 1.]

GAYA PRASAD *v.* GIRJA SHANKAR

Properties acquired by a member of a joint Hindu family with the assistance of joint funds are joint properties liable to be divided amongst the members of the family. [p 578, col. 2.]

Lal Bahadur v. *Kanhia 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.) followed.

In a decree for partition of joint family property provision cannot be made in anticipation for the marriage or *janeo* of any of the parties. [p. 579, col. 1.]

Ramalinga Annani v. *Narayana Annani*, 68 Ind. Cas. 451; 37 C. L. J. 15; 30 M. N. 255; (1922) M. W. N. 399; 45 M. 489; 26 C. W. N. 929; (1922) A. I. R. (P. C.) 201; 43 M. L J. 428; 16 L W. 689; 24 Bom. L. R. 1209; 20 A. L. J. 889 (P. C.), followed.

Appeal against the decree of the Subordinate Judge, Unao, the dated, 30th June 1921.

Messrs. *B. N. Srivastava* and *Bishambar Nath Srivastava*, for the Appellants.

Messrs. *Prag Narain* and *Radha Krishan*, holding the brief of Pandit *G. N. Mitra*, for the Respondents.

JUDGMENT.—This is the defendants' appeal in a suit brought by the plaintiffs-respondents for partition of joint Hindu family property. The decree passed by the lower Court is accepted by both the parties except in respect of certain matters to be stated hereafter. The appeal challenges the propriety of the decree for partition in respect of four items of property. They are Nos. 5, 9, 16 and 19 of schedule No. 1 attached to the decree prepared in the Court below. The second point urged in appeal is the extent of the shares to which the plaintiffs-respondents are entitled on partition of the family property, The respondents have filed cross-objections in respect of the findings of the Court below on issue No. 3 and they further urge that in the allotments following the partition, compact *mahals* and *pattis* be allotted to the parties to the suit and any disproportion in value should be made good by compensation either in money or in land.

The suit relates to the property of Misri Lal, who died on the 29th May 1919. Misri Lal was married three times. His first wife was Mt. Lachmin, who was defendant No. 4 in the present suit. She died during the pendency of the appeal in this Court. His second wife was Mt. Sheoraja. She had died before the institution of the suit. Her son, Gaya Prasad, is the chief defendant in the present litigation. Gaya Prasad's son, Bal Krishna, is defendant No. 2. Misri Lal's third wife is Mt. Sheoraja Kunwar, who is defendant No. 3, Girja Shankar, Sheo Kumar Lal and Iqbal Shankar are his three sons born of Mt. Sheoraja Kunwar and are the plaintiffs Nos. 1 to 3, respectively. They are all minors. Their next friend is Pandit Prag Narain. We will first deal with the second question involved in the appeal.

The argument under that head is that the lower Court should not have granted a separate share to the mother of the plaintiffs out of the joint estate but that her share should come out of the aggregate of the shares allotted to her three sons, the plaintiffs.

We were much impressed by the *a priori* reasoning underlying the argument which was borrowed from the observations of their Lordships of the Privy Council in the case of *Hemangini Dasi* v. *Kedarnath Kundu* (1). Indeed, that case was cited by the learned Advocate for the appellants as an authority in support of his argument. The respondents, however, point out that the case just now mentioned was a decision on the Dayabhag Law obtaining in Bengal. That it was a case under the Dayabhaga is true but the observations of their Lordships of the Privy Council, to be quoted shortly after, appear to us to be of general application, and if there were no precedent in favour of the respondents' contention that the rule is different under the Mitakshara Law we would have unhesitatingly accepted the argument of the appellants' learned Advocate. In the case mentioned above their Lordships said: "The right of a widow to maintenance is founded on relationship and differs from debts. On the death of the husband, his heirs take the whole estate and if a mother on partition among her sons takes a share, it is taken in lieu of maintenance. Where there are groups of sons the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed in accordance to relationship, the sons of each mother being bound to maintain her. The

(1) 16 C. 758 at p. 766; 16 I. A. 115; 13 Ind. Jur. 210; 5 Sar. P. C. J. 374; 8 Ind. Dec. (N.S.) 502 (P.C.).

step-sons are not under the same obligation." The position taken up by the respondents consistenly with the opinion of the Court below is, however, supported by a decision of the High Court at Allahabad in the case of *Har Narain* v. *Bishambhar Nath* (2). This case has a direct bearing on the point under consideration. The learned Judges in the Allahabad case distinguished the decision of the Privy Council mentioned above on the ground that that was a case under the Dayabhaga while the rule under the Mitakshara school of law is that a step-mother is entitled upon partition of a joint family property to get a share equal to that of a son. We are content to follow the opinion expressed in the Allahabad case. The argument, therefore, fails.

It is next contended that Mt. Lachmin, defendant No. 4, having died during the pendency of the appeal the share which the Court below had allotted to her, should devolve exclusively in equal proportions upon the sons of Misri Lal, and that Mt. Sheoraja Kunwar, the plaintiffs' mother, should get no increment to her share out of the portion allotted to Mt. Lachmin. We are of opinion that the contention is sound and must be accepted. In the presence of the son of Misri Lal his widows are not his heirs. His entire estate devolves upon his heirs alone who are his sons, the plaintiffs and the defendant No. 1. Mt. Sheoraja Kunwar is not entitled to any share in the character of an heir on the partition of the joint estates. Whatever she gets she gets in lieu of maintenance and it is settled law in this part of the country that she holds it for her life-time only. On her death the share, which she gets in lieu of maintenance, will devolve on the entire body of heirs of Misri Lal. Similarly, the share which was allotted to Mt. Lachmin, was merely a provision for her maintenance, the need for which came to an end on her death. That share must go only to the heirs of Misri Lal, that is, the plaintiffs and the defendant No. 1. Mt. Sheoraja Kunwar can have no claim to any portion of that share.

Now we come to the question of the four properties, to which objection has been taken by the appellants in respect of their liability to be partitioned.

(2) 31 Ind. Cas. 907 ; 38 A. 83 ; 18 A. L. J. 1129.

Item No. 5. The case of the appellants with regard to this property is, that Misri Lal made a gift of it to the defendant No. 1 on the occasion of the 12th day ceremony of his birth. The defendant No. 1 was born on the 4th March 1897. The direct evidence in support of this gift is oral and consists of the statements of the defendants' witness Debi Nandan. The learned Subordinate Judge has refused to place any reliance on the statement of Debi Nandan in respect of the matter of the gift In support of his opinion the learned Judge has given cogent reasons and anything said in argument to the contrary has not induced us to disagree with the Judge of the trial Court. Apart from the oral evidence, reliance is placed upon certain documents supporting the case of the alleged gift.

It appears that in March 1900, proceedings were taken in the Court of Revenue for mutation of nam s in respect of this property with the result that Misri Lal's name was expunged and Gaya Prasad's name was entered in the revenue papers. On the 7th March 1900, Misri Lal made a statement in relation to those proceedings. He stated that he had made a gift of the property in question to Gaya Prasad on the 20th February 1900 and that Gaya Prasad had been put in possession of the same under Misri Lal's guardianship (Ex. A19). On the 21st March 1900, the village Patwari gave his statement in support of Misri Lal's allegations (Ex. A20). On the 23rd March 1900, the Court of Revenue ordered mutation of names to be made as desired by Misri Lal (Ex. A21). The *khewat* (Ex. A22) shows that the entries were made in accordance with the order mentioned above. Exhibits A23 to A31 are receipts of the payment of the Government revenue in the name of Gaya Prasad. These documents clearly do not support the alleged gift on the 12th day of Gaya Prasad's birth. On the contrary, Exhibit A19 mentions the date of the gift to be the 20th February 1900. It is said that Misri Lal deliberately gave a wrong date of the gift with the object of evading the payment of penalty to which he would have been liable if he had stated the true date of it. We are not impressed with this explanation. If Misri Lal had really made the gift, as the defendant's case is that he had, we find no sufficient reason as to why he should have

delayed the mutation of names for so long a period as three years. We are of opinion that the proceeding relating to the mutation of names was merely a paper transaction and that Misri Lal, had never intended to nor, as a matter of fact, did he, make a real transfer of property fn question in favour of Gaya Prasad.

It appears that in the year 1904 there was a litigation between Mt. Luchmin and her husband, Misri Lal. This ended in a compromise under which Mt. Lachmin secured a maintenance allowance of Rs. 21 per mensem. In connection with this litigation, Debi Nandan acting as an agent of Misri Lal, filed certain lists of properties held by Misri Lal and Gaya Prasad. One of such lists is Exhibit A 14 in which the property under consideration is shown to be in the ownership and possession of Gaya Prasad. This was in consonance with the *khewat* in which Gaya Prasad's name was entered in pursuance of the mutation proceedings of the year 1900 and proves nothing more than the apparent character of the title.

Item No. 9. Misri Lal sold this property to one Chabnath some time in 1906-1907. One Sadhan Lal brought a suit for pre-emption in respect of the same, obtained a decree and subsequently made a gift of it to Gaya Prasad. On these facts the defendant No. 1 claims it as his exclusive property. The account-books produced by the plaintiffs show that Misri Lal had financed Sadhan Lal's claim for pre-emption. Indeed, in the arguments before us this was not disputed. The learned Subordinate Judge is of opinion, that the gift to Gaya Prasad was made in consideration of the pecuniary advances made by Misri Lal out of joint funds and, consequently, this property must be treated as joint family property. Against this opinion, the only argument urged on behalf of the appellants is that Misri Lal committed a fraud on the Court and the vendee Chabnath by helping the plaintiff in the pre-emption suit with money and that the fraud succeeded inasmuch as Sadhan Lal obtained a decree. The plaintiffs representing Misri Lal cannot be permitted to recover this property from the hands of the defendant No 1, who stands in the shoes of Sadhan Lal. We are unable to uphold this argument. In our opinion there is no question of fraud at all. Sadhan Lal had admittedly a right to pre-empt the sale made by Misri Lal and he, after recovering it from the hands of the vendee, made a gift of it to Gaya Prasad. The fact that Sadhan Lal received monetary help from Misri Lal in prosecuting his claim for pre-emption creates no estoppel against the present plaintiffs, who do not claim through Misri Lal. They claim a share in the joint family property in their own right. In the circumstances stated above, the gift was in consideration of the money derived from the joint family fund and, consequently, this property must bear the character of the source of its acquisition.

Item No. 16. These plots of land were conveyed under a sale-deed, dated the 13th June 1907, by one Kirpa Ram in favour of Gaya Prasad for a sum of Rs. 800 (Ex. 87). On the same date Kirpa Ram conveyed by another sale-deed some other property situate in the same village in which the plots in question lie. This sale-deed is in the name of Misri Lal alone (Ex. 96). The defendant No. 1 claims these plots as his exclusive property. The learned Subordinate Judge has rejected this claim. The entries in the account-books clearly establish that the money utilized for the purpose of the plots in question came from the joint family funds. We, therefore, agree with the learned Subordinate Judge that item No. 16 is joint family property.

Item No. 19. Mauza Rampur Balaqidas, the subject-matter of the item under consideration, was acquired under the sale-deed, dated the 8th June 1903, for a sum of Rs. 5,500, and the deed stands in the names of both Misri Lal and Gaya Prasad (Ex. 109). The defendant No. 1 claims a $\frac{3}{4}$th share as his exclusive property in this village. In the proceeding relating to mutation of names following the sale mentioned above, Misri Lal stated that the vendors had sold the entire 16-annas to him and to his son, Gaya Prasad, and that *the names of the vendees* should be entered in this way, that the four annas should stand in the *Khewat* 'in my name' and 12-annas in that of Gaya Prasad, minor (Ex. A 40). In the litigation between Mt. Lachmin and Misri Lal, to which reference has already been made, one of the lists filed by Debi Nandan, agent of Misri Lal, was Ex. A14 already noted. In this list, Gaya Prasad's share in the property in question was stated

to be 8-annas. The learned Subordinate Judge has, in a carefully written judgment, come to the conclusion that this item is also joint family property. For the reasons stated by him, we are of opinion that his finding is correct.

The general conclusion, that the four disputed items of property belong to the joint family and are not exclusive property of the defendant No. 1, is supported almost conclusively by entries in the account-books (Exs. XI, X 4 and X 5). Particular reference in this connection may be made to the entries in exhibit XI specially to pages 80 *et seq.* of the printed record. The income from properties, which admittedly belong to the joint family, and the income from the properties claimed by the defendant No. 1 as exclusively belonging to him are blended together and from these blended funds flow expenditure common to the whole family. We have also before us a memorandum partly written by Misri Lal himself and partly by his agent, Debi Nandan (Ex. 112). The entries in this memorandum point to the same conclusion at which we have arrived. Certain private *jamabandis* kept by Misri Lal and produced by the plaintiffs are exhibited on behalf of the appellants. In these *jamabandis*, we find entries in respect of the properties in question in the name of Gaya Prasad. As observed by the learned Subordinate Judge, these *jamabandis* must have been maintained for the purpose of production in rent suits, showing the realizations and arrears of rent and would, consequently, be consistent with the entries in the *khewat*. There are also here and there in the account-books entries showing sums of money under the heading of income in the name of Gaya Prasad alone. These entries do not, in our opinion, outweigh the effect of the rest of the evidence on which, we, in agreement with the trial Judge, have founded our conclusions.

On the basis of certain oral evidence, it was contended on behalf of the appellants that Gaya Prasad's mother was possessed of separate funds of her own and it was with the help of these funds that acquisitions were made by Misri Lal in the name of Gaya Prasad, from time to time for the benefit of Gaya Prasad. The evidence relied upon is wholly flimsy and has been discredited by the learned Subordinate Judge. We are unable to disagree with him in this behalf. Certain entries in the account-books were shown to us by the learned Advocate for the appellants, as indicating that the women of the family had certain money of their own. Small sums of money are shown as entered in the name of a woman of the house without mentioning her name or giving any description of her. Such entries are of no or little evidential value. That the family has been joint throughout before the present suit was instituted is common ground. It is further admitted on both sides that the family was possessed of large ancestral property. The onus, therefore, was on the appellants to show that the property in question was not purchased with the ancestral funds. We are of opinion, in agreement with the trial Judge, that they have failed to discharge that onus and that, on the contrary, the evidence fairly reasonably leads to the conclusion that the last three properties were purchased with the assistance of the joint funds and were consequently joint properties liable to be divided amongst the members of the family : *Lal Bahadur* v. *Kanhaia Lal* (3).

We now come to the consideration of the cross-objections filed by the respondents. The first objection is that the plaintiffs are entitled to a provision being made in the decree of the present suit for the marriages of the plaintiffs and *Janeo* of the plaintiffs Nos. 2 and 3 in anticipation. We are unable to accede to this contention. There seems to be a conflict of opinion on this point in the High Court of Madras. The case of *Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (4) is in favour of the respondents' contention while the case of *Narayana Annavi* v. *Ramalinga Annavi* (5) is against it. Again, the case of *Karuturi Gopalan* v. *Karuturi Venkataraghavulu* (6) is in support of it. The foundation for the opinion expressed in the last mentioned case is the practice prevailing in that Presidency. We are not aware of any

(3) 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.).

(4) 28 Ind Cas. 264 ; 38 M. 556 ; 15 M. L. J. 307 ; (1913) M W. N. 134 ; (1914) M. W. N 282 ; 25 M. L J. 644.

(5) 36 Ind. Cas. 428 ; 39 M. 587.

(6) 31 Ind Cas, 574 ; 40 M. 632 ; 29 M. L. J. 710.

such practice in this part of the country. Be that as it may, the recent decision of their Lordships of the Privy Council in the case of *Ramalinga Annavi* v. *Narayana Annavi* (7) seems to us to conclusively settle the question against the respondents. We, therefore, overrule this objection.

The second objection is, that this Court should insert a direction in its decree to the effect, that in carrying out the actual partition, entire *mahals* should be allotted to the parties so far as possible. We are unable to accede this prayer. The *zemindari* property in dispute consists of Government revenue paying *mahals* or portions of a *mahal*. It is the exclusive function of the Courts of Revenue to determine the mode of partition. This objection is also rejected.

The result is, that we allow the appeal in so far as we have indicated in this judgment on the question relating to the extent of shares, and direct that the decree of the Court below will be modified in that respect. In other respects, the appeal is dismissed. We also dismiss the cross-objections. The parties will receive and pay costs in both the Courts in proportion to their success and failure.

Z. K. *Appeal allowed in part.*

(7) 68 Ind. Cas. 451 ; 37 C. L. J. 15 ; 30 M. L. T. 255 ; (1922) M. W. N. 899 ; 45 M. 489 ; 26 C W. N. 929 ; (1922) A. I. R. (P.C) 201 ; 43 M. L. J. 428 ; 16 L. W. 639 ; 24 Bom. L. R. 1203 ; 20 A. L J. 839 (P.C.).

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1056 OF 1923.

December 20, 1923.

Present :—Mr. Justice Scott-Smith.

BIKA AND OTHERS—
DEFENDANTS—APPELLANTS.

versus

BALANDA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 11, O. II, r. 2—Dismissal of suit for misdescription of property—Subsequent suit, whether barred.

The dismissal of a suit on the ground of misdescription of the property in suit is not a bar to a subsequent suit on the same cause of action either on the ground of *res judicata* or under O. II, r. 2 of the Civil Procedure Code.

Janakdular Saran Misser v. *Ambica Prasad Singh*, 39 Ind Cas. 126, *Gulab Shah*, v. *Haveli Shah*, 31 Ind. Cas. 463 ; 87 P. R. 1915 ; 181 P. W. R. 1915, relied on.

Miscellaneous second appeal from the order of the Additional District Judge, Hoshiarpur, dated the 2nd February 1923.

Kanwar *Dalip Singh*, for the Appellants.

Lala *Amar Nath Chopra*, for the Respondents.

JUDGMENT.—On the 22nd of March 1920, plaintiff-respondent sued defendants appellants for one *marla* of land out of *khasra* No. 2493 upon which, he said they had encroached. The suit was refered to arbitration and was eventually dismissed on the ground that the property sued for had been misdescribed. The plaintiff was actually in possesion of *khasra* No. 2493, and what he really intended to claim was a part of *khasra* No. 2494. He was brought the present suit for a plot of land 26½' × 13½' out of *khasra* No 2494 on the ground that the defendants have encroached upon it. The first Court held that the present suit was barred by the rule of *res judicata*. The lower Appeliate Court held that it was not so barred and has remanded the case for trial on the merits. From this order the defendants have appealed to this Court.

The lower Appellate Court relied upon the case reported as *Janakdular Saran Misser* v. *Ambica Prasad Singh*, (1) where a Division Bench of the Patna High Court held that, "the "dismissal of a suit on the ground of misdes- "cription of property in suit is not a bar to a "subsequent suit on the same cause of action." That ruling is directly in point in the present case. What was held in the previous case was that the plaintiff was not entitled to a decree to any portion of *khasra* No. 2493. The property now claimed is a part of *khasra* No. 2494 and I fail to see how it can be said that this claim was heard and finally adjudicated upon in the previous suit.

Next, it is contended by Counsel for the appellants that if the property sued for is not the same as in the previous suit, the suit is

(1) 39 Ind. Cas. 126

barred by O. II, r. 2 of the Civil Procedure Code. In my opinion there is no force in this argument. The plaintiff did not in the previous case split up his claim and sue for only a part of the relief to which he was entitled. On the contrary, he sued for something to which he was not entitled. Counsel for the respondent has cited *Gula' Shah* v. *Haveli Shah* (2), where it was held when the dismissal of a suit takes place for defect in the form of the suit, O. II, r. 2 of the Code of Civil Procedure does not preclude a plaintiff, whose suit has been thus dismissed from bringing a second suit". The previous suit failed because the property sued for was misdescribed and it was found that the plaintiff was not entitled to a decree for any of the property as described in the plaint The suit really failed because there was a defect in the form of the suit. In the previous suit the plaintiff stated his cause of action to be an encroachment on *khasra* No. 2493. It was found that he had no such cause of action. The cause of action in the present case was stated to be an encroachment on a part of *khasra* No .2494 and it was, therefore, different from the cause of action in the former suit, and O. II, r. 2 does not in terms apply

The appeal accordingly fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 31 Ind. Cas. 468 ; 87 P. R. 1915 ; 181 P. W. R. 1915.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 222 OF 1923.

December 17, 1923.

Present :—Mr. Baker, J. C.

BANDAPPA—APPLICANT

versus

SHANKAR RAO AND OTHERS—APPLICANTS.

Limitation Act (IX of 1908) s. 14—Civil Procedure Code (Act V of 1908) O. XXI, r. 100 - Execution of decree—Dispossession, objection to—Collector, whether Court—Limitation, extension of.

A Collector in the Central Provinces is not invested with power to dispose of objections to dispossession in execution of a decree under O. XXI r. 100 of the Civil Procedure Code. He is not, therefore, a Court for that purpose within the meaning of section 14 of the Limitation Act, and the time occupied in proceedings taken before him under O. XXI r. 100 of the Civil Procedure Code, cannot be used to extend limitation under that section. [p 581, col. 2 ; p. 582, col. 1.]

Case-law discussed.

Application for revision of the order of the Additional District Judge, Nagpur, dated the 9th April 1923 in Miscellaneous Judicial Case No. 35 of 1923.

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

Mr. *M. R. Bobde*, for the Non-applicants.

ORDER:—The point in both these cases is whether the Collector in executing the decree of a Civil Court is a Court within the meaning of Section 14 of the Limitation Act, so that the time spent in proceedings before him would be excluded from limitation. The applicants in both cases were dispossessed in the course of proceedings in execution, which were transferred to the Collector. Applications were made under O. XXI, r. 100, Civil Procedure Code, to the Collector who held he had no jurisdiction to entertain them. On applying to the Civil Court it was held that the applications were barred by limitation, as the Collector could not be considered to be a Court within the meaning of section 14 of the Limitation Act under the ruling in *Tipangavda Sundawangavda* v. *Ramangavda Venkangavda Gavdar*. (1) Against this order these applications are preferred.

The Bombay case was decided on the rules framed in Bombay for the execution of decrees by Collectors and that this is so appears from the remarks on page 54 of the case, where it is stated that the Revenue Officer under the rules passed under section 320 of the old Code, which was still in force, has no power to consider an application to set aside a sale under O. XXI, rule 89, Civil Procedure Code. But under the rules in this Province, to be found in C. P. Revenue Manual, Vol. 2, page 149, the Collector was expressly invested with all the powers which the Court might exercise in the execution of such decrees, including powers under rr. 72 and 92 of O. XXI, Civil Procedure Code, the latter of which refers to setting aside or confirming a sale. The powers under O. XXI, r. 58, Civil Procedure Code, are, however, expressly withheld. It has been

(1) 54 Ind. Cas. 670; 44 B. 50; 22 Bom. L. R. 35.

held by this Court in *Hardeo* v. *Narbadi* (2), that no close analogy can be drawn from the views propounded in other Provinces, because an essential factor governing the application of the law lies in the extent to which the Local Government has directed a transfer of the execution powers of the Civil Court to the Collector by orders and rules made under section 320 of the Code of Civil Procedure, 1882 (now sections 68-71 of Act V of 1908), and these vary in each Province. It has been held by the Bombay High Court in *Laxman Ganesh Rajendra* v. *Keshav Govind Deshpande*, (3) that it is necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken, in order to decide whether it should properly be termed a civil proceeding in a Court. I am of opinion that if the proceeding in question was one which the Collector was competent to determine, he should be regarded as a Court within the meaning of section 14 of the Indian Limitation Act, otherwise not. It is necessary, therefore, to see whether, under the powers conferred on the Collector in execution of decrees by the Local Government, he was empowered to dispose of applications under O. XXI, r. 100, which provides for dispossession of third parties by the decree-holder. It was held in *Ragho Chandrarao Kadam* v. *Hanmati Chandrarao Kadam*, (4) that when a person has been dispossessed under the Collector's order, to whom the execution proceedings are transferred, he should apply to the Collector and not to the Court. This rule has no application when execution has been transferred to the Collector. That ruling is based on the rules in force in Bombay. As regards this Province, the Deputy Commissioner (Collector) is not invested with power to dispose of objections under O. XXI, r. 58, Civil Procedure Code, and hence if he is not empowered to dispose of claims or objections, it would appear that he has no power under O. XXI, r. 100, which is of the same nature as O. XXI, r. 58, the difference being that O. XXI, r. 58, refers to objections to attachment, while O. XXI, r. 100, refers to objections to dispossession.

Although the rules do not refer expressly to this point, I am supported in my opinion by certain remarks in the case quoted above, *Hardeo* v. *Narbadi* (2) in which it is stated that the Collector in this Province steps into the place and exclusively absorbs and exercises all the powers of the executing Civil Court to the extent of the transfer made to him, including correction of orders in execution proceedings by way of review, appeal or revision. but "where a separate suit can be maintained, *e.g.*, a suit by a person injured by an order passed in execution proceedings with which he had no sort of connection, we call in a civil jurisdiction, entirely outside the execution jurisdiction under which the order in question was made. . . . . ."

In *Harlal* v. *Narayan* (5), it is pointed out that the Collector under the rules is invested with all the powers which the Court might exercise in the execution of the decree but these do not include the power to investigate claims made on objections preferred under r. 58 because such an investigation would not be in the execution of the decree.

In these circumstances, although there is no direct ruling on the point, I am of opinion that the Collector was not empowered to decide the objection as to dispossession under O. XXI, r. 100, Civil Procedure Code, and he has declined to do so on the ground that he has no jurisdiction. The applicants are strangers to the decree and as such not parties to the execution and are persons injured by an order passed in the execution proceedings with which they had no sort of connection and thus are covered by the remarks in *Hardeo* v. *Narbadi* (2) quoted above. This being so, the Collector having no jurisdiction to deal with the objections, he cannot be considered as a Court in this connection.

It has been held in a number of cases that the time occupied during the pendency of an application to the Collector to set aside the execution of sale effected by him where the Collector is not empowered to set aside the sale, cannot be excluded under section 14 of

(2) 8 Ind. Cas. 572 ; 5 N. L. R. 121 at p. 124.
(3) 48 Ind. Cas. 467 ; 20 Bom L. R. 918 ; 48 B. 201.
(4) 19 Ind. Cas. 908 ; 37 B. 489 ; 15 Bom. L. R 889.
(5) 64 Ind. Cas. 420; 18 N. L. R. 152 at p. 158; 4 N. L. J. 118, (1922) A. I. R. (Nag.) 267.

the Limitation Act: cf. *Narayan* v. *Rasulkhan* (6), where it was held that when the Collector had no jurisdiction, there was no *bona fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation; and the same is the *ratio decidendi* in *Tipangavda Sundawangavda* v. *Ramangavda Venkangavda Gavda* (7).

In these circumstances, the Collector had no jurisdiction and cannot be considered a Court, and, therefore, the time occupied in prosecuting proceedings before him cannot be excluded under section 14 of the Limitation Act. In cases of this character it is not possible to lay down any general rule, as each case varies according to the question of whether the Collector had or had not jurisdiction. I am prepared to admit that, in certain cases, in which he had jurisdiction under the powers conferred on him by the rules, the time occupied in the proceedings taken before him might be used to extend the limitation under section 14 of the Limitation Act, but the present case is not one of that character, and the finding of the lower Court is correct.

Both appplications are accordingly dismissed with costs.

Z. K. *Applications dismissed.*

(6) 23 B. 531 ; 1 Bom. L. R. 33 ; 12 Ind. Dec. (N. S) 854.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1309 OF 1922.

January 29, 1924.

Present:- Mr. Justice Mukerji.

TOTA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOURI SHANKAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66, proceedings under, nature of—Decision whether res judicata *in subsequent regular suit.*

Proceedings under O. XXI, r. 66 of the Civil Procedure Code are of a non-judicial or *quasi* judicial character and any decision come to in those proceedings cannot operate as *res judicata* on the point raised in a regular suit later on.

Damber Singh v. *Kalyan Singh*, 65 Ind. Cas. 799 ; 20 A. L. J. 170 ; (1922) A. I. R. (All.) 27 ; 44 A. 850, distinguished.

Second appeal against the Subordinate Judge, Bulandshahr, dated the 2nd August 1922.

Messrs. *M. A. Aziz* and *G. Agarwala*, for the Appellants.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—The facts of this case are these. The plaintiff, who is the respondent in this Court, with his brother Shib Sahai, obtained a usufructuary mortgage from the ancestors of the appellants on 29th August 1905. On the same date, the mortgagors executed a rent-note, by which they agreed to pay to the mortgagees Rs. 7-12-0 per month as rent of the house mortgaged. Some time later, the mortgagees obtained a simple money decree against the mortgagors. In execution of that decree they attached the interest of the judgment-debtors in the house, *viz.*, a right to redeem. The judgment-debtors objected and said that it was wrong to describe them as mortgagors and that they were the full owners of the house. They added that, they apprehended that if they were described as mere mortgagors, the property might fetch a small value. Notice was given to the decree-holders but they were not present when the application was disposed of. The execution Court held, by decision dated 29th April 1920, that the words "mortgagor's interest" should be expunged. The house, however, was never brought to sale. I am told by the parties that some other property of the appellants was sold and that sale satisfied the simple money decree.

After all these had happened, the suit, out of which this appeal has arisen, was instituted by the respondent for recovery of the rent on foot of the registered rent-note. The suit was decreed by the lower Appellate Court and two points have been urged in appeal.

The fourth point in the grounds of appeal is that the lower Court was not justified in coming to the conclusion that the mortgage-deed of 1905 and the rent-note were not mere colourable transactions but were substantial ones. Mr. Aziz, however, conceded that the

plea could not be urged as it went counter to the finding of the lower Appellate Court.

Mr. Aziz has, however, urged that the finding of the execution Court, dated 29th April 1920, operates as *res judicata* in the present suit and he cites the case of *Dambar Singh* v. *Kalyan Singh* (1).

Mr. Aziz has conceded that there is nothing on the record to show that the respondent mentioned the mortgage of 1905 as the mortgage by virtue of which his judgment-debtors were in the position of the mortgagors and the property was being sought to be sold subject to the mortgage of 1905. To start with, therefore, there is no decision that the mortgage of 1905 and the rent note of that date were fictitious transactions.

Assuming that all the necessary facts were found in favour of the appellants, it is clear to me that, the plea of *res judicata* cannot be sustained. The proceedings in which the objection was raised were under O. XXI, r. 66 of the Civil Procedure Code. They were ministerial proceedings. More correctly speaking, they were non-judicial or *quasi* judicial proceedings. The Court had to determine what were the properties to be sold and what were the incumbrances on the same. Any decision come to on those proceedings cannot operate as *res judicata* on the very point raised in a regular suit latar on. In the case quoted, the question that subsequently arose, arose in the very execution proceedings in which the former finding had been arrived at.

The appeal fails and is dismissed with costs which will include fees in this Court on the higher scale.

S. D. *Appeal dismissed.*

(1) 65 Ind. Cas. 799; 20 A. L J. 170; (1922) A. I. R. (A) 27; 44 A. 350.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 52 OF 1922.
November 5, 1923.

Present:—Mr. Kennedy, J. C., Mr. Raymond, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

HIRIOMAL AND OTHERS—APPELLANTS

versus

HAZARISING AND OTHERS—RESPONDENTS.

Rule of Court of Judicial Commissioner, Sind, rule 28—*Execution of decree—Judgment-debtor, whether can raise plea of being agriculturist—Court, duty of—Interpretation of rules—Court, function of—Deccan Agriculturist's Relief Act* (*XIII of* 1879), *s.* 1—"*Agriculturist*," *meaning of.*

Under r. 28 of the Rules of the Court of the Judicial Commissioner of Sind, it is open to a judgment-debtor to raise the plea of his being an agriculturist in execution proceedings, though no such plea was raised by him at any earlier stage of the proceedings; but, such a plea can be successfully raised only for the purpose of having the decree transferred to the Collector for execution.

In that event, the executing Court is bound to inquire into the status of the judgment-debtor and in the event of finding him to be an agriculturist transfer the decree for the sale of property specifically mortgaged to the Collector for execution.

In interpreting a rule of Court which has the force of law, the office of the Court is *jus discere* and not *jus dare* and it has to abide by the words of the rule without attempting to re-form it according to the supposed intentions of the Legislature or attempting to exclude cases which fall within the express meaning of the rule in order to make the law reasonable [p. 585, Col. 2.]

The definition of an "Agriculturist" in section 2 of the Deccan Agriculturist's Relief Act is not limited to a judgment-debtor being an agriculturist at the date of the suit or of the decree It is comprehensive enough to include an agriculturist at any stage of the proceedings. [p 585, Col. 1.]

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Sangam Lal H. Jesswani*, for the Respondents.

JUDGMENT.

Rupchand, A. J. C.—Two questions have been referred to us for our decision by a Division Bench of this Court, *viz.*, (1) Whether under rule 28 of the Rules of the Court of the Judicial Commissioner of Sind, it is open

to a judgment-debtor to raise a plea of his being an agriculturist in execution proceedings, no such plea having been raised at any earlier stage of the proceedings ;

(2) Whether, in that event, the executing Court is bound to inquire into the status of the judgment-debtor and, if found an agriculturist, transfer the decree for the sale of property specifically mortgaged to the Collector for execution.

Rule 28 declares that the execution of decrees ordering the attachment or sale of immoveable property shall be transferred to the Collector of the district in cases where "such property belongs to a person who is an agriculturist within the meaning of the Deccan Agriculturist's Relief Act of 1879, and has been specifically mortgaged for the re-payment of the debt to which the decree relates and the security still subsists."

The appellants-judgment-debtors had executed a mortgage-deed in favour of the respondents-judgment-creditors for Rs. 9,000 mortgaging both their agricultural and non-agricultural lands to secure a loan of Rs. 9,000 borrowed by them for trade purposes. A consent decree was passed against them in 1910 in terms of an award which was filed in Court under the provisions of clause 20 of the second Schedule of the Civil Procedure Code. They were described as. traders in the application to file this award and shown as such in the decree passed against them. The judgment-creditors had made several prior applications for execution of the decree by sale of the mortgaged property and on one such application sale proclamation was ordered to issue, but the property was not sold, all prior applications having been struck off either for default of the judgment-creditors or on their applications stating that they had agreed to allow the judgment-debtors time to pay.

Though the judgment-debtors were served with notices of the execution applications, they did not claim that the decree be transferred to the Collector for execution on the ground that they were agriculturists. In the execution proceedings which have led to this reference they pleaded an adjustment of the decree after the period allowed for proving such adjustments under O. XXI, r. 2, Civil Procedure Code, and contended that they were agriculturists within the meaning of the Deccan Agriculturist's Relief Act, and as such entitled to prove the adjustment under section 71 of Deccan Agriculturist's Relief Act. The learned trying Judge being of opinion that the alleged adjustment could not be proved for want of sanction of the Court on behalf of the minor judgment-creditors ordered the sale to proceed. The judgment-debtors, however, urge that the lower Court has erred in not determining their status in order to see if the decree should not be transferred to the Collector under r. 28 of the Rules of this Court.

It is contended on behalf the judgment-creditors that a person must be an agriculturist at the date of the suit or, under any circumstances, at the date of the decree which is sought to be executed, so as to enable him to take advantage of this rule, and that if he has failed to plead and prove his status as an agriculturist before the decree was passed against him, it is not open to him to re-agitate the same question in execution proceedings for the purpose of getting the execution proceedings transferred to the Collector.

I can find nothing in the rule itself or in the definition of an agriculturist as given in section 2 of the Deccan Agriculturist's Relief Act to limit the operation of this rule to a person who is held to be an agriculturist in the decree which is sought to be executed.

Reliance has been placed on the rulings in *Balchand Chaturchand* v. *Chunilal Jagjivandas* (1) where a judgment-debtor who was not an agriculturist at the date of the decree passed against him, but who had acquired the status of an agriculturist subsequent to the decree, was held not entitled to claim instalments under section 20 of the Deccan Agriculturist's Relief Act, *Devu Jetiram Gujar* v. *Ravapa Satappa Shintre* (2), where, similarly, a judgment-debtor was held not entitled to claim instalments under section 15, clause (b) of the Act. *Mulji Purshottam Thakkar* v. *Govardhandas Tribhuvandas* (3), where the

(1) 19 Ind. Cas. 901 ; 37 B 486 ; 15 Bom. L. R. 397.
(2) 67 Ind. Cas. 84 ; 24 Bom. L. R. 870 ; (1922) A. I. R. Bom. 220 ; 46 B. 967.
(3) 76 Ind. Cas. 148 ; 24 Bom. L. R 1291 ; (1923) A. I. R. Bom. 36.

judgment-debtor was further held to be barred by the principles underlying the rule of *res judicata* to plead that he was an agriculturist in execution proceedings and to claim instalments under section 20 of the Act.

The rulings above referred to were based on the provisions contained in section 15 (B) and section 20 of the Act, and do not in any way control the definition of an agriculturist as given in section 2 of the Act which is comprehensive enough to include a person who is an agriculturist at any stage of the proceedings, and is contained in Chapter I of the Act. The Deccan Agriculturist's Relief Act affords different kinds of reliefs to agriculturists in different proceedings. Chapter II of the Act relates to trial by Subordinate Judges of certain kinds of suits and necessarily implies that the person who claims to be an agriculturist should have acquired that status at the time of the institution of the suit. Chapter II of the Act expressly refers to suits and also other proceedings, while Chapter IV refers to insolvency proceedings In *Maruti Babaji Totare* v. *Martand Narayan Kulkarni* (4) a Bench consisting of Mc Leod, C. J., who was a party to the decision in *Devu Jetiram Gujar* v. *Revappa Satappa Shintre* held that the heir of an agriculturist judgment-debtor, cannot prevent the sale of the property inherited by him under section 22 of the Act, unless he himself is an agriculturist at the date of the attachment of such property. This ruling also supports the view that the definition of agriculturist in section 2 of the Act is not limited to the judgment-debtor being an agriculturist at the date of the suit or of the decree.

The present rule 28 of the Court rules was made in 1907 under section 320 of the old Civil Procedure Code of 1882, corresponding to section 68 of the present Code. A somewhat similar rule, though more extensive in its operation, was published in Government Notification No. 5481 of 1893 and was in force prior to the extension of certain provisions of the Deccan Agriculturist's Relief Act to Sind. Under that rule the Court had to inquire into the status of the judgment-debtor at the time of the attachment of his property there being no occasion for the Court to make such inquiry at any earlier stage.

(4) 69 Ind. Cas. 175; 24 Bom L. R. 749; (1922) A. I. R. Bom. 213; 47 B. 45.

There is nothing either in the Deccan Agriculturist's Relief Act or in the Civil Procedure Code or the rules framed thereunder for the Court to hold that the Legislature intended to prevent an agriculturist from applying that a decree passed against him be transferred for execution to the Collector provided the decree is of the description falling within this rule.

It is no doubt true that the object of the Legislature in enacting the provisions of section 68 to the Civil Procedure Code was to prevent, as far as possible, the transfer of the landed estates from the old families to modern speculators, as per Garth, C J., in *Haroprosad Roy* v. *Kali Prosad Roy* (5), and not to afford relief to unsuccessful traders. The rule as framed does not in any way restrict the transfer of decrees obtained against old families of landed proprietors or deprive the unsuccessful traders or speculators who have acquired the status of agriculturists subsequent to the passing of the decree from taking advantage of it. The result is unfortunate, but our office is *Jus dicere* and not *jus dare*. The Court has to abide by the words of the rule which has the force of Law without attempting to reform it according to the supposed intentions of the legislature or attempting to exclude cases which fall within the express meaning of the rule, in order to make the law reasonable. *A. G.* v. *Lockwood* (6), *Rodrigues* v. *Melhuish* (7), *Coe* v. *Lawrence* (8)., *Rex* v. *Farde* (9). If the rule is not in comformity with the declared intentions of the Legislature it is for the Legislature to amend or alter the rule. The object of the judgment-debtors who are *banias* and appear to be unsuccessful traders is not *bona fide*. Though it may cause a hardship to the judgment creditors who have not been able to recover the full amount due to them for over twelve years, the rule must, in my opinion, receive its ordinary and natural meaning. It entitles the judgment-debtors to plead that

(5) 9 C. 230; 4 Ind. Dec. (N. S.) 842.

(6) (1842) 9 M. A. W. 378 at p. 396; 6 Jur. 171; 152 E. R. 160.

(7) (1854) 10 Ex. 110 at p. 116; 24 L. J. Ex. 26; 2 W. R. 518; 156 E. R. 376; 102 R. R. 503.

(8) (1853) 22 L. J. Q B. 140; 1 E. & Bl. 516; 17 Jur. 1115; 1 W. R. 146; 98 R. R. 275; 118 E R. 529.

(9) (1923) 2 K. B. 400; 92 L. J. K. B. 501; 17 Cr. App. R. 99; 128 L. T. 793; 27 Cox. C. C. 406; 17 J. P. 76; 67 S. J. 539; 39 T. L. R. 322.

they are agriculturists in execution proceedings though they may not have raised this plea before the passing of the decree or in prior execution proceedings. They can, however, raise this plea only for the purpose of having the decree transferred to the Collector for execution.

I would, therefore, answer both the questions in the affirmative.

Kennedy, J. C.—I concur.

Raymond, A. J. C.—I agree.

S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 609 OF 1922.

February 7, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BENI PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEODIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre emption—Custom—Wajib ul-arz *containing recital of pre-emption—Subsequent partition of village—New* Wajib-ul-arz *maintaining right intact—Custom whether still exists.*

Plaintiffs sued for possession by pre emption of certain land alleging that a custom of pre-emption applied to the *mahal* and that they were co-sharers in it. The existence of a custom applicable to the village as originally constituted and carrying the incidents as recorded in the *wajib-ul-arz* of that period was not disputed, but it was contended that on a subsequent partition of the village into two *mahals* the custom was abrogated in its entirety. It appeared, however, that the *wajib-ul-arz* of the *mahal* in suit prepared at the time of partition maintained intact the rights of certain specified persons:

***Held*, that what was recorded in the *wajib-ul-arz* at the time of partition could not be regarded as a contract, but as a continuation of the application of the custom to the altered state of affairs, and that, therefore, the plaintiffs were entitled to sue for pre-emption.**

Parbu Dayal v. *Jamil Ahmad*, 64 Ind. Cas. 646; 19 A. L. J. 911; 44 A. 117; (1922) A. I. R. (A.) 160, referred to and followed.

Second appeal from the decree of the District Judge of Cawnpore, dated 23rd of January 1922.

Dr. *K. N. Katju* and Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The property in dispute comprises a one-anna share in *mahal* Rukmin Kunwar of the village Azampur Garhua and was sold by the defendant Manni Lal, to the other defendant, Sheo Din, for a consideration of Rs. 4,000 out of which Rs. 2,500 were credited towards a mortgage held by the vendee, Rs. 652 were paid at the time of registration, and the balance was left with the vendee for payment to one Ram Sahai.

The plaintiffs claimed to be the co-sharers of the vendor in *mahal* Rukmin Kunwar. The defendant-vendee was a stranger to the village. The allegation of the plaintiffs was that there was a custom of pre-emption applicable to *mahal* Rukmin Kunwar. The Courts below found that there was a custom of pre-emption applicable to the village Azampur Garhua; but it had been abrogated by the partition of the village in 1906 and that what was recorded in the *wajib-ul-arz* prepared at the time of partition was a mere contract, which terminated with the expiry of the term of the Settlement. They further found that in any case the custom could not survive the partition, because there was a single proprietor left of the entire *mahal*, in which the property now in dispute was situated.

The existence of a custom of pre-emption applicable to the village Azampur Garhua, as originally constituted, and carrying the incidents recorded in the *wajib-ul-arz* of 1876 is not now disputed. It allowed a right of pre-emption in the first instance to such co-sharers of the vendor as were his kinsmen and on their refusal to the other co-sharers of the village. In 1906 the village was divided into two *mahals*, one of which was called *mahal* Rukmin Kunwar. It was the sole property of Mst. Rukmin Kunwar. The *wajib-ul-arz* of *mahal* Rukmin Kunwar pre-

pared at that time provided that the right of pre-emption shall belong to the *Hissedar ekjaddi* and after him to the other co-sharers of any *mahal* of the village.

The effect of the latter *wajib-ul-arz* was that the custom, as originally recorded in the *wajib-ul-arz* of 1876, was maintained intact in spite of the partition between the co-sharers of different *mahals*. *Mahal* Rukmin Kunwar had for the time being become the property of a single individual; but later on the *mahal* became the property of several co-sharers, one of whom sold the share in dispute to a stranger, It was open to the co-sharers of the new *mahals* at the time of partition to submit to a continuance of the custom as it stood prior to the partition or to abrogate it. In the present instance they agreed to submit to the continuance of the custom, and the the plaintiff, who is one of the co-sharers of *mahal* Rukmin Kunwar, is entitled to claim pre-emption in respect of the share sold out of that *mahal*.

It is contended on behalf of the defendant vendee that the fact that the *mahal* Rukmin Kunwar had become the property of a single co sharer, had the effect of abrogating that custom in its entirety; but what was done at the time of partition was to continue the application of the custom to the altered state of things by declaring that the right of pre-emption shall be enforceable as between the co-shares of the different *mahals* in the same manner as if no partition had taken place. What was recordedin the *wajib-ul-arz* prepared at the time of partition cannot, therefore, be regarded as a contract and the plaintiffs are entitled to sue for pre-emption. In *Parbhu Dayal* v. *Jamil Ahmad* (1), it was held, in somewhat similar circumstances, that the effect of the partition was not to abrogate or extinguish the old custom but to maintain it.

In the Court of first instance one of the pleas raised by the defendant-vendee was that the entire consideration mentioned in the sale-deed was genuine. Out of the three items mentioned in the sale-deed two were allowed by the Court of first instance, namely, the sum of Rs. 2,500 which was credited towards the prior mortgage held by the vendee, and that of Rs. 652 paid in cash before the Sub-Registrar. As regards the third item the Court of first instance held that it was doubtful whether that money was really due to Ram Sahai inasmuch as Ram Sahai was related to the vendee, but without recording a definite finding on that point, it proceeded to declare that if the amount was really due to Ram Sahai, the matter could be determined in a suit between the person liable to pay the money and the person who claimed it. The defendant-vendee admitted that he had not paid the money left with him for payment to Ram Sahai ; and, in those circumstances, on further finding is called for.

This appeal is therefore allowed and the suit of the plantiff decreed for pre-emption subject to the payment of Rs. 3,152, to the defendant-vendee within two months from this date. In case of non-payment the suit of the plaintiff will stand dismissed. As regards the sum of Rs. 848 left with the defendant-vendee for payment to one Ram Sahai the plaintiff will have to take their chance to pay this money if Ram Sahai succeeds in establishing his right to it. In case of payment of the amount first mentioned, the plaintiffs will get their costs here and heitherto from the defendant-vendee, who will bear his own costs throughout. In case of non-payment the defendant-vendee will get his costs from the plaintiff-appellant in all these Courts including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

(1) 64 Ind. Cas. 646 ; 19 A. L. J. 911; 44 A. 117; 1922) A. L. J. (A.) 160.

ALLHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 93 OF 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

KARAMAT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

WAZIR HUSAIN—PLAINTIFF—RESPONDENT.

Custom — Pre-emption — Wajib-ul arz, *entry in, value of—Right denied to one class of co-sharers, effect of.*

KHARAG NASHIN v. DWARKA PRASAD SINGH

Although a *wajib-ul-arz* raises a *prima facie* presumption of the existence of the custom it recites, nevertheless, if it contains certain other matters relating to that right which cannot possibly form the subject of a custom, there would be no justification for presuming that the entry is one of custom.

Balwant Singh v. *Mare Singh*, 74 Ind. Cas. 822; 21 A.L. J. 542; (1924) A. I. R. (A) 52, followed.

It is impossible to conceive of a custom of pre-emption which makes distinctions between persons who have inherited by collateral succession and persons who have inherited by direct descent. All such persons become co-sharers in the village, and have equal status and rights in the eye of the law.

An entry in a *wajib-ul-arz* which sets forth a custom of pre-emption but winds up by saying that the right is denied to a person who becomes a co-sharer by collateral inheritance cannot be regarded as a record of custom of pre-emption.

First appeal from the order of the District Judge of Budaun, dated the 27th March 1923

Mr. *M. A. Aziz*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT:—This is a defendants' appeal arising out of a suit for pre-emption. The plaintiff relied mainly on an entry in the *wajib-ul-arz* of 1272 Fasli. The defendants denied the existence of any such custom.

The Court of first instance came to the conclusion that, although the *wajib-ul-arz* raised a *prima facie* presumption of the existence of custom, nevertheless there was internal evidence in the clause relating to pre-emption which negatived it. It held that no custom had been established and accordingly dismissed the suit. On appeal the learned District Judge came to a different conclusion. He held that the custom is established and remanded the case for trail of the other issues raised.

The entry relied on by the plaintiff, first of all, contains a recital setting forth the right of pre-emption and the way in which the price is to be settled in case of dispute. The clause winds up by saying that if a stranger has inherited property from an issueless co-sharer he would not be entitled to the right of pre-emption. There is no dispute as to the correct interpretation of this portion of the clause. It undoubtedly means that the right of pre-emption is denied to a person who has become a co-sharer by collateral inheritance. This portion of the clause cannot be detached from the other portions of it and in fact it is part of the whole entry regarding the existence of the right of pre-emption. In the case of *Balwant Singh* v. *Mare Singh* we expressed the view that, although a *wajib-ul-arz* raises a *prima facie* presumption of the existence of the custom it recites, nevertheless if it contains certain other matters relating to that right which cannot possibly form the subject of a custom, there would be no justification for presuming that the entry is one of custom. We are of opinion that this part of the clause is of that nature. It is impossible to conceive of a custom which makes distinctions between persons who have inherited by collateral succession and persons who have inherited by direct descent. All such persons become co-sharers in the village and have equal status and rights in the eye of the law. This being the view, we are inclined to agree with the first Court that the entry in the *wajib-ul-arz* was a record of contract which had ceased to be of any effect after the expiry of the Settlement. This being the sole evidence in the case, the plaintiff has failed to establish the custom alleged by him.

The result, therefore, is that this appeal is allowed, the order of the lower Appellate Court is set aside and the decree of the Court of first instance restored with costs in all Courts including in this Court feeson the higher scale.

Z. K. *Appeal allowed.*

(1) 74 Ind. Cas. 822; 21 A. L. J. 542, (1924) A. I. R. (A) 52.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 219 OF 1920.

February 12, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

KHARAG NASHIN AND OTHERS—APPELLANTS

versus

DWARKA PRASAD SINGH AND OTHERS—RESPONDENTS.

Zarpeshgi lease, object of—Redemption, whether can be prevented—Apparent transaction, presumption attaching to—Interest—Market rate, proof of.

KHARAG NARAIN v. DWARKA PRASAD SINGH

The primary object of a *Zarpeshgi* lease is not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor. [p. 592, col. 1.]

Sheo Sahai Missir v. *Bajo Singh*, 41 Ind. Cas. 495 ; (1917) Pat. 271, followed.

Ramdhari Singh v. *Mackensie*, 10 C. W. N. 851, not followed.

Where therefore a lease is executed not merely as a contract for the cultivation of land but constitutes a real and valid security to the tenant for the principal sums advanced together with interest thereon, the tenant's possession is that of creditors operating repayment of the debt due to them by means of their security. [p 592, col. 2.]

Bengal Indigo Co., v. *Roghobur Das*, 24 C. 272 ; 1 C. W. N 83 ; 23 I. A. 159; 7 Sar. P. C. J. 94 ; 12 Ind. Dec. (N. S.) 848 (P. C.), relied on.

Equity will not permit any device or contrivance to prevent or impede redemption. [p. 592, col. 2.]

Noakes & Co., Ld. v. *Rice*, (1902) A. C. 24 ; 71 L. J. Ch. 139; 86 L. T. 62 ; 50 W. R. 305; 66 J. P. 147 ; 18 T. L. R. 196, followed.

An apparent transaction must be assumed to be the real transaction until the contrary is proved. [p. 591, col. 2.]

Where no evidence is adduced to prove that the rate of interest provided for in the bond is the market-rate, the interest must be calculated at the market-rate.

Appeal from a decision of the Subordinate Judge of Monghyr, dated the 31st May 1920.

Messrs. *P. K. Sen*, *B. C. Mitter*, *and S. N. Bannerji*, for the Appellants.

Messrs. *Sultan Ahmad*, *S. N. Ray*, *Dinesh Ch. Varma*, *A. K. Roy and L. K. Jha*, for the Respondents.

JUDGMENT.

Das, J.—This was a suit to enforce a mortgage-bond executed by certain persons represented by defendants 1st party on the 18th April 1909. The defendants, other than defendants 1st party, are interested in the mortgage-security either as prior mortgagees and purchasers or as subsequent mortgagees and purchasers. The suit was not seriously contested by the defendants 1st party ; defendant 13, who is both a prior and a subsequent purchaser in respect of some of the mortgaged properties, raised various issues, all of which have succeeded in the Court below.

The history of the transaction between plaintiffs and the defendants 1st party is as follows:—On the 10th January 1901 they borrowed Rs. 200 from the plaintiffs and executed a simple bond in their favour. It is stated that the money was borrowed to enable them to pay the Government revenue and to meet other necessary expenses. On the 4th September 1902 there was a sum of Rs. 288 due to the plaintiffs upon the bond of the 10th January 1901. They required a fresh advance of Rs. 462 on that day, Rs. 60 to pay off certain decrees which had been obtained against them and Rs. 402 for certain necessary purposes. On the 4th September 1902 the defendants 1st party accordingly executed a mortgage-bond in favour of the plaintiffs to secure an advance of Rs. 750. Out of the money borrowed they discharged the bond of the 10th January 1901 and took a present advance of Rs. 462. The bond in suit, dated the 18th April 1909, was executed in order to pay off the mortgage-bond of the 4th September 1902.

The learned Subordinate Judge took the view that the doctrine of antecedent debt had no application to the case and he thought that there was no legal necessity which entitled the defendants to incur the debt. He also came to the conclusion that the mortgage bond in suit was a *farzi* transaction intended to defeat or delay the claim of defendant No. 13.

In my opinion it is quite impossible to support the judgment of the learned Subordinate Judge. The mortgage in suit was clearly to discharge an antecedent debt. Apart from that, the evidence is clear and convincing that the money was borrowed for purpose of necessity. In dealing with this question it must be remembered that the defendants 1st party have notseriously contested the claim of the plaintiffs. Defendants 1, 2, 4 and 6 to 12 filed a joint written statement and they expressly admitted the bond, although they raised a question as to the interest claimed. They also put forward a plea of payment of Rs. 875 which, however, has not been established in the Court below. It is worthy of note that they did not raise the question whether the debt was incurred for a necessary purpose. Defendant No. 3 took the point that his branch of the family was separate from the other members of the family cited as defendants 1st party in this action. This question has been investigated by the learned

Judge in the Court below and it has been decided against defendant No. 3, and defendant No. 3 has not presented any appeal against the decision of the learned Subordinate Judge on this point. There is just a suggestion in his written statement that the debt was not incurred for a necessary purpose; but he adduced no evidence on this point in the Court below and has not appeared before us to contest the claim of the plaintiffs.

The learned Subordinate Judge has, however, investigated the question of legal necessity at the instance, not of the defendants 1st party, but of defendant No. 13. I have very grave doubt whether it was open to the learned Subordinate Judge to do so; but, assuming that defendant No. 13 could raise the question of legal necessity, I am of opinion that the learned Subordinate Judge should have answered the question in favour of the plaintiffs. As I have already said, there was no fresh advance on the mortgage of the 18th April 1909. We have then to see whether the debt of the 4th September 1902 was incurred for a necessary purpose. The bond shows that out of the money raised on the mortgage of the 4th September 1902, Rs. 288 was paid to satisfy the earlier bond of the 10th January 1901, Rs. 60 was applied in satisfaction of certain decrees obtained against them and Rs. 402 was spent for necessary purposes. We have then to go to the earliest of these bonds to see whether the debt of Rs. 200 was incurred for a necessary purpose. The learned Subordinate Judge says that there is no evidence how much was raised for Government revenue and how much for other necessary expenses. Munshi Lal, examined on behalf of the plaintiffs, states that Rs. 200 was borrowed to pay Government revenue of *kist* January 1901 as also for feeding expenses of the family and for cloths." He added "Government revenue was paid out of the said money. *Chalan* and ledger of the same have been destroyed." In my opinion there is no reason to doubt the substantial accuracy of this witness especially when it is remembered that the defendants 1st party were in a chronic state of indebtedness.

The next question is as to the payment of Rs. 60 in satisfaction of certain decrees which had been obtained against the defendants 1st party. On this question Munshi Lal said as follows:—"Rs. 60 was required to pay the decree—Rs. 60 was deposited in Court in satisfation of the decree. I tried to take copies of the petition under which the payments were made but could not get them as the records had been destroyed." The evidence, in my opinion, is sufficient to establish the debt as against the defendants 1st party. The other item is as to the sum of Rs. 402 which was a present advance on the bond of the 4th September 1902. Munshi Lal says that the money was borrowed to defray the necessary expenses of the family and he added that he made enquires about the necessities for the loan. In cross-examination he gives the names of the persons from whom he made the enquiries and as there is denial of the facts stated by him, there is no reason whatever to disbelieve his evidence. If the bond of the 4th September 1902 be established, the bond now sued upon is necessarily established, for, as I have said, there was no present advance on the bond of the 18th April 1909. I hold that the bond of the 18th April 1909 was executed for a necessary purpose and that it binds the defendants 1st party.

I should like to say that I take strong objection to that portion of the judgment of the learned Subordinate Judge in which he says that he attaches no value to the plaintiffs books of accounts. His actual decision on the point is as follows:—"I do not attach any value to the plaintiffs' books of accounts which could be easily manipulated to support their case." The fact that they might be so manipulated does not establish that they were so manipulated. The plaintiffs are very respectable men of business and numerous transactions with numerous parties are entered in these books of accounts. The learned Sub ordinate Judge should have remembered that to pass a sweeping opinion of this nature was to discredit all their books of accounts and to imperil the various transactions into which the plaintiffs have entered. He has given no reasons whatever for holding that the books of accounts are not trustworthy except speculative reasons which should never have weighed with him.

The next question is, whether the bond in suit is a *farzi* document intended to defeat or delay the claim of defendant No. 13. In order to appreciate the point that has been argued before us, it is necessary to remember that

the plaintiffs consist of two different parties, Babu Kharag Narain and his son being plaintiffs 1st party and Babu Kali Charan Singh and his family being plaintiffs second party. The case of the plaintiffs is that they are jointly interested in the transaction and are accordingly entitled to sue jointly. The learned Subordinate Judge has taken great pains to point out that Ritlal Singh, the father of plaintiffs Nos. 3 and 4 of the second party, was a friend of Brij Bhukan Das, father of plaintiff No. 1, and that Ritlal Singh was also related to defendant No. 1. Having come to this conclusion the learned Subordinate Judge found no difficulty in holding that the transaction was a device to defeat the interest of Mr. O'Reiley and Chaman Singh. I have had some difficulty in following the arguments of the Subordinate Judge; but his view seems to be this: The mortgagers owed certain money to Chaman Singh, defendant No. 13. Chaman Singh was an unsecurad creditor. On the 16th March 1907 a decree was obtained by O'Reiley against defendants, 1st party for Rs. 8,987-5-6. Chaman Singh also demanded the money which was due to him. Upon these facts the learned Subordinate Judge came to the conclusion that the bond in suit was executed in order to defeat the claim of O' Reiley and Chaman Singh, but it is not disputed that there was no advance to the plaintiffs upon the bond of the 18th April 1909. That bond was executed in order to discharge the prior bond of the 4th September 1902 and it is not shown that on the 4th September 1902 there was any claim of O'Reiley or of Chaman Singh to defeat which the defendants executed a mortgage in favour of the plaintiffs. This is the answer to a very speculative case made out for Chaman Singh by the learned Subordinate Judge. The other point to which the learned Subordinate Judge refers is that there was a substitution of certain properties in the mortgage bond of the 18th April 1909. It appears that four specific properties formed the subject-matter of the mortgage of the 4th September 1902. In the bond of the 18th April 1909, one for the properties was left out and many other properties were substituted. The learned Subordinate Judge thought that this was a suspicious matter, but he failed to give due weight to the fact that the property which was left out in the bond of the 18th April 1909 was a property which was sold inexecution of a decree obtained against the defendants 1st party.

The learned Subordinate Judge says that although the property may have been sold, the security of the plaintiffs could not be impaired and there was no reason for substituting one security for another. This is true enough; but, at the same time, the plaintiffs as mortgagees may reasonably have wished to avoid trouble and expense if it was possible for them to do so, by taking other properties as security for the money advanced by them. The only other point in connection with this matter is that the learned Subordinate Judge thought that the value of the substituted securities was Rs. 50,000 to Rs. 60,000 and that there was no reason whatever why they should have been included when the money borrowed was only Rs. 3,191. The learned Subordinate Judge has referred to the evidence of Kharag Narain Singh in this connection. Kharag Narain, no doubt, says that the properties mortgaged are worth about Rs. 50,000 to Rs. 60,000 but Kharag Narain was giving the value of the properties, not the value of the security. The evidence is clear and convincing that all these properties were already subject to various mortgages and there is no reason to suppose that the value of the security is anything more than what is usual in a case of this nature. It is well established that an apparent transaction must be assumed to be the real transaction until the contrary is shown and that suspicion can never take the place of proof. In my opinion there is no proof that the transaction in question is *benami* transaction and I must overrule the decision of the learned Subordinate Judge on this point.

The next question is whether defendant No. 13 has occupancy rights in 220 bighas, 9 cuttahs and 13¼ dhurs of land comprised in the mortgage-security. The claim of defendant No. 13 arises in this way. One Holloway advanced Rs. 15,400 to the defendants 1st party on the 10th October 1897. As security for the money advanced, the defendants 1st party executed a mortgage-bond in his favour in respect of certain properties specified therein. They also executed a lease in respect of 220 *bighas*, 9 *cuttahs* and 13¼ *dh.* of *khudkasht* land belonging to the

defendants 1st party. Defendant No. 13 represents the interest of Holloway. The *patta* executed by the defendants 1st party in favour of Holloway makes it perfectly clear that the lease was executed as a security for the loan advanced. The lease was for 20 years from 1305--1324, for the purpose of cultivating indigo; but Ex. F, the *patta*, shows that this lease was granted as a security for the loan of Rs. 15,400 advanced by Holloway to the defendants' 1st party and that the object of the lease was not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor. In my opinion Ex. D, the mortgage-deed, Ex. E, the *ekrarnama* and Ex. F, the lease, must be taken and read as one transaction: and, when so read, there is no difficulty in coming to the conclusion that the transaction was a transaction between debtor and creditor, and not a transaction between lessor and lessee.

That being the governing intention between the parties to the contract, the question arises whether the lessee entered into possession in the capacity of mortgagee or in the capacity of *raiyat*. Mr. Sultan Ahmad on behalf of defendant No. 13 has contended before us that Holloway was already in possession as a *jotedar*. There is no evidence in support of this argument except the stray statements of Bhairo Dayal and Bansi Rai, two of the witnesses examined on behalf of defendant No. 13. There is, however, no documentary evidence in support of this evidence and I am not prepared to act upon it. Mr. Sultan Ahmad relied upon the case of *Ramdhari Singh* v. *M. H. Mackenzie* (1) in support of his argument that a *raiyat* by taking a *zarpeshgi* lease of land of which he was then put in possession does not divest himself of his right to acquire a right of occupancy. That decision has not been followed in the subsequent decisions of the Calcutta High Court and of this Court, and I am not prepared to follow it. It was laid down by Chapman and Atkinson, JJ., in *Sheo Sahay Misir* v. *Bajo Singh* that the "primary object of the *zarpeshgi* lease is not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor. That being the governing intention between the parties to the contract it is clear that the *zarpeshgidars* entered into possession in the capacity of mortgagees and not as *raiyats*; and, consequently, they are not entitled to claim occupancy rights although there was a letting of the land in the sense that they were required by the terms of the *zarpeshgi* lease to cultivate the lands and to pay merely a nominal annual rent." The leading case on the subject is that of *Bengal Indigo Company* v. *Roghobur Das* (3) which lays down that where the leases are not mere contract for the cultivation of the land but are intended to constitute and do constitute a real and valid security to the tenant for the principal sums which he had advanced and interest thereon, the tenants' possession under the documents is in part at least not that of cultivators only but that of creditors operating repayment of the debt due to them by means of their security. The question, to my mind, is to see whether the relationship between Holloway and the defendants 1st party was that of lessor and lessee or that of mortgagor and mortgagee. As soon as we find a debt and a security for the debt, the transaction is one of mortgage, by whatever name it may be called by the parties; and once you get a mortgage, there is no difficulty in working out the rights of the parties. As Lord Macnaghten pointed out in *Noakes & Co., Ltd.* v. *Rice*. (4) "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." Lord Macnaghten added that it followed as a necessary consequence that when the money secured by a mortgage of land was paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security. In my opinion it is impossible to hold that defendant No. 13 has acquired any rights of occupancy in these lands.

(1) 10 C. W. N. 851.
(2) 41 Ind. Cas. 495; (1917) Pat. 271.
(3) 24 C. 272; 1 C. W. N. 88; 23 I. A. 158; 7 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848 (P. C.)
(4) (1902) A. C. 24 L. L. J. Ch. 189; 86 C. L. T 62; 50 W. R. 305; 66 P. J. 147; 18 T. L. R.196.

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The last question is as to interest. The interest in the bond in 24 per cent. per year with yearly rests. No evidence was adduced by the plaintiffs to prove that this was the market-rate of interest on a transaction of this nature. That being so, the interest must be calculated at the market-rate of interest. We think that the plaintiffs are entitled to interest at the rate of 12 per cent. per annum with yearly rests.

There are various defendants who have various rights in these properties which have not been determined by the learned Subordinate Judge. Before this case is finally disposed of, the rights of these parties must be determined.

We allow the appeal, set aside the judgment of the Court below and remand the case to the learned Subordinate Judge for disposal of those issues which have not been disposed of by him and to pass a decree in accordance with this judgment. The appellants are entitled to the costs of this appeal from defendant No. 13. So far as the costs in the Court below are concerned, they ary entitled to them from defendants 1st party and are entitled to add them to their mortgage-security.

S. D. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1808 TO 1824 OF 1921.

August 16, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

NAND LAL CHAUBE AND OTHERS—DEFENDANT—APPELLANT

versus

MAHARAJA KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885) s. 50 (2)—Presumption of fixity of rent, rebuttal of—Holdings, different—Burden of proof.

Where a landlord succeeds in showing that certain holdings as recorded in the Record of Rights, in respect of which the presumption laid down in section 50 (2) of the Bengal Tenancy Act is claimed, were not in existence in the condition in which they were recorded in the Record of Rights in certain years, the onus is shifted on the tenants to prove that their present holdings are made up of other holdings which have also borne a uniform rental. [p. 595, col. 1.]

Appeal from a decision of the Subordinate Judge of Shahabad, dated the 22nd June 1921, reversing a decision of the Munsif of Buxar, dated the 30th April, 1920.

Mr. *B. B. Saran*, for the Appellants.

Mr. *N. N. Sinha*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—These 17 appeals arise out of as many suitsbrought by the plaintiff-respondent for enhancement of rent under section 30 (*b*) of the Bengal Tenancy Act on adjudication that the tenants defendants were occupancy *raiyats* and not *raiyats* at fixed rents as recorded in the Record of Rights. The defence of the defendants was that their holdings were not occupancy holdings but that they were *Sharahmoaian* tenants or tenants holding at fixed rates. They further raised certain pleas objecting to the enhancement under section 30 (*b*), even if it be held by Court that they were occupancy tenants.

There were altogether 25 suits brought by plaintiff, out of which four suits were dismissed an account of non-service of summons on the defendants. Four other suits were decreed by the Munsif on a finding that the tenants in those suits were occupancy tenants and that the plaintiff was entitled to enhancement of rent under section 30 (*b*) of the Bengal Tenancy Act. Those eight suits are not before us in these appeals and the present appeals relate to the remaining 17 suits in which the learned Munsif held that the tenant-defendants were *raiyats* at fixed rates. On appeal by the plaintiff, the learned Subordinate Judge of Shahabad has reversed the decrees of the Munsif, and has found that the defendants were occupancy tenants and that their rents are liable to enhancement under section 30 (*b*) of the Bengal Tenancy Act. Against the decrees in these suits the tenant-defendants come in second appeal to this Court.

NAND LAL CHAUBE v. MAHARAJA KESHO PRASAD SINGH

The learned Munsif, in dealing with the issues as to whether the holdings in the suits are holdings at fixed rate or occupancy holdings, held that the Survey Records were in favour of the defendants. He found that, although the *Jamabandis* for the years 1246, 1248, 1267, 1268 and 1280 Fasli produced by the plaintiffs showed that the holdings of the defendants have not continued uniform either in area, or in the amount of rent payable by the defendants, yet from 1280 downwards there has been no change either in the area, or in the amount of rent, and he has drawn the presumption raised in favour of the defendants by clause (2) of section 50 of the Bengal Tenancy Act. As regards the *Jamabandis* produced by the plaintiff, the learned Munsif remarked that, in order to be of any evidential value, they require full corroboration from independent source, and that this circumstance was wanting in the present case ; but, having regard to the fact that the Patwari examined by the plaintiff, gave genealogies of the defendants which were not challenged by the defendants, and to the fact that the defendants did not make any specific allegation that their lands in 1246 or 1248 were not as entered in the *Jamabandis* and the entries in those *Jamabandis* were not specifically challenged, he held that the *Jamabandis* could not be wholly discarded. He went in detail into the entries as regards each case, and he found that a large area of land went out of the tenants' possession after 1248 Fasli ; that the lands in the *Jamabandi* of 1267 did not include any new lands which were not tenancy lands in 1246 or 1248. He thought that there might have been readjustment or redistribution of lands by purchase, etc., but no new land came in, which was not in the *Jamabandi* of 1248. He observed that it was not the plaintiff's suggestion, nor was there any evidence to show that the 1248 *Jamabandi* was incomplete, and he remarked that this fact had an important bearing in the present cases as the mere fact that the area of the tenants' lands in 1267, or in any other subsequent year, was higher than the lands in 1248 *Jamabandi*, does not establish the plaintiff's case. He was of opinion that the plaintiff had to prove, in addition, that the increased area are lands of new Settlement not acquired by purchase from other tenants, and he placed the onus on the plaintiff to prove that the excess area was a result of new Settlement as the *Khatian* was in the defendants' favour. Then, as regards the *Bhaoli* lands shown in the earlier *Jamabandis* against the names of some of the tenants, and the fact that while the *Bhaoli* area in 1248 was 60 *bighas*, in 1268 it was reduced to 18 *bighas*, he held that these facts did not warrant the conclusion that all the *Bhaoli* lands were commuted to *Nagdi* and the *Bhaoli* lands of 1246 or 1248 or any subsequent year was continued to be held by the self-same tenants in later years. The learned Munsif further held that mere alteration in area accompanied with alteration in land, as shown by *Jamabandi*, proved nothing. He was of opinion that the plaintiff must prove increase in rent or in rates of rents and also that the previous *Bhaoli* areas were, as a matter of fact, included in the later years' holdings and that the lands were of new Settlement. He then took up each case or each group of cases separately and he found that the plaintiff had failed to prove that the new lands were of new Settlement. He was of opinion that it was possible that they were acquired by purchase. He further held that the *Jamabandis* show constant alterations in areas and rents but it was not shown that the old rent was enhanced, or that new lands were settled. He further held that identity of the lands in dispute with those in the *Jamabandis* had not been established. He accordingly dismissed the 17 suits now in question.

On appeal, the learned Subordinate Judge was of opinion that the landlord had sufficiently rebutted the presumption raised by the entryin the Record of Rights and under section 50 (2) of the Bengal Tenancy Act by showing from his earlier *Jamabandis* of 1246, 1248, 1267 and 1268 that in most of the cases the present *Nagdi* holdings with the present *Jamas* were new creations and in some cases there were conversions or commutations from *Bhaoli* holdings. He was also of opinion that the learned Munsif placed the onus on the plaintiff about matters which would be entirely within the special knowledge of the defendants themselves, for instance, as regards purchase of old *raiyati* lands, etc. He held that the *Jamabandis* of the earlier years, mentioned above, having rebutted the presumption arising in favour of the defendants, and the onus having

having shifted upon the defendants to show that their present holdings were made up of other holdings acquired by them by purchase or other means, which were also held at uniform rent, the defendants had failed to discharge the onus, and that, therefore, it must be held that they were occupancy tenants and not tenants at fixed rents.

In second appeal it has been argued on behalf of the appellants that the learned Subordinate Judge had not considered each case separately, but has considered all the cases *en bloc*. Further, he has not considered the fact that the *Jamabandis* were held by the the Munsif not to have been proved according to law. Thirdly, that the presumption being in favour of the defendants, the learned Subordinate Judge has improperly thrown the onus upon them to prove new acquisitions by purchase or other means, or by commutation of *Bhaoli* rents into *Nagdi* rents. Now, although the learned Subordinate Judge was right in his view that once the plaintiff succeeded in showing that the holdings, as recorded in the Record of Rights, were not in existence in the condition in which they were so recorded, in the years 1246, or 1248, or 1267 or 1268, the onus shifted on the defendants to prove that their present holdings are made up of other holdings which also have borne uniform rental, yet it must be said that the learned Subordinate Judge has not properly considered the evidence adduced by the defendants. He merely observes that the onus was improperly thrown on the landlord about matters which would be only within the special knowledge of the tenant himself ; but he does not consider whether the onus which was on the defendants has been discharged by them by the evidence produced. Moreover, the learned Munsif considered each case or group of cases separately and dealt with the evidence relating to those case or groups of cases. The learned Subordinate Judge has not dealt with each case or group of cases separately, and I am not sure whether his attention was directed to the evidence adduced by the defendants as regards each case. Moreover, the learned Munsif observed that the plaintiff had failed to prove the identity of the lands in dispute with the lands in the *Jamabandis*. The learned Subordinate Judge does not deal with this point. No doubt, he refers to the genealogies deposed to by the plaintiff's Patwari, but I am not sure whether by this he meant that the identity of the lands had been established. Having regard to these circumstances. I am of opinion that the appeals have not been properly dealt with by the learned Subordinate Judge. I would, therefore, set aside his decrees and remand the appeals to the Subordinate Judge for fresh hearing and disposal according to law. Costs will abide the result.

Das, J.—I agree.

Z. K. *Appeals remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 640 OF 1922.

July 12, 1923.

Present :—Mr. Justice Daniels.

BALDEO AND OTHERS—DEFENDANTS APPELLANTS

versus

BHAGWAN MISIR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by father—Necessity, absence of—Son, whether can sue to recover property—Antecedent debt.

The circumstances under which it is necessary for a Hindu son suing to recover family property to show that a debt incurred by the father was illegal or immoral are two ; the first is, where property has passed out of the family under a conveyance executed by the father in consideration of an antecedent debt or in order to raise money to pay off such debt, and the second is, where property has been sold in execution of a decree for the father's debt. Where, however, an alienation of family property is effected by the father for a cash consideration for which there is no family necessity, a son can recover the property without proof of the fact that the debt was an immoral or illegal one.

Girdharee Lal v. *Kantoo Lal*, 1 I. A. 321 ; 12 W. R. 58 ; 14 B. L. R. 187 ; 3 Sar. P. C. J. 880 (P. C.), followed

Second appeal against the decree of the Subordinate Judge of Basti, dated the 20th of February 1922.

Mr. *Braj Nath Vyas*, for the Appellants.

Messrs. *Jung Bahadur Lal* and *S. P. Sinha*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought to set aside

a sale deed executed by his father in 1917 and to recover possession of the property on the ground that the sale was not for legal necessity. The case as put in the plaint was that the consideration never passed at all and that if paid it was paid for illegal purposes. However, the substantial issue in the Courts below was that of legal necessity. The sale consideration was Rs. 119. Rs. 41-4-0 has been found to be binding on the plaintiff and the plaintiff has submitted to this part of the decree. The remaining amount of Rs. 77-12-0 was paid in cash at the time of registration and as to this the Court below finds that there was no legal necessity. Against this portion of the decree the defendants appeal.

Only two pleas have been urged before me. The first is that the amount of Rs. 77-12-0 was taken for legal necessity. The arguments advanced in support of this plea are purely questions of fact. The items in question were stated in the sale-deed to have been borrowed for household expenses and for payment of petty debts. The defendants adduced evidence to show that they were borrowed for the purchase of bullocks and funeral expenses of the plaintiff's grandfather. The Courts below has given good reasons for disbelieving this evidence and the finding is one of fact. It is not open to attack in this appeal.

The second plea is that the plaintiff can only recover property which has once been sold by showing that the sale consideration was for illegal or immoral purposes. This plea is equally untenable. The circumstances in which it is necessary for the sons to show that the debt was illegal or immoral in order to recover the property were laid down by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1). There are two such circumstances and two only. The first is, where property has passed out of the family under a conveyance executed by a father in consideration of an antecedent debt in order to raise money to pay of such debt. The second is, where property has been sold in execution of a decree for the father's debt. Neither branch of the rule has any application to this case. This was not an execution-sale but a private conveyance, and, so far as this item of Rs. 77-12-0 is concerned, it was a private conveyance executed not in lieu of an antecedent debt but for an amount paid in cash at the time of the registration of the deed. The appeal, therefore, fails and it is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 1 I. A. 321; 22 W. R. 56; 14 B. L. R. 187; 8 Sar. P. C. J. 880, (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 174 OF 1922.

January 8, 1924.

Present:—Mr. Aston, A. J. C.

ROCHALDAS GIDOOMAL & COY.—PLAINTIFFS,

versus

THE MERCANTILE BANK OF INDIA LTD.—DEFENDANTS.

Banker & Customer—Bankers' lien, nature of—Moneys handed to Bank for specific purpose—Right of Bank to set off such monies against another account—Civil Procedure Code (Act V of 1909), O. VIII, r. 6.

Bankers have a general lien on securities deposited with them as Bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with the lien, they can set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons but they cannot successfully claim a lien on securities delivered to them for a specific purpose inconsistent with the existence of the lien claimed. [p. 597, cols. 1 and 2.]

Brandao v. *Barnett*, (1846) 69 R. R. 204; 12 Cl. Fin. 787; 8 C. B. 519; 8 E. R. 1622; 136 E. R. 207; *London Chartered Bank of Australia* v. *White*, (1879) 4 A. C. 413, 422; 48 L. J. P. C. 75; *Bank of New South Wales* v. *Goulburn Valley Butter Co.*, (1902) A. C. 543; 71 L. J. P. C. 112; 87 L. T. 68; 51 W. R. 367; 18 T. L. R. 735; *Hill* v. *Smith*, (1844) 12 M. & W. 618; 13 L. J Ex. 243; 8 Jur. 179; 67 R. R. 436; 152 E. R. 1346; *Young* v. *Bank of Bengal*, (1836) 1 Moore P. C. 150; 1 Deac. 622; 43 R. R. 8; 12 E. R. 771; 1 M. I. A. 87; 18 E. R. 84; 1 Sar. P. C. J. 97; *Alsogar* v. *Currie* (1844) 12 M. & W. 751; 13 L. J. Ex. 203; 67 R. R. 445; 152 E. R. 1402; *In re Pallit*, (1898) 1 Q. B. 455; 62 L. J Q. B. 236; 4 R. 253; 68 L. T. 366; 41 W. R. 276; 10 Morrell 85; *Re Mid Kent Fruit Factory*, (1896) 1 Ch. 567, 652 L. Ch. 250; 74 L. T. 22; 44 W. R. 284; 3 Manson 59, relied upon.

ROCHALDAS GIDOOMAL & COY. v. THE MERCANTILE BANK OF INDIA

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

Mr. *Pamanmal Valabdas*, for the Defendants.

JUDGMENT.—This is a suit filed by the plaintiffs for the recovery of Rs. 3,600 from the defendants, Rs. 3,500 being a sum telegraphically remitted to plaintiff on 8th February 1922 from Colombo through the defendant Bank and Rs. 100 being claimed by way of damages on account of the wrongful conduct of the defendants in withholding payment.

The defendants contend that they were entitled to retain this Rs. 3,500 as a set off against the sum of Rs. 3,317-6-3 the balance due under two dishonoured Bills drawn for valuable consideration by Messrs Berli & Co., Limited, (who were in liquidation in February 1922) in favour of the defendants and accepted by the plaintiffs and to retain the balance of Rs. 182 9-9 as a set off towards dishonoured Bills of the value of about £3,300 (Sterling) drawn for valuable consideration by Messrs. Shasha in favour of defendants upon plaintiffs and accepted by the plaintiffs. The defendants also claim that they had a Banker's lien over the sum of Rs. 3,500 and that they were entitled to amalgamate the various accounts of the plaintiffs with themselves as Bankers and set off a credit in one against a debit in another account.

Plaintiffs, on the other hand, contend that since the money was given to the Bank at Colombo for a specific purpose, *viz.*, to be telegraphically transmitted to the plaintiffs in Karachi, the money was not subject to any lien and could not be retained by the Bank against sums alleged to be due under dishonoured Bills. Plaintiffs further contend that the Bills drawn by Messrs. Berli and Co. were not accepted by the plaintiffs but by another firm of the same name doing business in Sukkur.

With regard to the question of lien it was pointed out by their lordships of the Privy Council in *London Chartered Bank of Australia* v. *White* (1) that Bankers most undoubtedly have a general lien on all securities deposited with them as Bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien. A Banker is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons see *Bank of New South Wales* v. *Goulburn Valley Butter Company* (2). Bankers have a general lien on securities deposited with them as Bankers but they cannot successfully claim a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed, *Brandao* v. *Barnett* (3).

In the present case the Rs. 3,500, in my opinion, cannot, any more than in *Brandao* v. *Barnett* (3), be considered to have been deposited with the defendants as Bankers.

Verhomal, the plaintiffs' partner, requested the Mercantitle Bank of India at Colombo to telegraph to their agent at Karachi at his own cost and risk the fact that they had sold to Rochal Das Gidoomal and Co. a telegraphic transfer on Karachi for Rs. 3,500 in favour of Rochaldas Gidoomal and Co.

The transaction, thus, was the sale of a telegraphic transfer entered into for the purpose of the speedy transmission of funds to Karachi. The plaintiff was not a depositor but a vendee and the defendant Bank as vendors were under an obligation to deliver what they had sold.

It is, of course, conceivable that Verhomal, instead of making the request which he made, could have requested the Mercantile Bank of India at Colombo to telegraphically transfer Rs. 3,500 to the credit of plaintiffs' account with the Mercantile Bank of India at Karachi. In this case whatever the motive with which the request was made, the defendants would, in my opinion, have had a Banker's lien on the sum thus transferred, for it would have been deposited in the account, just as much as if plaintiffs in Karachi had deposited it themselves.

Verhomal, however, requested the Bank at Colombo to wire to the defendants in Karachi

(1) (1879) 4 A. C. 413 at p. 422 ; 48 L. J. P. C 75.

(2) (1902) A. C. 543 ; 71 L. J. P. C. 112 ; 87 L. T. 88 ; 51 W. R. 367 ; 18 T. L. R. 785.

(3) (1846) 69 R. R. 204 ; 12 Cl. Fin 787 ; 8 C. B. 519 ; 8 E. R. 1622 ; 136 E. R. 207.

the fact that they had sold a telegraphic transfer for Rs. 3,500-0-0.

The circumstances appear to me to show a contract between the parties inconsistent with lien.

With regard to the contention of the defendants that they were entiled to retain this Rs. 3,500 as a set off against the sum of Rs. 3,317-6-3 under two dishonoured Bills drawn by Berli & Co. and to retain the balance of Rs. 182 9-9 as a set off towards dishonoured Bills of the value of about £ 3,300 (sterling) drawn by Messrs. Shasha, it has been held that money paid for a specific purpose cannot be set off by a Banker, see Grant's Law of Banking, Sixth Edition, p. 696, and the cases there cited, *viz.*, *Hill* v. *Smith* (4) *Young* v. *Bank of Bengal* (5) as explained in *Alsogar* v. *Currie* (6) *In re Pallat* (7), *Re Mid-Kent Fruit Factory* (8). The present case seems to me very similar to the hypothetical case put by Lord Chancellor during the course of the argument in *Bradao* v. *Barnett* (3), where Lord Brongham expressed the opinion that, unless the Banker on taking the notes for transmission into the country stated that he did so subject to his right of lien he waived it. In the present case the money was paid to the Mercantile Bank at Colombo for a specific purpose and it cannot, in my opinion, be set off. Provision has been made in Order VIII, rule 6 of the Civil Procedure Code for set off in certain cases but in order to entitle a defendant to set off, it is necessary that the parties should fill the same character as they fill in the plaintiffs" suit. In the matter of the claims sought to be set off debts were owing to the defendant Bank on account of dishonoured bills, but in the plaintiffs' suit the Rs. 3,500 had been telegraphically remitted through the Bank or, to be precise, the Mercantile Bank of India Limited at Colombo sold to Verhomal, a partner in the plaintiff's firm, a telegraphic transfer of Rs. 3,500 to Karachi and wired to their agent, the Mercantile Bank of India Limited at Karachi, at Verhomal's expense and risk, informing them of the fact.

In case I am wrong in my view that the Bank is not entitled to set off the debts due on the dishonoured bills on the grounds mentioned, it is necessary to consider the other contentions of the plaintiff.

Plaintiff has failed to prove the alleged damage of Rs 100. It seems to me established with regard to issue No. 1. that the plaintiffs were indebted to the defendants when the telegram was received by the defendants. Mr Laing's evidence shows that on two drafts of Berli & Co a sum of £ 258-19-0 at the rate of 1 3s 9|16d, *viz.*, Rs. 3,883-7-0 was due and Rs. 11,675-12-6 on the Shasha drafts.

Plaintiff contends that the branches at Sukkur and Shikarpur had no connection with the Karachi firm of Rochaldas Gidoomal and Co., except that they were all called by the same name and that each had one common capitalist partner.

The evidence called in support of this consists of mere oral statements of interested witnesses and the contention appears to me inconsistent with Ex. 27, a Reference made at Karachi under the Indian Arbitration Act, which is not in force in Shikarpur, by the firm of Rochaldas Gindumal and Co. of Karachi, Shikarpur and elsewhere. The contention appears to me also inconsistent with Ex. 32, in which Rochaldas Gidumal & Co. of Karachi wrote calling on defendants to send them delivery orders for goods covered by drafts drawn on the Sukkur Office.

My finding on issue 1 is in the affirmative. On issue 2 in the negative.

I give judgment for plaintiff for Rs. 3,500 and costs and interest at 6 % from date of suit till payment.

P. B. A. *Suit decreed.*

(4) (1844) 12 M. and W. 618; 13 L. J. Ex. 243; 8 Jur. 179; 67 R. R. 486; 152 E. R. 1346.
(5) (1886) 1 mover P. C. 150 ; 1 Dec. 622 ; 48 R. R. 8; 12 E. R. 771; 1 M. I. A. 87; 18 E. R. 84 ; 1 Sar. P. C. J. 97.
(6) (1844) 12 M. and W. 751; 13 L. J. Ex. 203; 67 R. R. 475; 152 E. R. 1402.
(7) (1893) 1 Q. B. 455; 62 L. J. Q. B. 236; 4 R. 258; 68 L T. 866; 41 W. R. 276; 10 Morrell. 35.
(8) (1896) 1 Ch. 567; 65 L. J. Ch. 250 ; 74 L. J. 22 44 W. R. 284; 8 Manson 59.

JAGABANDHU KUNDU *v.* RAJMOHAN PAL

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2391 of 1921.

January 25, 1924.

Present :—Mr. Justice Rankin and Mr. Justice Mukerji.

JAGABANDHU KUNDU AND OTHERS—APPELLANTS
versus
RAJMOHAN PAL AND OTHERS—RESPONDENTS.

Co-sharer landlords—Occupancy holding, non-transferable, transfer of, to co-sharer landlord—Purchaser, position of—Ejectment—Injunction, mandatory, when to be granted.

When one co-sharer landlord takes a transfer of a non-transferable holding from a tenant, he may be treated by the other co-sharer landlords as a trespasser [p. 599, col. 2]

Dilbar Sardar v. *Hosein Ali Bepari*, I. L. R. 26 Cal. 553 ; 13 Ind. Dec. (N. S.) 955 ; *Lakhi Kant Das Mahapatra* v. *Bolabhadra Prosad Das*, 25 Ind. Cas. 546 ; 19 C. L. J. 400, followed.

Sreemutty Basanta Kumari Dasya v. *Mohesh Chandra Saha*, 21 Ind. Cas. 621; 18 C. W. N. 828, distinguished.

Where on a transfer of a non-transferable occupancy holding to a co-sharer landlord another co-sharer landlord sues to eject the transferee to the extent of his own share claiming joint possession with the transferee to the extent of his share, it is no equitable defence for the defendant to say that the plaintiff has been in possession of other lands purporting to hold an occupancy right therein. [p. 600, col. 1]

It requires a strong case for a Court to refuse an injunction restraining a further alteration of the character of the property ; but a mandatory injunction directing the restoration of the property to its original condition is a most exceptional remedy and one never to be applied except with the greatest safeguards for the prevention of waste as well as injustice. [p. 600, col. 1]

Appeal against the decree of the Sub. Judge, 5th Court, Dacca, dated the 20th September 1921.

Dr. *Sarat Chandra Basak* (with him Babu *Dibendra Chandra Pal*), for the Appellants.

Dr. *Dwarkanath Mitter* (with him Babus *Rupendra Coomar Mitter* and *Manindranath Banerjee*), for the Respondents.

Rankin, J :—This is an appeal from a decision of the 5th Subordinate Judge of Dacca whereby he modified a decision of the Munsif of Munshiganj. The plaintiff is a co-sharer in the *miliki* interest of a small piece of land in area about one-third of an acre and he has a 3-annas 4-gundas share. So far as this particular land now in question is concerned, it appears that it was the subject matter of a non-transferable occupancy right in defendant No. 11. The original *raiyat* transferred it or purported so to do to the first defendant and the case has been argued on the footing that the first defendant is merely a *benamidar* transferee for a co-sharer of the plaintiff, by name Hari Binode. It appears that the transfer was in November 1918 and that, in May of 1919, Hari Binode settled the land with the present appellants, defendants Nos. 2 and 3. It appears, further, so far as we can gather, that in or about January of 1919 Hari Binode excavated a tank and dug certain ditches on the property and that, in May 1919, defendants 2 and 3 erected certain structures for use as jute godowns, the intention being to use this plot of land not for agricultural purposes but for the purposes in connection with the storage of jute. In these circumstances, about a month after defendants Nos 2 and 3 had taken settlement the plaintiff brought this suit in June 1919 claiming to the extent of his share the right to eject the defendants from the land, that is to say claiming a decree for joint possession with the defendants to the extent of his share.

The first point urged by the appellants was successful before the trial Judge. That point is this: —that in respect of other lands wherein the plaintiff and Hari Binode were co-sharers, these two were settled in non-tranferable right, and that of these the plaintiff has taken a transfer from the tenants and is now in possession. Accordingly, it is said that this gives rise in the present suit to an equitable defence on the part of the defendants No. 2 and 3; that is to say, that they are entitled to object that, in consideration that the plaintiff is in actual possession of more lands than are referable to his share, he cannot, as regards this land get a decree for joint possession but may be limited to his mere rights to bring a suit for partition of all the common properties. With regard to this matter, one has to observe that the principle that, when one co-sharer landlord takes a transfer of a non-transferable holding from a tenant, he may be treated by

the other co sharer landlords as a trespasser, has been laid down in this Court more than once, and the principle itself is not disputed by the learned Vakil who appears for the appellants. The case of *Dilbar Sardar* v. *Hosein Ali Bepari* (1) and the case of *Lakhi Kant Das Mahapatra* v. *Bolabhadra Prosad Das* (2) are sufficient authorities. It has been contended, however, that the case of *Sreemuty Basanta Kumari Dasya* v. *Mohesh Chandra Shaha* (3) affords some authority, in certain circumstances, for an equitable defence such as that now put forward. But an examination of the case in 18 Calcutta Weekly Notes (3) shows that the aspect of the case which is the prominent aspect of this case, namely, that the defendants have taken transfer of a non-transferable right was not the basis of the decision and the case had not really been looked at from that particular point of view. In any case, it seems to me that the fact that the plaintiff has been for a long period in possession of other lands purporting to hold an occupancy right therein is no equitable defence when afterwards Hari Binode seeks to do the same thing as regards a different piece of land altogether and the plaintiff takes objection. Whether Hari Binode could have taken objection successfully to the plaintiff's occupation of other lands, what his motives were in not claiming ejectment in good time, whether he would now be barred from proceeding in ejectment—all these are matters which seem to me foreign to the present case Under *Dayamoyi* v. *Ananda Mohan Roy* (4) it appears to me that the transfer out and out of a non-transferable occupancy *jote* gives to the landlord a right to re-enter. If the landlord does not re-enter but does not recognize, it may be that his right to re-enter continues for a substantial time. But, in this case, so far as the other lands are concerned, no co-sharer of the plaintiff has ever purported or attempted to re-enter and the plaintiff, as the matter stands, is standing, in fact, in the shoes of the previous tenant against whom his right is quite unimpeachable. Accordingly, there seems to be a fallacy in treating the plaintiff, as regards those lands, as a person who is merely exercising a right given to him by his *maliki* interest. For these reasons, I think that the equitable defence set up by the appellants fails and that the correct view on this point was taken by the Court of Appeal below.

We then come to a matter of considerable practical importance. There can be no doubt that, with regard to this land, defendants Nos. 2 and 3 have been engaged in changing its character from agricultural land to land suitable to some form of business connected with jute. As regards the future, the learned Judge has given an injunction restraining the defendants from further digging the land and from raising any other huts thereon. So long as that decree is corrected by confining it to the defendants 2 and 3, I can see no objection to that decree for an injunction standing. The learned Judge has, however, also granted against the defendants without distinction a mandatory injunction that they do fill up the ditches, remove the earth and the huts from the land within a fortnight at their own costs failing which the plaintiff may do that recovering costs from the defendants. Now, on that question, it may be desirable to be a little precise. Hari Binode, who is said to have done the excavation of the tank, is not a party to this suit. His excavation was not objected to at the time and the plaintiff, as regards that, seems to have taken no action until it was completed. I do not say that his delay had been such as would disentitle him to an ordinary injunction but that the delay disentitles him to a mandatory injunction may very easily be inferred in the present case. However that may be, Hari Binode is not a party to this suit and the plaintiff took no action until Hari Binode had parted with his possession of the land to the defendants Nos. 2 and 3. I fail to see, therefore, that there can be any possible question of granting in this suit a mandatory injunction to reinstate the tank or the ditches against any one. That being so, the next question is this: The plaintiff is not willing, and certainly cannot be asked now to express his willingness, to make any arrangement for restoring the land so as to make it suitable for such modest agricultural purposes as it would seem to be capable of. The buildings on the land, that is to say, the huts—whatever they be—we are informed that there is only now an office—are certainly

(1) 26 C. 558 ; 13 Ind. Dec. (N. S) 955.
(2) 25 Ind. Cas. 546; 19 C. L. J. 400.
(3) 21 Ind. Cas. 621 ; 18 C. W. N. 828.
(4) 27 Ind. Cas. 61 ; 42 C. 172 ; 18 C. W. N. 971 ; 20 C. L. J. 52.

things which the defendants may remove as the defendants put them up so very shortly before the suit; and I am inclined to think that the defendants Nos. 2 and 3 may be ordered to remove them. At the same time, having regard to the condition of the land as it now is and the other circumstances of the case which rather point to a probability of this property being comprised within a suit for partition at the instance of some party or another, it would seem reasonable, if this mandatory injunction is granted at all to stay the operation of the order for a period of two months from this date with a view to see whether a partition suit is in fact instituted; and, in that event, to let the stay continue until such partition suit is determined or until further order of this Court. If in fact, Hari Binode has a strong claim in the partition suit, in the circumstances, to have this land allotted to him as part of his share; it would be mere useless injustice to require the defendants Nos 2 and 3, in the meantime, to take away the huts, though the tank and the ditches have to be left standing. It requires a strong case for a Court to refuse an injunction restraining a further alternation of the character of the property; but, in the case of mandatory injunction to restore to its original condition, I am of opinion that that is always a most exceptional remedy and one never to be applied except with the greatest safeguard for the prevention of waste as well as injustice.

In the present case, the order for removing the huts will be made but it is not to take effect until two months have elapsed from this date and, in the event of a partition suit being instituted and, of course, properly prosecuted, the intention is that the injunction shall not operate until the question of allotment in the partition suit has been decided.

As regards the costs of this appeal, I think there should be no order.

Mukerji, J :—I agree.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 56-B OF 1923.

October 22, 1923

Present :—Mr. Kinkhede, A. J. C.

PANNALAL —APPLICANT

versus

BHAGIRATHIBAI AND ANOTHER — NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 46 (3)—Attachment of debt—Debtor, whether can be ordered to deposit the amount in Court—Procedure—Scope of s. 151.

The Civil Procedure Code does not empower a Court attaching a debt to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect. [p. 603, col. 2.]

An executing Court is not bound to satisfy itself as to the existence of the debt but it can cause it to be sold or appoint a Receiver with powers to sue the garnishee to recover the debt from him. [p. 603, col. 2.]

Section 151 of the Civil Procedure Code cannot be called to aid to justify an act, which instead of being necessary for the ends of justice or to prevent abuse of the process of the Court, not only causes or is likely to cause incalculable mischief but also perpetrates injustice to third persons who are neither parties to the suit nor bound by the decree passed therein. [p. 604, col. 1.]

Revision against the order of 2nd Additional District Judge, East Berar, Amraoti, in execution case in Civil Suit No. 8 of 1908, decided on 9th September 1922.

Mr. *D. W. Kathalay*, for the Applicant.

Mr. *J. K. R. Cama, K. B*, for the Non-Applicants.

ORDER.—This petition of revision raises a question of jurisdiction of an executing Court to order a garnishee to deposit into Court a debt alleged by the decree-holder to be due to his judgment-debtor but not admitted to be due by the garnishee. In this case the decree-holder Bhagirathi Bai took out execution of her decree against the judgment-debtor Chinnappa. The decree was obtained on 16th January 1909 in the Court of Subordinate Judge, Poona, and a certificate of non-satisfaction was brought to the Court of Additional District Judge, Amraoti, for execution of

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the decree against the judgment-debtor's property within the jurisdiction of that Court. Executions were taken out from time to time and it appears Rs. 6,800 were already realised leaving a sum of Rs. 2,910 and odd to be realised by the present execution proceedings which were started on 5th January 1921. Efforts were made to execute the decree by attachment of other property but they were not successful.

On 17th November 1921 the decree-holder's pleader informed the Court that he recently learnt that Pannalal, the present applicant, had a sum of about Rs. 1,200 belonging to the judgment-debtor in deposit with him and prayed that the amount may be attached. The Court granted the prayer and directed a prohibitory order to issue under O. XXI, r. 46, Civil Procedure Code, to the said Pannalal and to the judgment-debtor. The first notice to Pannalal was returned unserved and a second notice issued for the hearing, dated 17th June 1922, was served on his agent Sundarsa on 11th May 1922. The applicant was thus prohibited from handing over the alleged deposit to Chinnappa. The agent appeared at the hearing before Mr. Vighney, Additional District Judge on 17th June 1922 and intimated to the Court that he held no money belonging to the judgment-debtor. The case was adjourned to 5th August 1922 on which date the said Judge recorded in the Order sheet that the debt was attached, and ordered sale notices under O. XX I, r. 66 to be issued, fixing 9th September 1922 as the date of the next hearing. Notice for settling the terms of the proclamation of sale was served on the present applicant on 2nd September 1922, but no notice appears to have been served on the judgment-debtor. The case was, however, dismissed for default of the decree-holder and judgment-debtor on 9th September 1922. On sufficient cause being shown, the Judge by an order, dated 28th September 1922, restored the case to file and ordered warrants to issue as prayed and fixed the case for 11th November 1922. A fresh prohibitory order was served on Pannalal through the same agent on 3rd November 1922. Mr. Vighney passed the following order :—

" 11th November 1922: D. H. by S. V. Gokhale and J. D. absent. Debt attached. For sale notices under O. XXI, r. 66 to issue for 16th January 1922. "

In the meantime, there was a change in the incumbent and the file came before Mr. Jawahirlal who, on 16th December 1922, passed the following order :—

" D. H. by agent. Money in the hand of one Pannalal is attached. Now an order shall issue to him to deposit the money in Court by 3rd February 1923.

Jawahir Lall,
S. J."

The order was served on the applicant on 28th January 1923 but the latter neither appeared nor deposited the money at the hearing. The order sheet runs thus :—

" 3rd February 1923. D. H. by agent. Money not deposited. D. H. states that the amount in deposit with Pannalal is about Rs. 1,200. Let warrant of attachment of moveables to the extent of Rs. 1,200 issue against Pannalal. Case for 17th March 1923.

Jawahirlal,
2nd A. D. J."

Before the date of the hearing arrived, the garnishee Pannalal made a petition, dated 1st, March 1923, to the Court where he drew the attention of the Court to the order sheet dated 17th June 1922 and also repeated that he had no deposit of the judgment-debtor and prayed that the order dated 3rd February 1923 be set aside and, further, that the proceedings about the attachment of his property be stayed. The Judge ordered the petition to be put on 5th March 1923 but on that day in the presence of the applicant's pleader the hearing of the petition was fixed for 17th March 1923 along with the execution case ; the Judge very wisely ordered that day that warrant of attachment "shall not issue" for the "present". On 17th March 1923 the decree-holder was present through his agent but the applicant Pannalal and his pleader being found absent the Court wrote " the application is filed. Warrant of attachment to issue. Case for 28th April 1923."

Feeling himself aggrieved by the Court's order, dated 16th December 1923 and 3rd February 1923 the applicant applied for copies

thereof on 5th March 1923 and soon after, *i.e.*, on 22nd March 1923, lodged this petition for revision in this Court contending that the orders were without jurisdiction and, therefore, liable to be set aside. Upon an *ex parte* motion this Court on 24th March 1923 ordered the stay of attachment proceedings pending the decision of this petition, and the executing Court, in obedience to the order of stay, has withheld its warrant. Mr. S. M. Parande who succeeded Mr. Jawahirlal passed an order granting liberty to the decree-holder to move the Court after the case before this Court would be decided or the order staying execution withdrawn. My object in giving this history of the proceedings before the executing Court was only to show the difference in the procedure respectively followed by Mr. Vighney and Mr. Jawahirlal in respect of the same matter. I dare say if the case had not changed hands the applicant would have been saved all the expense, trouble, inconvenience and indignities which he was required to suffer owing to the highly improper orders of Mr. Jawahirlal for which there is absolutely no authority in the Civil Procedure Code. A Judge of his standing was expected to act with greater caution than his proceedings disclose. His orders, dated 16th December 1922 and 3rd February 1923 bring to light a very deplorable condition of things and displays an utter disregard for the procedure laid down in the Civil Procedure Code. If the Judge had not the time and patience to open the copy of Mulla's Code of Civil Procedure, with which I presume his Court like every other Court is supplied, and look into the commentary under O. XXI, r. 46, Civil Procedure Code, he could at least have turned his eyes to the last page of the order sheet only to know what futher action was necessary, and I dare say even a cursory glance at Mr. Vighney's carefully drawn up previous proceedings would have at once given him a flood of light. Unfortunately, the decree-holder's pleader was not present at the hearing. The Judge naturally fell into an error and passed an order which he had no jurisdiction to pass, namely, that the garnishee should deposit the money into the Court. He did not stop there. He still remained disillusioned on the point even at the next hearing, as shown above, because he perpetrated the mistake by committing another one of ordering attachment of the garnishee's own moveable property to the extent of Rs. 1,200 to recover the amount of the attached alleged debt. It appears that he did not care to read the provisions of the Civil Procedure Code in this behalf, even when he passed orders upon the application dated 1st March 1923 withholding the issue of the warrant for the "present". He ought to have paused to read the petition, dated 1st March 1923, and considered the situation carefully, at least on 17th March 1923, before repeating the mistake he committed on 3rd February 1923 by ordering attachment to issue. But for the prompt intervention of this Court, the applicant would surely have suffered still greater indignities and been put to serious loss.

Sub-rule 3 of r. 46 of O. XXI, Civil Procedure Code, clearly lays down that a debtor prohibited under clause (*i*) of sub-r. (1) *may* pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. The wording a debtor *may* pay is quite clear and unmabiguous and leaves no manner of doubt as to the meaning of the Legislature. It does not clothe the executing Court with any power to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect. It is needless to point out that an executing Court is not bound to satisfy itself as to the exitence of the debt It can still cause it to be sold or appoint a Receiver with power to sue the garnishee to recover the debt from him. It was in view of the information given by the applicant's agent Sundersa on 17th January 1922 that Mr. Vighney elected to pass the right order on 5th August 1922 for sale of the debt and if the case had not been dismissed in default that careful Judge would certainly have caused the judgment-debtor's right to recover the alleged debt from the applicant to be put to auction and sold it for whatever it was worth. There is ample authority for this view as will be seen from the rulings in *Maharaj Coomar Kishen Pertab Sahee* v. *Chowharinee Sree Bhowa Debya and others* (1), *Toolsa* v. *Antone* (2) and *Maharaja of Benares* v. *Patraj Kumar* (3). There is no provision

(1) 18 W. R. 40.
(2) 11 B. 448 ; Chitty's S. C. C. R. 147; 6 Ind. Dec. (N. S.) 294.
(3) 28 A. 262; A. W. N. (1915) 277.

in our Civil Procedure Code analogous to that of r. 3 of O. XLV of the Rules of the Supreme Court (*vide* the Annual Practice, 1922) which would justify our Indian Courts to order execution to issue to levy the amount due from garnishee in the event of garnishee not disputing the debt due or claimed to be due from such debtor of if he does not appear upon summons. But even the English Law recognises the jurisdiction of Courts to relieve the garnishee from the pernicious effect of his acquiescence, where he remained inert and an order absolute was made and he became bound to pay the garnisher although no attachable debt existed at the time of the order: *Randall* v. *Lithgow* (4). For a case where this jurisdiction was exercised and the order absolute obtained under such circumstances was set aside, see *O'Brien* v. *Killeen* (5).

In the case before me there is no acquiescence on the part of the garnishee because he came at the earliest moment and apprized the Court of the alleged debt being non-existent at the date of the order. My attention has been drawn by the non-applicants' learned Counsel to the ruling in *Harinath Chowdhury* v. *Haradas Acharjya Chowdhury* (6), and it is contended that the order was justifiable. I am not prepared to accept the view for the simple reason that the words of our Indian Statute are plain and, consequently, there is no scope for the application of the doctrines of English Law in this behalf. It is next argued that section 151 Civil Procedure Code would justify the passing of the order. But I do not think that that section can be called to aid to justify an act, which, instead of being necessary for the ends of justice or to prevent abuse of the process of the Court, not only causes or likely to cause incalculable mischief but also is perpetrates injustice to third persons who are neither parties to the suit nor bound by the decree pased therein. For these reasons I am not prepared to uphold the orders sought to be revised. I, therefore, allow this petition and set aside the orders as being made without jurisdiction. I direct that the non-applicants shall pay all costs of these proceedings. I allow Rs. 30 as pleader's fee.

G. R. D. *Revision accepted.*
S. D.

(4) (1884) 12 Q. B. D. 525 ; 53 L. J. Q. B. 518 ; 50 L. T. 587 ; 32 W. R. 794.
(5) (1914) 2 Ir. R. 63.
(6) 29 Ind. Cas. 580; 48 C. 269 ; 20 C. W. N. 188; 28 C. L. J. 168.

LAHORE HIGH COURT.

CIVIL REVISION NO. 509 OF 1923.

December 22, 1923

Present :—Mr. Justice Moti Sagar.

Musammat AZIM BIBI AND ANOTHER—PLAINTIFFS—PETITIONERS
versus
Musammat IMTIAZ BEGAM AND OTHERS—DEFENDANTS RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 115, O. VII, r. 11 (4), O. XXXIII, r. 7—Undervaluation of suit—Order directing amendment and payment of additional Court-fees—Order refusing leave to sue in forma pauperis*—Order rejecting plaint—Appeal—Revision.*

A suit was found to have been undervalued and the Court called upon the plaintiff to amend the valuation and pay additional Court-fees. The plaintiff, thereupon, applied for leave to continue the suit *in forma pauperis*, which was refused. The plaint was then rejected on the ground that the plaintiff had failed to make the necessary amendment and to pay additional Court-fees. The plaintiff filed a revision against the order refusing to allow him to continue the suit *in forma pauperis*;

***Held* (1) that the order complained against had merged in the order rejecting the plaint ;**

(2) that the latter order was a decree and was appealable as such, and that, therefore, the application for revision was not maintainable.

Sada Kaur v. *Butur Singh*, 25 Ind. Cas. 565 ; 80 P. R. 1914 ; 265 P. L. R. 1914 ; 167 P. W. R. 1914, followed.

The remedy by way of revision is an exceptional remedy and is to be resorted to only when there is no other remedy available to the aggrieved party.

Petition for revision of the order of the Subordinate Judge, Lahore, dated the 15th May 1923.

Maulvi *Ghulam Mohy-ud-din*, for the Petitioners.

Lala Jagan Nath, for the Respondents.

KAMALUDDIN AHMAD *v.* RAMANAND SINGH

JUDGMENT.—This was a suit for the possession of certain immoveable properties at Lahore and Sheikhupura originally valued by the plaintiffs at Rs. 4,780 A Court-fee of Rs. 265 was affixed upon the plaint. Subsequently, on the objection of the defendants, it was found that the value of the property was more than Rs. 7,000 and the plaintiffs were required to make up the deficiency in Court-fees. The plaint was returned for amendment, and it was ordered that the amended plaint should be re-filed by the plaintiffs within a certain time. The plaintiffs, instead of complying with this order, filed an application to the effect that they should be allowed to continue the suit *in forma pauperis*. Reliance was placed in support of this prayer on the case of *Thompson* v. *The Calcutta Tramway Company, Limited* (1). The trial Court declined to accede to this prayer and rejected the plaint on the ground that the plaintiffs had failed to make the necessary amendments and to pay the balance of the Court-fees as ordered.

Against this decision an application for revision has been preferred to this Court and it has been urged on behalf of the petitioners that the order of the Court below disallowing their prayer to continue the suit *in forma pauperis* is erroneous and should be set aside. A preliminary objection is taken on behalf of the respondents that the order rejecting the plaint amounts to a decree and that if the plaintiffs were dissatisfied with that order, they ought to have preferred an appeal against that order and not a revision. Mr. Ghulam Mohy-ud-Din, on the other hand, contends that he does not challenge the validity of the order rejecting the plaint but only of the order by which his application to continue the suit *in forma pauperis* was disallowed, and that this latter order is capable of being revised by this Court. I am unable to agree to this contention, and am of opinion that the preliminary objection taken by the respondents must prevail. The order disallowing the plaintiffs' application to continue the suit *in forma pauperis* has now become merged in the order rejecting the plaint, and it is difficult to see how the two orders can be differentiated from each other. It is admitted that the plaintiffs could have filed an appeal *in forma pauperis* and that in that appeal they could have challenged the validity of the order disallowing their prayer to be allowed to continue the suit *in forma pauperis*. That being so, there is no reason why that course should not have been adopted in the present case. Remedy by way of revision is an exceptional remedy and is to be resorted to only when there is no other remedy available to the aggrieved party. In *Sada Kaur* v. *Buter Singh*, (2) a suit had been under-valued. The plaintiff was directed to pay additional Court-fee, and this order not having been complied with the plaint was rejected under O. VII, r. 11 (b) of the Code of Civil Procedure. It was held that the order was appealable as a decree within the meaning of section 2 of the Code, and that, consequently, no revision against that order could be entertained by the Chief Court. The principle laid down in that authority fully governs the present case, and I hold that the order is not capable of revision.

The application is dismissed.

Z. K *Application dismissed.*

(1) 20 C. 619; 10 Ind. Dec. (N.S.) 216.

(2) 25 Ind. Cas. 565; 80 P. R. 1914; 265 P. L. R. 1914; 167 P. W. R. 1914.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 24 OF 1922.

August 13, 1923.

Present:—Sir Dawson Miller, Kt., K. C., Chief Justice, and Justice Sir B. K. Mullick, Kt.

KAMALUDDIN AHMAD—APPELLANT
versus
RAMANAND SINGH AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) ss. 50, 102, 103 B, 115—Record of Rights—Presumption of correctness, extent of—Presumption of fixity of rent, applicability of—Particulars under s. 102 not actually recorded.

The presumption contained in section 103 B of the Bengal Tenancy Act applies only to the actual entries in the Record of Rights as finally published and to nothing else. The presumption does not extend to the orders of the Settlement Officers on which the entries are based. [p. 607, col. 1.]

KAMALUDDIN AHMAD *v.* RAMANAND SINGH

When certain persons are entered in the Record of Rights as tenure holders, no presumption arises as to whether they are or are not permanent tenure holders or tenure holders at fixed rates

The presumption arising under section 50 of the Bengal Tenancy Act only ceases to apply by reason of section 115 of the Act when the particulars required by the order of the Local Government directing the Survey and Record of Rights to be prepared have been in fact recorded. [p. 607, col. 1.]

Letters Patent Appeal.

Messrs. *S. Ahmad* and *S. M. Tahir*, for the Appellant.

Messrs. *S. M. Mullick*, *S. N. Palit* and *J. Prasad*, for the Respondents.

JUDGMENT.

Dawson-Miller, C. J.—The suit out of which this appeal arises was instituted before the Munsif at Monghyr in July 1919 by the plaintiffs as landlords claiming, under section 7 of the Bengal Tenancy Act, an enhancement of the rent of their tenants the defendants who held as tenures under them 20 *bighas* 7 *cottahs* 12 *dhurs* of land. The question for determination in the suit was whether the defendants held at a fixed rent or whether their rent was liable to enhancement. It was proved by evidence at the trial, and in fact it is admitted in the plaint, that the defendants had held for the last 20 years and more at the same rental, namely, Rs. 34-5-6 which included Rs. 1-0-6 as cess the actual rent being Rs. 33-5-0. Recently, the cess has been increased to Rs. 8 odd. In these circumstances, the defendants relied upon the presumption under section 50 clause (2) of the Bengal Tenancy Act which provides that "if it is proved in any suit or other proceedings under this Act that either a tenure holder or *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement." If that were all, then there can be no doubt upon the facts found in this case that the defendants were entitled to the benefit of the presumption under that section. By section 115 of the Act, however, it is provided that: "When particulars mentioned in section 102 clause (b), have been recorded under this Chapter in respect of any tenancy the presumption under section 50 shall not thereafter apply to that tenancy." The plaintiffs contended that, in the circumstances of this case, the particulars mentioned in section 102 had been recorded under Chapter X of which that section and section 115 formed part and, therefore, that the presumption arising under section 50 no longer applied. The question for determination really depends upon whether the particulars mentioned in section 102 have or have not been recorded as therein provided. Section 102 provides that: "When an order is made under section 101, the particulars to be recorded shall be specified in the order, and may include either without or in addition to other particulars, some or all of the following, namely:—

(*a*) the name of each tenant or occupant: –

(*b*) the class to which each tenant belongs, that is to say, whether he is a tenure holder, *raiyat* holding at fixed rates, settled *raiyat*, occupancy *raiyat* non-occupancy *raiyat* or under-*raiyat* and if he is a tenure-holder whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure". It ought perhaps to be mentioned that section 101, referred to in the section just quoted, provides that the Local Government may, in any case, make an order directing that a Survey be made and Record of Rights prepared by a Revenue Officer in respect of the lands in any local area, estate or tenure or part thereof in certain cases and as a rule the order directing the Record of Rights to be prepared would contain the particulars which ought to be recorded and which are referred to in section 102. What happened in the present case was that when the Record of Rights was being preparred in the year 1903 there was a dispute under section 103A of the Bengal Tenancy Act, that is, after the draft record was published but before final publication, and the result of that dispute was that the Assistant Settlement Officer directed that the defendants, the tenure holders, should be entered in the Record of Rights as tenure-holders and nothing more. They were so entered and no entry was made as provided in section 102 as to whether they were permanent tenure-holders or not or whether the rent was liable to enhancement

during the continuance of the tenancy. The whole question was apparently left open. At all events, the particulars referred to in section 102 were not in fact entered in the Record of Rights. In the decision which was come to in that dispute under section 103A the Assistant Settlement Officer (*Sic*) that there was no evidence of the rent being fixed for ever and under the circumstances he merely ordered the defendants' name to be entered as tenure-holders. The learned Government Advocate who appears on behalf of the landlords-appellants in this case has asked us to say that the decision of the Assistant Settlement Officer ought to be regarded as a substantive part of the Record of Rights and therefore the Record of Rights ought to read as if it stated that the defendants were not in fact tenure-holders at a fixed rate, and if that is so then the presumption attaching to the Record of Rights under section 103B ought to be applied equally to the decision of the Assistant Settlement Officer as if it formed part of the record. I am unable to take this view. Under section 103B of the Act the presumption applies only to the actual entries in the Record of Rights as finally published and not to anything else. Therefore, it cannot be contended that there arises from the record itself any presumption beyond the fact that the defendants are tenure holders. In fact, the reason why no further particulars were given was that before the Assistant Settlement Officer no evidence was given which would enable him to come to a decision upon this question.

On behalf of the appellants it has been contended, however, that under section 115 the moment the Record of Rights has been prepared and any of the particulars mentioned in section 102 entered therein, then the presumption arising under section 50 ceases to apply. In my opinion, the presumption arising under section 50 only ceases to apply by reason of section 115 when the particulars required by the order of the Local Government directing the Survey and Record of Rights to be prepared have been in fact recorded. As a rule, as already stated, the order would require the particulars mentioned in section 102, as to whether the tenure is permanent or not and as to whether the rent of a tenure is liable to enhancement or not, to be recorded. In the present case they were not recorded and the appellants who rely upon section 115, coupled with section 102, have failed to satisfy the Court that the particulars required in the present case were in fact recorded. Indeed, the order made by the Local Government has not been produced but it seems to me that it is impossible for the appellants to prove that the particulars required to be recorded under that order have in fact been so recorded until that is proved and what the order contained and what the particulars required were. In this state of affairs, it seems to me, that the appellants' case upon this part of the appeal must fail and that the presumption arising under section 50 of the Bengal Tenancy Act has not, under the circumstances of this case, ceased to apply.

The next point which was urged on behalf of the appellants was that, where an entry is made in the Record of Rights that the defendants were tenure holders and nothing else it ought to be presumed that they are not either permanent tenure holders or tenure holders at fixed rates. In my opinion, it would not be right to presume that the entry in the Record of Rights meant to record anything more than was actually recorded, and where the question is left open as to whether they are permanent tenure holders or whether the rent is liable to enhancement or not it seems to me that there is nothing in the record itself from which these facts could be inferred, and certainly nothing which would create any presumption of their existence.

It was further contended that in the present case, although the rental may for the last twenty years have been the same there is some evidence to show that, shortly before that period, the rental was somewhat different and, therefore, that the presumption arising under section 50 had been rebutted. The facts in connection with this matter have been stated at length by the learned Munsif of the trial Court who found in favour of the defendants that they were tenure holders at a fixed rate and dismissed the suit.

The Subordinate Judge on appeal took the view that the presumption arising under section 50 did not apply and he granted a decree for enhancement of rent.

On second appeal to this Court the learned Judge who heard the appeal set aside the decision of the Subordinate Judge and restored

that of the Munsif. From that decision the present appeal is brought under the Letters Patent.

The facts which were found by the Munsif were not dissented from by the Subordinate Judge and it has not been suggested to us in this appeal to-day that those facts are not accurate. They may, therefore, be taken as representing the true state of affairs. For the last 20 years and a little more it is clearly proved that the rent was Rs. 33-5-0. Rent suits have been brought ; in some cases they included cess and in some they did not, the cess till recently was Rs. 1-0-6. Where that was included in the rent suits the rent recoverable was Rs. 34-5-6 ; where that was not included the amount recovered was Rs. 33-5-0 but in one case which was heard in the year 1893 the rent recovered was Rs. 33-4-17½ dams. For all practical purposes, it may be called Rs. 33-5-0. There is nothing to show whether that included cess at that time payable or whether it did not and, in these circumstances, I think it may well be assumed that this rent was exclusive of cess. If the cess is added then there is practically no difference between the rent claimed and recovered on that occasion and the rent as now recorded in the names of the defendants. The defendants, therefore, clearly established that not only for the last 20 years but for several years before that the rent they have paid has been the same rent as they are paying at the present moment. This point, therefore, raised by the appellants also fails. The result is that the appeal is dismissed with costs.

Mullick, J.—I agree.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION NO. 589 OF 1923.

January 25, 1924.

Present :—Mr. Justice Broadway.

FIRM BEHARI LAL-KANHAYA LAL—DEFENDANT—PETITIONER

versus

THE OFFICIAL RECEIVER, INSOLVENT ESTATES, LAHORE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) ss. 22, 23—Transfer of case—Issues settled—Application, whether maintainable.

The provisions of section 22 of the Civil Procedure Code are mandatory, and an application under that section must be made, in a case where issues are settled, at or before such settlement is made.

Gulab Chand v. *Sher Singh*, 35 Ind. Cas. 616 ; 11 P. R. 1917 ; 150 P. W. R. 1916 ; 16 P. L. R. 1917, followed.

Ramji Das v. *Firm Brij Lal Jagan Nath*, 69 Ind. Cas. 289, distinguished.

An application under this section is not maintainable after all the issues arising out of the pleadings have been settled and an issue relating to the jurisdiction of the Court has been disposed of.

Petition under sections 22 and 23, Civil Procedure Code, for transfer of the case noted in the heading from Lahore to Calcutta.

Lala *Jagannath*, for the Petitioner.

Lala *Mul Chand*, *R. S.*, for the Respondent.

ORDER.—This is an application under sections 22 and 23, Civil Procedure Code, in which I am asked to transfer a case pending in the Court of the Subordinate Judge at Lahore to some Court in Calcutta on the ground that the case is triable in Calcutta and a trial there would be more beneficial and far more convenient to the petitioner. Mr. Mul Chand on behalf on the respondent objects to the transfer and points out that this application does not lie. He bases his contention on the fact that all the issues arising out of the pleadings had been settled and one issue, namely, as to the jurisdiction of the Lahore Court, had actually been disposed of before this application was made. My attention has

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been drawn to *Gulab Chand* v. *Sher Singh* (1), in which a similar matter came up before me. I there held that the provisions of section 22, Civil Procedure Code, were mandatory and that an application under this section must be made, in a case where issues are settled, at or before such settlement is made. On the other hand, Mr. Jagan Nath has referred me to a decision of Mr. Justice Raoof reported in *Ramji Das* v. *Firm Brij Lal Jagan Nath*, (2). A reference to that judgment does not, to my mind, show any conflict between the views expressed by Mr. Justice Raoof and those expressed by me in *Gulab Chand* v. *Sher Singh* (1) In any event, the facts are very different, for in the case before Mr. Justice Raoof it appeared that all the issues arising out of the pleadings had not been settled and that the only issue framed referred to jurisdiction and the application to this Court was made before the issue as to jurisdiction had been decided.

In the present case what appears to have happened is, that all the possible pleadings were filed by the petitioner. One of the pleas denied the jurisdiction of the Lahore Court. All the issues that arose out of the pleadings were settled and, not unnaturally, that relating to the jurisdiction of the Lahore Court was first decided. After this decision the petitioner's Counsel asked for an adjournment in order to lead evidence on one of the other issues. Time was granted and in this interval the present application was made after notice to the other side had been given. It seems to me that this application almost amounts to an attempt to get this Court to exercise its revisional powers and thus evade the decision of the question of jurisdiction that the Court below has arrived at against the petitioner.

In my opinion Mr. Mul Chand's objection must prevail and I, therefore, dismiss this application with costs.

Z. K. *Application dismissed.*

(1) 35 Ind. Cas. 616 ; 11 P. R. 1917; 150 P. W. R. 1916 : 16 P. L. R. 1917.
(2) 69 Ind. Cas. 289.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 146 OF 1922.

January 2, 1924.

Present :—Justice Sir Jwala Prasad, Kt., and Mr. Justice Foster.

RAGHUNATH SAHAI AND OTHERS—APPELLANTS

versus

DAROGA SAHU AND OTHERS—RESPONDENTS.

Civil Procedure Code, (Act V of 1908) O. XXI, r. 90—Execution of decree—Mortgage decree—Sale—Order in which properties to be sold, settlement of—Court, duty of—Equities of parties, disregard of—Irregularity.

In the absence of a direction in the mortgage-bond or in the mortgage-decree specifying the order in which the mortgaged properties are to be sold, the decree-holder is primarily entitled to sell the properties in the order he thinks best, in order to satisfy his decree. But the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. [p 612, col 1]

Jatadhari Singh v. *Baldeo Lall*, 51 Ind. Cas. 444 ; 4 P. L. J. 207, followed.

Where an executing Court directs the sale of mortgaged properties in execution of a mortgage-decree in a certain order in disregard of the equities affecting the judgment-debtors *inter se*, the sale is liable to be set aside on the ground of irregularity in the conduct of the sale. [p. 612, col. 2.]

Appeal from the order of the Subordinate Judge, First Court, Gaya, dated the 26th June 1922.

Messrs. *Hasan Imam* and *Kailaspati*, for the Appellants.

Messrs. *Sultan Ahmed*, *Ragho Prasad* and *Nawal Kishore Prasad II*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This is an appeal against the decision of the Subordinate Judge of Gaya dated the 26th June 1922, refusing an application of the appellants to set aside an auction-sale under O. XXI, r. 90. The decree in execution of which the sale took place was a mortgage-decree. The preliminary decree was passed on 7th July 1922 and was confirmed on appeal on 4th May 1915. It was made final on 16th April 1917, and was amended on 13th May 1921 A petition for execution was filed on the 25th May 1921. The amount sought to be levied was over fifteen thousand rupees.

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The following properties were asked to be sold :—

(1) Three-annas *pacca* share equal to 8-annas *katcha* share by partition out of 16-annas proprietary interest in *mouza* Tengara valued at Rs. 3,000.

(2) One-anna out of two-annas in the 11-annas *takhta* out of 16-annas proprietary interest in *mouza* Sokanar, etc., valued at Rs. 200.

(3) Three-annas out of 16-annas proprietary interest in *mouza* Pritampur valued at Rs. 500.

(4) Two-annas out of 8-annas from 16-annas permanent *mukarari* interest in *mouza* Bhaus and Kharagpur, valued at Rs. 3,000.

(5) Two-annas out of 4-annas from 16-annas proprietary interest in *mouza* Rajhara Asli and Dakli together with Chak Chakukats, Nami and Benami Tappa Kot, valued at Rs. 4,000, and

(6) Two-annas out of 8-annas from 16-annas share in *mouza* Sikmi together with Chakukats Nami and Benami, valued at Rs. 500.

On 4th November 1921 notice under O. XXI, r. 66 was ordered to be issued for fixing valuation. The valuation of the decree-holder was accepted by the Court by order, dated the 17th December 1921, the objection of the judgment-debtors having been dismissed for default. The sale proclamation was ordered to be issued.

On the 6th March 1922, Saligram, one of the judgment-debtors, filed an objection under section 47 of the Civil Procedure Code stating that the amount covered by the decree was not due, it having been paid off by the judgment-debtors Raghunath Sahai and others executing a sale-deed, dated the 29th July 1917, whereby the decree-holders purchased the following properties of the judgment-debtors :—

(1) 1-anna 6-pies of *mouza* Rajhara ;
(2) 2-annas of *mouza* Sikmi ;
(3) 2-annas of *mouza* Nagar ;
(4) 2-annas of *mouza* Bisram ;
(5) 1-anna of *mouza* Bhaur ; and
(6) 1-anna of *mouza* Kharagpur.

This petition was numbered Judicial Miscellaneous Case No. 19 of 1922. On the 17th March 1922, Dasrath Lal, judgment-debtor, also filed an objection under section 47 of the Civil Procedure Code stating that he had purchased the entire 8-annas share of *mouza* Bhaur on the 4th November 1921 for Rs. 8,900 at an auction-sale held in execution of a mortgage-decree No. 147 of 1921 passed by the Subordinate Judge, 1st Court, Gaya, in which Saligram and others were decree-holders, and Raghunath Sahai and others were judgment-debtors (mortgagors in the present case) and, therefore, he prayed that *mouza* Bhaur be exempted from the sale. He also supported the petition of Saligram referred to above as to the decree having been satisfied by the registered sale-deed, dated the 29th July 1917. He further stated that both the villages Bhaur and Kharagpur were not covered by the decree. Both the aforesaid Miscellaneous Judicial Cases were disposed of on the 24th March 1922 by Order No. 35. The Court held that the satisfaction of the decree by means of the registered sale-deed of 1917 cannot be recognised and that both Bhaur and Kharagpur were clearly covered by the decree. On that very day Dasrath Lal, judgment-debtor, then put in a petition praying that 2-annas *Mukarrari* share of Bhaur be sold last of all, inasmuch as he had purchased 8-annas *mukarrari* share of that village in execution of a decree based upon a mortgage. Similarly, Saligram put in a petition praying that the properties Nos. 1 to 3 be sold last. The guardian *ad litem* of minor judgment-debtor applied that the properties be sold in the order as given in the sale proclamation. The Court passed the following order :—

" Let properties Nos. 1 to 3 be sold last and " village Bhaur be sold after other properties, " and the petition of the guardian of the " minors be rejected and let the bid sheet be " sent to Nazir for sale, and put up on 27th " March 1922 for orders".

The properties were then sold in the order indicated above. Property No. 1 was sold for Rs. 9,000 and purchased by Murlidhar ; property No. 2, two-annas of Kharagpur, was sold for Rs. 3,600 in the name of Dasarath Lal ; property No. 5 *mouza* Rajahra was sold for Rs. 4,250, and property No. 6 *mouza* Sikmi for Rs. 750. The decree was thus satisfied, and hence village Bhaur, property No. 4, and Pritampur, property No. 3, were not sold.

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On 22nd April 1922, two applications were filed by judgment-debtors; Jagatdeo Prasad and others filed one objection and Rahunath Sahai, Ram Prasad Lal and Rameshwar Prasad filed another objection, for setting aside the sale under O. XXI, r. 90. These applications were numbered Miscellaneous Judicial Cases Nos. 37 and 38, respectively. They were heard together and disposed of by the order of the Court, dated the 26th June 1922.

The Subordinate Judge dismissed the applications holding that there was no material irregularity in publishing or conducting the sale and that the appellants failed to show that the properties were sold for inadequate price or that the applicants sufferred any loss or injury from the sale. The decision of the Subordinate Judge is assailed in appeal. Nothing has been urged before us to show that the finding of the Court below that the appellants failed to prove that the prices fetched were inadequate is wrong. The onus to prove this was upon the appellants. The learned Subordinate Judge says that the village papers showing realizations from the villages sold were not produced and that this would tell against the case of the appellants. They also failed to show that the Road Cess Return (Exhibit 1) was acted upon.

As to the service of the processes, the Court below has accepted the evidence offered on behalf of the respondents that the processes were duly served. There was no evidence offered by the appellants of non-service of the processes. No irregularity has also been shown in the service of the processes or in publishing the said proclamations. The main contentions have been those set forth in grounds Nos. 5 and 9 in the memorandum of appeal to this Court. It is said that the Court below should not have changed the order of the properties to be sold "without there being any prayer on behalf of the decree-holders," nor should lot No. 4 have been split up into two lots.

The last objection was disposed of by the Subordinate Judge on the 24th of March 1922 in order No. 35, wherein he held that Bhaur and Kharagpur were two villages and were distinctly recited in the decree in question. There was no appeal from that order and it became final. Moreover, the order of the Subordinate Judge is supported by the decree. This contention, therefore, fails.

As to the other contention that the Subordinate Judge should not have changed the order of the properties mentioned in the sale proclamation, the learned Subordinate Judge says: "The sale of the properties in another order than given by the decree-holder appears to have been properly done, as it is admitted that these properties had previously been sold." It is conceded that there was no special direction given in the decree as to the order in which the mortgaged properties were to be sold. There was no such direction in the mortgage-bond. The properties were mentioned in the decree in the order in which they happened to be mentioned in the mortgage-bond. In the absence of any such special direction the decree-holder had a right to sell the properties in the order he thought best, in order to satisfy his decree. This is settled by authorities and is conceded in ground No. 5 of the memorandum of appeal wherein it is said that the Subordinate Judge should not have changed the order of the properties to be sold "without there being any prayer on behalf of the decree-holder" Mr. Hassan Imam refers to the petition for execution and the sale proclamations for his contention that the decree-holder prayed for the sale of the properties in the order mentioned therein and, consequently, the properties should have been sold in that order. To this Mr. Sultan Ahmed answers by referring to the proceedings which culminated in order 36 of the 24th March 1922. He says that the prayer of Saligram and Dasrath Lal for the sale of properties Nos. 1, 2, 3 and village Bhaur after the sale of the other properties was not objected to by the decree-holder, rather the decree-holder accepted the directions made by the Court, and in fact he sold the properties in the order prescribed by the Court. Therefore, the decree-holder exercised his right to sell the properties in the order in which he liked and the appellants, therefore, cannot urge that the properties were sold in that order contrary to the wishes of the decree-holder.

Mr. Hassan Imam then contends that, in determining the order in which the properties should be sold, the Court should have looked into the equities in favour of all the persons concerned in the case. Now, reference has

been made to a decision of this Court reported in *Jatadhari Singh* v. *Baldeo Lall*.(1) That case seems to lay down that (1) the decree-holder has primarily the right to choose the order in which the properties should be sold, and (2) the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. Saligram was purchaser of properties Nos. 1 to 3 and Dasrath Lal was purchaser of Bhaur, one of the properties in lot No. 4, in execution of the decrees based on mortgages subsequent to that on the basis of which the present mortgage-decree was passed. They were parties to the present decree, being subsequent mortgagees being interested in the equity of redemption. The properties 1 to 3 and Bhaur purchased by them were liable to contribute rateably to the satisfaction of the present decree. The judgment-debtors have a right to call upon them to contribute their quota of the decree-debt in proportion to the value of those properties. It is conceded that the judgment-debtors have this right, but that they should enforce it by a separate suit. The judgment debtors would have been saved the trouble of a separate action for contribution against Saligram and Dasrath Lal if the Court had not directed the properties purchased by them to be sold last. The decree-holders in their application for execution and in the sale proclamations desired the properties to be sold in a particular order. When the properties were about to be sold Saligram and Dasrath Lal prayed for changing the order in which the properties were advertised for sale, urging that the properties in which they were interested should be sold last. The guardian *ad litem* of the minor judgment-debtor objected to it; the other judgment-debtors did not. The Court should have at this stage considered the equities in favour of the judgment-debtors who are now by reason of the order of the Court being driven to expensive litigation for contribution from the properties held by Saligram and Dasrath Lal. The decree-holder has not appeared before us; so (he being primarily in control of the execution sale) his intentions can be gauged only by his execution petition. In changing the order at a late stage the Court should have regard to the equities in favour of each particular party involved, especially when there were a number of judgment-debtors some, mortgagors, some transferees from the mortgagors, all holding properties equally liable as security for the mortgage-debt. It is said that the judgment-debtors other than the minor judgment-debtor did not object to the order of the 24th March 1922. There is nothing to indicate in the order sheet that this order was passed in their presence. There is no signature of theirs or their pleader's in the order sheet.

We, therefore, are of opinion that the order of the Subordinate Judge of the 24th March 1922 was irregular and inequitable, and the sale conducted under that order was, therefore, irregular. This irregularity in the conduct of the sale resulted in substantial injury to the judgment-debtors

The question now is what order would be equitable in the present case. We find that the properties Nos. 2 and 3 and Bhaur have not been sold, whereas they should have been sold before *mouza* Kharagpur and properties Nos. 5 and 6 were sold. The sales of Kharagpur and of properties Nos. 5 and 6 have, therefore, been irregular and have caused material injury to the judgment-debtors These sales are, therefore, set aside. Properties Nos. 2 to 6 will now be advertised for sale after fresh sale proclamation and they will be sold in that order. The sale of property No. 1 need not be set aside. The proceeds of the sale of that property will be applied towards the claim under the decree.

The result is that the appeal is partially decreed. As the sales of all the villages, except that of No. 1, have been set aside, the appellants have largely succeeded and are entitled to the costs of this Court as well as of the lower Court.

Foster, J.—I agree.

Z. K. *Appeal decreed partially.*

(1) 51 Ind. Cas. 444, 4 P. L. J. 207.

PRITAM RAM *v.* DHARU RAM

PATNA HIGH COURT.

CIVIL REVISION NO. 279 OF 1923.

November 15, 1923.

Present :—Mr. Justice Dass and Mr. Justice Ross.

PRITAM RAM AND ANOTHER—PETITIONERS
versus
DHARU RAM AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXXII, rr 3, 4—Minor defendant—Guardian ad litem, appointment of—Irregularity, effect of.

Where a minor is properly a party to a suit, that is to say, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian as laid down in rr. 3 and 4 of O. XXXII of the Civil Procedure Code.

Pande Satdeo Narain v. *Ramayan Tewari*, 71 Ind. Cas. 705; 2 Pat. 335; 4 P. L. T. 147; (1923) A. I. R. (Pat.) 242, followed.

It was proposed to appoint the fathers of certain minor defendants as their guardians *ad litem* and notice of this was given to the minors and their fathers. The latter did not consent to act as guardians and the Court without any further notice appointed a pleader as guardian *ad litem* to the minor defendants. As the pleader was unable to get any instructions from the minors the suit was decreed *ex parte*;

Held, that in the absence of prejudice to the minors it could not be held that the appointment of the pleader as guardian *ad litem* was invalid for want of notice to the minors.

Application for revision of the order of the Additional Subordinate Judge, Hazaribagh, dated the 9th June 1923.

Messrs. *A. K. Roy* and *P. K. Mukarji*, for the Petitioners.

Mr. *S. N. Bose*, for *S. Dayal*, for the Opposite Parties.

JUDGMENT.

Ross, J.—These are two applications for revision of an order passed by the Subordinate Judge of Hazaribagh setting aside the *ex parte* decrees in two mortgage-suits brought by the plaintiffs-petitioners against the opposite party. It appears that two mortgages were executed by defendants Nos. 1, 2, 3 and 4 of the suits. Defendant No. 1 had four sons defendants Nos. 5 to 8 and defendant No. 5 had two sons, defendants Nos. 13 and 14. Defendant No. 2 had a son defendant No. 9 and defendant No. 3 had three sons defendants Nos. 10 to 12. All these defendants, except defendants Nos. 1 to 5, were minors. They were sought to be represented in the first instance by their fathers. Summonses were served on all the defendants and notices of the intention to appoint the fathers as guardians were served on the minor sons and on the fathers themselves. As the fathers did not appear to consent to act as guardians of their minor sons the Court, without further notice to the minors, appointed a Pleader to represent them. As the Pleader was unable to get any answer to a registered letter sent to the minor defendants the suits were decreed *ex parte*, no defence having been entered. One of the major defendants having applied without success to get the *ex parte* decrees set aside the present applications were made on behalf of certain of the minor defendants through their mothers.

The learned Subordinate Judge has held that, although the notices above-mentioned were proved to have been issued, yet because of the want of notice of the intention to appoint a Pleader as guardian the whole suit was bound to fail and the decree was liable to be set aside. The effect of irregularity in the appointment of a guardian to a suit has been considered by this Court in the case of *Pande Satdeo Narain* v. *Ramayan Tewari* (1), where it was laid down that "where a minor is properly a party to a suit, that is to say, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian, for example, the provisions of O. XXXII, r. 3 (4) or r. 4 (3), Civil Procedure Code." In view of this authority it seems to me that the learned Subordinate Judge is wrong in holding that the absence of this notice had the effect that the minors were not represented in the suit at all especially in the absence of any

(1) 71 Ind. Cas. 705; 2 Pat. 335; 4 P. L. T. 147; (1923) A. I. R. (Pat. (242).

proof of prejudice to the minors. The consequence is that there is no good ground for setting aside the decrees whether under O. IX, r. 13 or under other powers of the Court.

I would, therefore, allow these applications and set aside the order passed by the learned Subordinate Judge and dismiss the petitions for setting aside the *ex parte* decrees. The applicants are entitled to their costs.

Hearing fee two gold mohurs.

Das, J.—I agree.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 412 OF 1923.

January 2, 1924.

Present :—Mr. Justice Martineau.

LABHU RAM AND ANOTHER—DEFENDANTS—PETITIONERS

versus

KARTA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 24, 115—Transfer of case—Notice, whether necessary—Revision, whether lies.

An application for transfer is a particular branch of a case for which a special procedure is provided in the Civil Procedure Code, and an order on such an application amounts to a decision of a case within the meaning of section 115 of the Code and is, therefore, open to revision.

Section 24 of the Civil Procedure Code requires the Court to issue notice to the parties before it makes an order of transfer otherwise than of its own motion. An order of transfer made at the instance of one party without notice to the other is liable to be set aside in revision.

Pandit Ram Kant v. *Pandit Ragdeo*, 60 P. R. 1897 (F. B.), followed.

Farid Ahmed v *Dulari Bibi*, 6 A. 238 ; A. W. N. (1884) 45 ; 8 Ind. Dec. (N. S.) 842, dissented from.

Petition for revision of the order of the District Judge, Jullundur, dated the 6th April 1923.

Lala *Har Gopal*, for Dr. *G. C Naran*, for the Petitioners.

Mr. *M. L. Puri*, for Lala *Badri Das*, *R. B.*, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the District Judge of of Jullundur transferring a suit from the Court of Mr. Lewis to the Court of *Chaudhri* Kanwar Singh. The order of transfer was passed on the plaintiff's application without notice to the defendants. Section 24 of the Civil Procedure Code requires the Court to issue notice to the parties before it makes an order for transfer otherwise than of its own motion. I cannot agree with the view taken in *Farid Ahmed* v. *Dulari Bibi* (1), on which Counsel for the respondent relies, that the lower Court's order is not open to revision. The application for transfer appears to me to be a particular branch of a case for which a special procedure is provided in the Civil Procedure Code, and the decision of such an application is, in accordance with the ruling of a Full Bench of the Chief Court in *Pandit Rama Kant* v. *Pandit Ragdes* (2), a decision of a "case." I hold that the revision lies, and that as the lower Court acted illegally in transferring the case without notice the order should be set aside.

I accordingly accept this application, set aside the order of the District Judge, and direct him to dispose afresh of the application for transfer according to law. No order as to costs in this Court.

Z. K. *Petition accepted.*

(1) 6 A. 238 A. W. N. (1884), 45; 8 Ind. Dec. (N.S.) 842.

(2) 60. P. R. 1897). (F B.).

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 146 OF 1923.

CIVIL REVISION NO. 322 OF 1923.

January 18, 1924.

Present :—Justice Sir Jwala Prasad, Kt., and Mr. Justice Kulwant Sahay.

Musammat DHANWANTE CHOWDHRANI—PLAINTIFF—APPELLANT

versus

HURGOBIND PRASHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Sale under first mortgage—Property purchased by first mortgagee—Redemption by second mortgagee—First mortgagee, position and rights of.

Where a first mortgagee brings the mortgaged property to sale and himself purchases it in execution, and a second mortgagee then seeks to redeem

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the first mortgagee, the latter occupies a double position, *viz.*, that of a mortgagee and of the owner of the equity of redemption as purchaser of the property, and in his latter character he is in turn entitled to redeem the second mortgagee on payment to him of the sum found due on his mortgage as well as the sum, if any, deposited by him to redeem the first mortgage.

Durga Charan Mukhopadhya v. *Chandra Nath Gupta Chowdhury*, 4 C. W. N 541 ; *Debendra Nath Rai* v. *Ram Taran Bannerji*, 30 C. 599 ; 7 C.W. N. 766 (F.B), considered.

Appeal from an order of the District Judge of Darbhanga, dated the 21st April 1923.

Messrs. *P. K. Sen* and *A. B. Mukerjie*, for the Appellant.

Mr. *Siveshar Dayal*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J. —This is an appeal on behalf of the plaintiff-decree-holder against the order of the District Judge of Darbhanga, dated the 21st April 1923, whereby he set aside the order of the Munsif dated the 24th February 1923 and directed him to allow the present respondent, who was the defendant third party in the suit, to redeem the plaintiff.

The undisputed facts of the case are shortly these :—

The predecessor-in-interest of the defendant No. 1 executed two mortgages, dated the 7th August 1907 and 9th December 1908 in favour of the defendant third party. On the 25th January 1912 he executed another mortgage of the same properties in favour of the plaintiff's husband. The defendant third party brought a suit upon his mortgages, obtained a decree, sold the mortgaged property and purchased it himself, and obtained delivery of possession of the same on the 9th of January 1918. In this suit, the present plaintiff or her husband who was a second mortgagee was not impleaded as a party. The plaintiff brought a suit to enforce her mortgage and in this suit the defendant No. 1 represented the original mortgagor, the defendant second party, held a mortgage of a date subsequent to the plaintiff's mortgage ; and the defendant 3rd party, as I have already stated, was the prior mortgagee under the bonds of 1907 and 1908 and who was in possession of the mortgaged property by virtue of the delivery of possession of the 9th of January 1918. The defendant fourth party were subsequent lessees of the mortgaged property. The plaintiff in his suit prayed, first, that she may be entitled to redeem the defendant third party and, after such redemption, she prayed for sale of the mortgaged property for the sums found due to her upon her mortgage as well as the sum paid by her to the first mortgagee to redeem his first mortgage.

Various points were raised by the learned Munsif before whom the suit came on for trial; but, for the purpose of the present appeal, it is only necessary to mention that one of the questions raised between the plaintiff and the defendant third party was as to whether the plaintiff was entitled to redeem the defendant third party, and as to whether the plaintiff could bring the property to sale, if so, on what terms. The learned Munsif dealt with these points under issues Nos. 4 and 5 in his judgment. He held that the plaintiff, not being made a party in the first mortgagee's suit, the right of redemption, in so far as she was concerned, had not been extinguished and that she had still the right to redeem. Thereafter, the learned Munsif held that the plaintiff was entitled to add the sum paid by her in order to redeem the first mortgagee to the sum found due upon her own mortgage and the original mortgagor, namely, the defendant No. 1 or his representatives-in-interest would be entitled to redeem the plaintiff on payment to her of the sums found due upon her mortgage as well as the sum paid by the plaintiff to redeem the first mortgagee, and, in the event of the mortgagor or his representative or the subsequent mortgagee, namely, the defendant second party, failing to redeem the plaintiff, the latter would be entitled to bring the property to sale.

It appears that, in compliance with this decree, the plaintiff deposited in Court on the 28th of November 1922 the sun found due to the first mortgagee, namely, the defendant third party under the decree of the Munsif. Thereupon, on the 3rd of February 1923, the defendant third party applied to the Munsif for leave to deposit in Court the money due to the plaintiff on account of her own mortgage as well as the money deposited by the plaintiff to redeem the defendant third party. The learned Munsif by his order, dated the 24th February 1923 held that the defendant third party was not entitled to deposit the money, and he accordingly rejected his application for leave to deposit the money. Against this order the defendant third party went in appeal before

the District Judge. Various points were raised by the respondent before the District Judge but they were all decided against her and in favour of the appellant before him. He held that the appellant before him, namely, the defendant third party, was entitled to deposit the money and he accordingly set aside the order of the Munsif and directed him to allow the appellant before him to redeem the plaintiff. Against this order the plaintiff comes in second appeal to this Court. She has also filed an application for revision under section 115 of the Civil Procedure Code in the alternative in case it held that the order of the District Judge was not appealable.

The only point argued by the learned Counsel for the appellant is that the defendant third party, who is the first mortgagee, has no right to redeem the plaintiff who is the second mortgagee. His contention is that, having regard to the fact that the second mortgagee, namely, the plaintiff, was not made a party to the suit brought by the first mortgagee, the second mortgagee has the right to redeem, and once the second mortgagee exercises this right and redeems the first mortgagee, the latter is out of the field and he has no right in his turn to redeem the second mortgagee.

Now, the rights of the parties have been determined by the decree of the Munsif passed in the suit of the second mortgagee, namely, the present appellant. The learned Munsif, in dealing with issues Nos. 4 and 5 in the suit, observed as follows :—

"Now, the first mortgagee in this case happens to be a purchaser of the equity of redemption. Therefore, if the plaintiff pays the amount due on the first mortgage, then the plaintiff in his own turn may be redeemed by the first mortgagee." The decree prepared by the Munsif in accordance with this judgment also directs that, in the event of the plaintiff redeeming the first mortgagee, the mortgagor or his representatives would be entitled to redeem the plaintiff on payment to her of the sum found due to her under her own mortgage as well as under the mortgage of the first mortgagee. The learned Counsil for the appellant relies upon the case *of Durga Charan Mukhopadhya* v. *Chandra Nath Gupta Chowdhury* (1) were the learned Judges of the Calcutta High Court observed that, after a sale of the mortgaged property in execution of a decree obtained by the first mortgagee there is no right of redemption left in the mortgagor, his right to redeem went at the time of the first sale and he contends that in the Full Bench case of *Debendra Nath Rai* v, *Ram Taran Bannerji* (2), although the decision of the Division Bench in the case of *Durga Charan Mukhopadhya* v. *Chandra Nath Gupta Chowdhuri* (1) was overruled on the question that the subsequent mortgagee had the right not only to redeem the first mortgagee but also to sell the mortgaged property subject to the encumbrance of the first mortgage, the decision of the Division Bench as regards the right of the mortgagor to redeem having been lost was not disturbed. To my mind, the case of *Durga Charan Mukhopadhya* v. *Chandra Nath Gupta Chowdhury* (1) does not lay it down as a proposition of law that in no case the mortgagor can be allowed to redeem after sale of the mortgeged property. The question as to whether the mortgagor would be entitled to redeem the second mortgagee who in his turn had redeemed the first mortgagor, even after the sale in execution of a decree obtained by the first mortgagee was not considered, and the learned Cheif Justice of the Calcutta High Court in the Full Bench case of *Debendra Nath Rai* v. *Ram Taran Bennerji* (2), observes that a purchaser at a sale in execution of a decree obtained by a first morgagee in a suit to which the puisne encumbrancer was not a party, does not displace the latter but stands only in the position of the first mortgagee and that under such sale the interest of the first martgagee and of the mortgagor pass to the purchaser subject to the rights of the puisne encumbrancer The Full Bench there held that the right of the purchaser in execution of a decree obtained by the first mortgagee was the same as that of the mortgagor ; in other words, the purchaser was representative of the mortgagor and stood in his shoes and was, therefore, entitled to redeem the second mortgagee. The same view is expressed in Sir Rash Bihari Ghose's Law of Mortgage, where the learned author in dealing with the case of *Gope Bandhu* v. *Kali Pado*, (23 W. R. 338) observes that though the purchaser under the first decree was entitled to the outstanding interest in the mortgagor, as the puisne mortgagee was not a party to it the

(1) 4 C. W. N. 54.

(2) 30 L. 599 ; 7 C. W. N. 766 (F. B.).

latter had a right to pay off the amount due under the first mortgage and that, upon such payment, he would be the "holder of the first charge" on the property with power to realise in the usual way, *if the first mortgagee in his character of owner of equity of redemption did not choose to redeem* (*vide* Ghose's Law of Mortgage, page 658, 5th edition). It is manifest that, in the present case, the defendant third party occupies the double capacity of a first mortgagee as well as the owner of the equity of redemption by virtue of his purchase and, in my opinion, he is entitled to redeem the plaintiff on payment to him of the sum found due upon his mortgage as well as the sum deposited by the plaintiff to redeem the defendant third party.

Apart from the legal position of the parties, their rights in the present case have been determined by the decree which is binding on both parties. That decree clearly entitled the defendant third party to redeem the plaintiff. Mr. P. K. Sen has referred to the wording of the decree of the Munsif drawn up in the vernacular wherein it is stated that the mortgagor and his *warisan* would be entitled to redeem the plaintiff, and he argues that the word "*warisan*" means not representatives but heirs and, therefore, the defendant third party who is not the heir of the mortgagor has no right to redeem. Mr. Shibeshwar Dayal on behalf of the respondent contends that the word "*warisan*" includes representatives as well as heirs. If there is any doubt as regards the interpretation to be put upon the decree we have to refer to the judgment, and, as I have already pointed out, the judgment clearly directs that the mortgagor and his representatives would be entitled to redeem. In fact, in the passage quoted by me above from the judgment of the learned Munsif, it is quite clear that the defendant third party was given the right to redeem the plaintiff.

Under these circumstances, the decision of the learned District Judge is correct and this appeal must be dismissed with costs.

No question has been raised in this Court as regards the maintainability of the appeal and the revision case is also dismissed but without costs.

Jwala Prasad, J.—I agree.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1424 OF 1923.
January 22, 1924.

Present :—Mr. Justice Moti Sagar.

PIROZE KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KANHIYA RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), ss. 19, 20—Mortgage—Redemption suit—Acknowledgment after expiry of period of limitation—Payment of malikana *by mortgagee—Extension of limitation—Admission—Estoppel.*

In a suit for redemption it is for the plaintiff to prove that he has a subsisting right of redemption at the date of suit, and he is not relieved of the burden by showing that the fact of the mortgage was admitted by the defendant at a date when more than sixty years after the mortgage was effected had expired. The admission does not operate as an estoppel and having been made after the expiry of the period of limitation for a suit for redemption cannot serve as a valid acknowledgment under section 19 of the Limitation Act.

An acknowledgment, in order to be operative under section 19 of the Limitation Act, must be signed by the party against whom any particular right is claimed.

Section 20 of the Limitation Act applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to a mortgagor to redeem his property.

Khilanda Ram v. *Jinola*, 87 P.R. 1883; *Anwar Husain* v. *Lalmir Khan*, 26 A. 167; A. W. N. (1903) 223, relied on.

Second appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 8th March 1923.

Sheikh Niaz Muhammad, for the Appellants.

Mr. *M. L. Puri*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit for redemption of a mortgage alleged to have been effected by one Allah Dad, the predecessor in-interest of the plaintiffs, in favour of one Wasawa Mal who is now represented by the present defendant. In the plaint the date of the mortgage was not mentioned, but the learned District Judge has found as a fact that the mortgage in question had been effected on the 7th of November 1918. He has also found that the plaintiffs have failed to establish that their right to redeem was subsisting. It is contended on behalf of the plaintiff-appellants that in 1904 the predecessors-in-title of the defendant brought a suit against the present

plaintiffs for possession of this land as mortgagees, and that it was admitted by them in their plaint that the mortgage was then subsisting. That suit was decreed in 1905 and the argument is that the existence of the mortgage having been admitted in that year the defendant is now estopped from denying its existence and from contending that the plaintiffs have no right to redeem. It is clear that the suit was instituted more than 60 years after the mortgage had been effected, and the admission made in the plaint cannot, therefore, serve as a valid acknowledgment under section 19 of the Indian Limitation Act. It is, however, argued that the allegation made in the plaint amounts to an admission of the plaintiffs' rights and that the defendant is not entitled now to set up an adverse title. This argument, however, entirely loses sight of the fact that the defendant is not in any way denying the plaintiffs' title. He still admits that he is the mortgagee and that the plaintiffs are the mortgagors. His contention simply is that the plaintiffs' right to redeem, though they are undoubtedly the mortgagors, is not subsisting. I do not think that the admission made by the defendant's predecessors-in-title in 1905 of the existence of the mortgage can in any way improve the position of the plaintiffs so far as their right to redeem the property is concerned. It was for the plaintiffs to prove that they had a subsisting right of redemption at the date of suit, and they are not relieved of the burden by showing that the fact of mortgage was admitted by the predecessors-in-title of the present defendant when more than 80 years after the mortgage was effected had expired. In my opinion, there is no force in this contention and I must overrule it.

It was next contended that the mortgage having been admitted in 1905 the defendant is now estopped from contending that it would not be redeemed. I do not see how the doctrine of estoppel can apply to the facts of the present case. The admission made by the defendant in 1905 has not made the plaintiffs change their position in any way, and I am clearly of opinion that the defendant is not estopped from challenging the plaintiffs' right to redeem.

The next contention was that the mortgagee has been paying a certain share of the crops to the mortgagors as a kind of *malikana* called *lichh walwi* up to 1905 and that this brings the suit within limitation under section 20 of the Indian Limitation Act. Section 20, however, applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to the mortgagor to redeem his property; see *Anwar Husain* v. *Lalmir Khan* (1) and *Khalander Ram* v. *Jinola* (2).

Lastly, a certain acknowledgment said to have been made at the time of the Settlement of 1872 by the predecessors-in-title of the present defendant was relied on, and it was contended that, under section 19 of the Indian Limitation Act, a fresh period of limitation arose from the date of that acknowledgment. The acknowledgment, in order to be operative, however, must be signed by the party against whom any particular right is claimed. In the present case there is no evidence to show that the alleged acknowledgment, even if it did amount to an acknowledgment under section 19, was ever signed by any of the predecessors-in-title of the present defendant. It appears from the Settlement Record of 1872 that Milkhain, son of Wasawa Mal, mortgagee, was alive at that time. He is, however, not a signatory to the statement alleged to have been made by the proprietors and the mortgagees on that occasion, and the alleged acknowledgment cannot, therefore, be held to be a valid acknowledgment in law so as to be binding upon the defendant.

There is no force in this appeal and I dismiss it with costs throughout.

Z. K. *Appeal dismissed.*

(1) 26 A. 167; A. W. N. (1903) 223.
(2) 57 P. R. 1883.

ANANTOO KALWAR *v.* RAM PRASAD TIVARI

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 102 OF 1922.

January 4, 1924.

Present:—Sir Grimwood, Mears, Chief Justice, and Mr. Justice Piggott.

ANANTOO KALWAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM PRASAD TIVARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Antecedent debt—Alienation by father, whether binding on sons—Alienation by member to pay off father's debt—Co-parcener, whether bound.

The sons of a Hindu are bound to the extent of their interest in the joint family property by their father's action in alienating the same in order to pay of antecedent debts incurred by himself.

A member of a joint Hindu family is justified in alienating his share in the family property in order to pay off an antecedent debt incurred by his father, but he has no power to alienate the share of his minor brother for the same purpose.

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas 689; 21 A L. J. 934; 46 M. L. J. 28; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L O. R 41; 10 O. and A. L. R. 82; (1924) A. I. R. (P. C) 50; 33 M. L. T. 457 (P. C), followed.

Appeal under section 10 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Gokul Prasad, dated the 22nd June 1922.

Mr. *Ram Nama Prasad*, for the Appellants.

Messrs. *Kumudar Prasad* and *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—The essential facts to be considered may be stated thus: Two brothers, Sahdeo and Jagat, were members of a joint Hindu family. We must take this fact as established by the findings which have been recorded, although there has been some argument to the contrary before us. Jagat died first, leaving two sons, Ram Das and Ram Prasad, of whom Ram Das was very considerably the older. Sahdeo has died since, leaving one son of the name of Ram Rup, who is a major, and another son named Lalji who was still a minor on the date of the institution of this suit. We may take it that, after the death of Jagat, there was in existence a joint Hindu family consisting of Sahdeo, his two sons Ram Rup and Lalji, and his two nephews Ram Das and Ram Prasad. On the 30th of June 1910 two members of this joint family were majors and the rest were minors. The two major members of the family, Sahdeo and Ram Das, joined in executing a deed of sale by which they conveyed certain property to the defendants in this suit for a consideration of Rs. 699. Of this they took Rs. 39-12-0 in cash, and the balance went to pay off two mortgages previously contracted in the years 1900 and 1905. The former of these mortgages had been jointly contracted by the brothers Sahdeo and Jagat. The other mortgage was contracted by Sahdeo alone, though he purported to act for himself and his two nephews, who were then minors.

The present suit was brought in the year 1919 by Ram Rup and Lalji, sons of Sahdeo, and Ram Prasad, son of Jagat, to have this sale set aside. Ram Das refused to join in the suit and was impleaded as a defendant. Two Courts, after going into the facts at considerable length, dismissed the suit in its entirety.

A learned Judge of this Court came to the conclusion that, in view of the decision of their Lordships of the Privy Council in *Sahu Ram Chander's case*, the mortgages of 1900 and 1905 could in no event be relied upon as constituting antecedent debts, for the discharge of which Sahdeo and Ram Das, acting as the sole adult members of a joint Hindu family, could alienate property belonging jointly to themselves and to the minor members of the said family. He did not think it necessary to go further into the history of the transactions between members of this family and their creditors, and he seems to have overlooked the circumstance that he had before him a clear finding, whether right or wrong, that the sum of Rs. 39-12-0 taken in cash as part of the consideration for the sale was taken for family necessity. He has set aside the decrees of both Courts below and has decreed the claim of the plaintiffs for possession over the entire property specified at the foot of the plaint, including the share which Ram Das would have taken on a partition between himself and the other members of the joint family.

The case has been argued before us at some length; but it must be remembered that since the decision of the learned Judge of this Court was passed their Lordships of the Privy Council have reviewed this entire question in the case of *Brij Narain Rai* v. *Mangla Pra-*

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sad Rai (1). On the principles laid down in that ruling it seems to us beyond question that the sons of Sahdeo are bound, to the extent of their interest in the joint family property, by Sahdeo's action in alienating the same in order to pay of antecedent debts incurred by himself. We think that Ram Das had a perfect right to join in executing this deed in order to pay off an antecedent debt incurred by his own father Jagat, although we do not think that the decision of their Lordships of the Privy Council goes the length of holding that Ram Das could for this purpose alienate the interest of his own brother in the joint family property. Their Lordships seem to us to draw a very clear distinction between cases in which the alienation is made by the father and is being contested by his sons, and cases in which alienations made by the managing co-parcener of a joint undivided estate are being contested by other co-parceners, not the sons of the person making the alienation. The conclusion we come to, therefore, is that this suit should have been decreed only to the extent of the ¼th share which the plaintiff Ram Prasad would take in the joint family property on a partition. Setting aside the decree of the learned Judge of this Court, we give a decree in favour of the plaintiff Ram Prasad to the extent of a ¼th share in the property specified at the foot of the plaint. The parties will pay and receive costs throughout in proportion to failure and success. The costs of both hearings in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O & A. L. R. 82; (1924)A. I. R. (P. C.) 50, 33 M. L. T. 457 (P. C.).

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 228 OF 1923.

January 7, 1924.

Present :—Mr. Justice Das, and Mr. Justice Ross.

SIRDHAR CHOWDHRY—APPELLANT

versus

MUGNIRAM BANGAR AND OTHERS—RESPONDENTS.

Receiver, duty of, towards Court—Receiver appointed by one Court—Another Court, whether should appoint Receiver—Leave to sue Receiver, effect of—Possession, whether surrendered by Court granting leave.

A Receiver is merely an officer of Court through whom the Court takes possession of property, the subject-matter of a litigation, and it is not for the Receiver to take up any attitude except one of absolute loyalty and obedience to the Court appointing him. [p. 622, col. 1.]

It is of the utmost importance that, where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction. [p. 620, col. 1; p. 621, col. 2.]

Where a Receiver has already been appointed by a Court of competent jurisdiction and has taken over possession of the properties in respect of which he has been appointed, another Court should not appoint a Receiver in respect of any portion of those properties. It is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried, so that the claim of the third party may be tried in the presence of the Receiver. But by giving leave to sue the Receiver, the Court does not relinquish possession of the properties to the Court in which the claim of the third party may be asserted. It retains full control and dominion over the property, though it may give leave to a stranger to sue the Receiver.

Marris v. *Baker*; (1904) 73 L. J Ch. 143; 52 W. R. 207, relied on.

Appeal from an order of the Subordinate Judge of Dhanbad, dated the 15th September 1923.

Messrs. *P. K. Sen*, *S. M. Mullick*, *A. T. Sen*, and *N. N. Sen*, for the Appellant.

Messrs. *Hasan Imam*, *S. A. Sami*, *S. K. Mitter*, *S. C. Mitter*, and *A. B. Mukharji*, for the Respondents.

Das, J.—I am unable to assent to the order passed by the learned Subordinate Judge. It is of the utmost importance that, where concurrent proceedings for similar relief are taken in two different and independent Courts,

no order should be passed which may lead to friction or conflict of jurisdiction. It is because I think that the order of the learned Subordinate Judge will lead to conflict between two independent jurisdictions, the jurisdiction of the Calcutta High Court and the jurisdiction of the Court of the Suborainate Judge at Dhanbad that I have come to the conclusion that it ought not to stand.

In a suit for dissolution of partnership and for partnership accounts instituted in the Calcutta High Court, by Sridhar Chowdhury, the appellant in this Court, against his brother Nilmoney Chowdhury and another, a consent order was passed on the 17th July 1923 appointing Mr. R. N. Mitter, an Advocate of the Calcutta High Court, Receiver of the partnership assets which included certain colliery properties, the subject-matter of the present suit. Now, the Calcutta High Court was without question a Court of competent jurisdiction, and it had undoubted power to direct the appointment of a Receiver to take possession of the partnership assets. This, then, was the position on the 17th July, 1923. On the 14th August, 1923 Mugniram Bangar and certain other persons instituted a suit in the Court of the Subordinate Judge of Dhanbad to enforce a mortgage executed by Nilmoney Chowdhury in their favour on the 22nd January 1920. They cited as defendants not only Nilmoney Chowdhury, the executant of the mortgage, but also Sridhar Chowdhury and the 'receiver.' Their case in the plaint is that the suit in the Calcutta High Court is collusive with the intent and the purpose of defeating or delaying the creditors. They maintain that the colliery properties are the absolute properties of Nilmoney Chowdhury and that he was entitled to execute a mortgage of these properties as security for an advance made or to be made to him by them. I ought to mention that, before instituting their suit, the present plaintiffs obtained the leave of the Calcutta High Court to sue the Receiver.

This being the position disclosed in their plaint, the plaintiffs obtained an order from the learned Subordinate Judge on the 15th September 1923 appointing Mr. R. N. Mitter, Receiver of the mortgaged properties. The conclusion at which the learned Subordinate Judge arrived may be stated in his own words: "So, on such circumstances", says the learned Subordinate Judge, "I am of opinion that a good *prima facie* case has been made out that the properties in suit belong to Nilmony; that with the object of defeating Kedar Nath and also with the present plaintiffs Nilmoney and Sridhar entered into an unholy conspiracy and acted in collusion and by their statements having little foundation and by suppressing facts which should have been disclosed, or, in other words, by practising fraud on the Hon'ble Court succeeded in no time in obtaining the appointment of a Receiver Mr. R. N. Mitter—and, in my opinion, such an appointment is hardly binding on this Court, and that this Court can appoint its own Receiver if there be good grounds." The learned Subordinate Judge then proceeded to discuss the question whether "good grounds existed for the appointment of a Receiver; and having come to the conclusion that they did exist, he appointed Mr. R. N. Mitter Receiver of the mortgaged properties; and gave him certain directions which are not reconcilable with the terms of the consent order passed by the Calcutta High Court. It is this order of the 15th September 1923 which is the subject matter of the appeal in this Court.

Now, in my opinion, the order of the learned Subordinate Judge is wholly without effect upon the mortgaged properties which are already in the custody of the Calcutta High Court by the order of the 17th July 1923. I am somewhat surprised that Mr. Mitter should have agreed to be Receiver of the mortgaged properties, for, by accepting the nomination, he has put himself in a position which is full of peril to himself. The Calcutta High Court is not a Court subordinate to the Court of the learned Subordinate Judge; nor is the Court of the Subordinate Judge in any sense subordinate to the Calcutta High Court. It is not to be expected that the Court of the learned Subordinate Judge will always accommodate itself to the orders that may be passed by the Calcutta High Court, and it is at least conceivable that conflicting orders may be passed by the two Courts, so that, by obeying the order of one Court, the Receiver may make himself liable to attachment for contempt by the other Court. I have a strong feeling that Mr. Mitter should not have compromised his position as an officer of the Calcutta High

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Court by accepting office at the hands of the Subordinate Judge. His conduct is open to the construction that he has surrendered the mortgaged properties to the Subordinate Judge, and this he could not have done without the permission of the Calcutta High Court, whose officer he is. A Receiver is merely the officer of the Court through whom the Court takes possession of property the subject of a litigation and it was not for Mr. Mitter to take up any attitude except one of absolute loyalty and obedience to the Calcutta High Court. And if Mr. Mitter had refused the nomination, the learned Subordinate Judge would have found himself in great difficulty, for it is not easy to understand how any officer appointed by him could have recovered possession of the properties from an officer appointed by the Calcutta High Court. But the case is free from complications, even though Mr. Mitter has accepted appointment as Receiver of the mortgaged properties. As I have said, the possession of the Receiver is the possession of the Court. The Calcutta High Court, according to the true interpretation of the consent order of the 17th July 1923, took possession of the partnership properties, including the mortgaged properties on that date. There is neither principle nor authority to support the view that any order which may be passed by the Subordinate Judge has or can have the slightest effect on the Calcutta High Court in relation to the properties of which it has assumed control. The refusal of the Calcutta High Court to surrender these properties to the Subordinate Judge will place him in a position of embarrassment, and it is not in the interest of that perfect administration of justice, which it is the duty of every Court to aspire to, that the Subordinate Judge has invited this conflict between his Court and the Calcutta High Court.

The exact point was decided in *Jopson* v. *James* (1). On the 27th January, 1908, Hall issued a writ in the Supreme Court of Judicature in Nova Scotia against Antrobus, Jopson and James, claiming an account of the partnership dealings, a dissolution and winding up of the partnership and a sale of the property of the partnership. On 25th February 1908, Jopson issued a writ in the Palatine Court of Lancashire againt James, Hall and Antrobus, claiming, first, a dissolution of the partnership relating to the mining properties in Nova Scoitia ; secondly, to have the affairs of the partnership wound up ; thirdly, to have the said mining properties sold ; and, fourthly, to have a Receiver and manager appointed. Hall gave notice of an application for the apppointment of a Receiver and manager in the Nova Scotian action ; but while that application was pending a motion by Jopson for the appointment of a Receiver and manager came before the Vice-Chancellor in the Palatine action, and on March, 16th the Vice-Chancellor made an order appointing James Blackey as Receiver and manager with liberty to him to appoint an agent in Nova Scotia. James Blackey by cable appointed James to act as his agent in Nova Scotia. It will be noticed that the application in the Palatine Court for the appointment of a Receiver was made after the application in the Nova Scotian Court, though the appointment was made first in the Palatine Court. On March 27th the Nova Scotian Court made an order appointing James as the Receiver of the partnership properties. Hall subsequently applied in the Palatine action for an order that all further proceedings in the Palatine Court might be stayed, and proper direction given for the discharge of the Receiver. The Vice-Chancellor refused the application ; but on appeal the order of the Vice-Chancellor was set aside. In the course of his judgment, Farwell, L. J., pointed out that the existence of concurrent jurisdiction rendered very necessary the observence of a comity between those jurisdictions, the disregard of which would lead to most unfortunate friction. The learned Lord Justice proceeded to say as follows :—" Two points appear to me to be usual on considering whether the Court should have regard and defer to a jurisdiction with which it may come in conflict, or whether the Court can fairly expect that other jurisdiction to defer to it. One is the priority in time, and the other is the extent of the relief asked for or obtainable in the other jurisdiction." Mr. Hasan Imam has contended before us that there is no similarity whatever between the Calcutta action and the Dhanbad action That is true enough ; but in regard to the question of the appointment of a Receiver, the relief claimed is the same.

Mr. Hasan Imam, however, contended that

(1) (1908) 77 Ch.L. J (N. S.) 624.

provided he had established collusion between the parties in the Calcutta action, he was entitled to ask the learned Subordinate Judge to appoint his own Receiver ; and he relied upon *Nothard* v. *Proctor* (2). It is difficult for us to express any opinion on the question of collusion especially as it appears that the documents upon which Mr. Hasan Imam relied, were not admitted in evidence by the learned Subordinate Judge. There are sufficient materials in the record to raise a suspicion; and more than that I am not prepared to say on the materials before us. I will, however, assume that the Calcutta action is a collusive action ; but it is for the Calcutta High Court to say so and to recall the order made by it for the appointment of a Receiver. *Nothard* v. *Proctor*, (2) in my opinion, does not touch the point. It is important to remember the following dates in order to undertand that case. On the 9th August 1875 Proctor filed a petition for liquidation of his debts by arrangement. No arrangment being arrived at, the plaintiff on the 31st August 1875 filed a petition for adjudication of Proctor. On 1st September, Mr. Edwards was appointed Receiver and manager by the Court of Bankruptcy. On the 7th Septembem Proctor died, leaving a Will by which he gave all his property to his wife and appointed her sole executrix. The executrix at once turned the Receiver out of possession and possessed herself of the assets. On the 9th of October the the plaintiff filed his bill in the Court of Chancery praying for the administration of the estate and for the appointment of a Receiver. The notice of motion for the appointment of a Receiver was served on the executrix on the 15th October. On the same 15th of October a suit was commenced in the Lord Mayor's Court by Blewitt, another creditor against the executrix, and, on the same day, a decree was made therein by consent for administration of the estate, and Milford was appointed Receiver. On the 19th October the motion for a Receiver was heard by Vice-Chancellor Bacon in the plaintiff's suit in Chancery, and the Vice-Chancellor, being of opinion that the circumstances showed collusion between Blewitt and Mrs. Proctor, made an order for the appointment of a Receiver and manager. This order was confirmed in appeal by the Court of Appeal.

Now, it will be noticed that no conflict of jurisdiction was possible between the Court of Chancery or, as I should say, the High Court of Justice and the Lord Mayor's Court. The Lord Mayor's Court is an inferior Court of Record, and is subordinate to the High Court of Justice. This aspect of the case was prominently referred to by Lord Justice James who, in the course of his judgment, pointed out that the Receiver when duly constituted could obtain from the Vice-Chancellor an order authorizing him to use the name of Mrs. Proctor in any proceedings before the Lord Mayor. It is a case, not of conflict of jurisdiction between two independent Courts, but of a superior Court taking the matter out of the hands of a Court subordinate to it. That, in my opinion, is the explanation of *Northard* v. *Proctor*.

It was then contended by Mr. Hasan Imam that the effect of the order of the Calcutta High Court giving leave to the plaintiffs in the Dhanbad action to sue the Receiver was that the Calcutta High Court surrendered the Receiver, to quote the exact words employed by Mr. Hasan Imam, "to the obedience of the Dhanbad Court" to be dealt with by the Subordinate Judge as his own officer. I am wholly unable to accept the contention. It is well settled that it is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession ; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried, so that the claim of the third party may be tried in the presence of the Receiver. But, as Mr. P. K. Sen pointed out in the course of his very able and interesting argument, by giving leave to sue its officer the Court does not relinquish possession of the properties to the Court where the claim of the third party may be asserted ; and he relied upon *Marris* v. *Baker* (3) which seems to be in point. It was laid down in that case that, where a mortgagee of leaseholds has obtained the appointment of a Receiver, the lessor who, by leave of the Court, brings an action for recovery of the land against the lessee, and recovers judgment, cannot proceed to enforce the judgment as

(2) (1876) 1 Ch. D. 4 ; 45 L. J. Ch. 302 ; 33 L. J. 209.

(3) (1904) 73 L. J. Ch. 148; 52 W. R. 20.

Court by accepting office at the hands of the Subordinate Judge. His conduct is open to the construction that he has surrendered the mortgaged properties to the Subordinate Judge, and this he could not have done without the permission of the Calcutta High Court, whose officer he is. A Receiver is merely the officer of the Court through whom the Court takes possession of property the subject of a litigation and it was not for Mr. Mitter to take up any attitude except one of absolute loyalty and obedience to the Calcutta High Court. And if Mr. Mitter had refused the nomination, the learned Subordinate Judge would have found himself in great difficulty, for it is not easy to understand how any officer appointed by him could have recovered possession of the properties from an officer appointed by the Calcutta High Court. But the case is free from complications, even though Mr. Mitter has accepted appointment as Receiver of the mortgaged properties. As I have said, the possession of the Receiver is the possession of the Court. The Calcutta High Court, according to the true interpretation of the consent order of the 17th July 1923, took possession of the partnership properties, including the mortgaged properties on that date. There is neither principle nor authority to support the view that any order which may be passed by the Subordinate Judge has or can have the slightest effect on the Calcutta High Court in relation to the properties of which it has assumed control. The refusal of the Calcutta High Court to surrender these properties to the Subordinate Judge will place him in a position of embarrassment, and it is not in the interest of that perfect administration of justice, which it is the duty of every Court to aspire to, that the Subordinate Judge has invited this conflict between his Court and the Calcutta High Court.

The exact point was decided in *Jopson* v. *James* (1). On the 27th January, 1908, Hall issued a writ in the Supreme Court of Judicature in Nova Scotia against Antrobus, Jopson and James, claiming an account of the partnership dealings, a dissolution and winding up of the partnership and a sale of the property of the partnership. On 25th February 1908, Jopson issued a writ in the Palatine Court of Lancashire against James, Hall and Antrobus, claiming, first, a dissolution of the partnership relating to the mining properties in Nova Scotia; secondly, to have the affairs of the partnership wound up; thirdly, to have the said mining properties sold; and, fourthly, to have a Receiver and manager appointed. Hall gave notice of an application for the apppointment of a Receiver and manager in the Nova Scotian action; but while that application was pending a motion by Jopson for the appointment of a Receiver and manager came before the Vice-Chancellor in the Palatine action, and on March, 16th the Vice-Chancellor made an order appointing James Blackey as Receiver and manager with liberty to him to appoint an agent in Nova Scotia. James Blackey by cable appointed James to act as his agent in Nova Scotia. It will be noticed that the application in the Palatine Court for the appointment of a Receiver was made after the application in the Nova Scotian Court, though the appointment was made first in the Palatine Court. On March 27th the Nova Scotian Court made an order appointing James as the Receiver of the partnership properties. Hall subsequently applied in the Palatine action for an order that all further proceedings in the Palatine Court might be stayed, and proper direction given for the discharge of the Receiver. The Vice-Chancellor refused the application; but on appeal the order of the Vice-Chancellor was set aside. In the course of his judgment, Farwell, L. J., pointed out that the existence of concurrent jurisdiction rendered very necessary the observence of a comity between those jurisdictions, the disregard of which would lead to most unfortunate friction. The learned Lord Justice proceeded to say as follows:—"Two points appear to me to be usual on considering whether the Court should have regard and defer to a jurisdiction with which it may come in conflict, or whether the Court can fairly expect that other jurisdiction to defer to it. One is the priority in time, and the other is the extent of the relief asked for or obtainable in the other jurisdiction." Mr. Hasan Imam has contended before us that there is no similarity whatever between the Calcutta action and the Dhanbad action That is true enough; but in regard to the question of the appointment of a Receiver, the relief claimed is the same.

Mr. Hasan Imam, however, contended that

(1) (1908) 77 L. J. (N. S.) 624.

provided he had established collusion between the parties in the Calcutta action, he was entitled to ask the learned Subordinate Judge to appoint his own Receiver ; and he relied upon *Nothard* v. *Proctor* (2). It is difficult for us to express any opinion on the question of collusion especially as it appears that the documents upon which Mr. Hasan Imam relied, were not admitted in evidence by the learned Subordinate Judge. There are sufficient materials in the record to raise a suspicion; and more than that I am not prepared to say on the materials before us. I will, however, assume that the Calcutta action is a collusive action ; but it is for the Calcutta High Court to say so and to recall the order made by it for the appointment of a Receiver. *Nothard* v. *Proctor*, (2) in my opinion, does not touch the point. It is important to remember the following dates in order to undertand that case. On the 9th August 1875 Proctor filed a petition for liquidation of his debts by arrangement. No arrangment being arrived at, the plaintiff on the 31st August 1875 filed a petition for adjudication of Proctor. On 1st September, Mr. Edwards was appointed Receiver and manager by the Court of Bankruptcy. On the 7th Septembem Proctor died, leaving a Will by which he gave all his property to his wife and appointed her sole executrix. The executrix at once turned the Receiver out of possession and possessed herself of the assets. On the 9th of October the the plaintiff filed his bill in the Court of Chancery praying for the administration of the estate and for the appointment of a Receiver. The notice of motion for the appointment of a Receiver was served on the executrix on the 15th October. On the same 15th of October a suit was commenced in the Lord Mayor's Court by Blewitt, another creditor against the executrix, and, on the same day, a decree was made therein by consent for administration of the estate, and Milford was appointed Receiver. On the 19th October the motion for a Receiver was heard by Vice-Chancellor Bacon in the plaintiff's suit in Chancery, and the Vice-Chancellor, being of opinion that the circumstances showed collusion between Blewitt and Mrs. Proctor, made an order for the appointment of a Receiver and manager. This order was confirmed in appeal by the Court of Appeal.

Now, it will be noticed that no conflict of jurisdiction was possible between the Court of Chancery or, as I should say, the High Court of Justice and the Lord Mayor's Court. The Lord Mayor's Court is an inferior Court of Record, and is subordinate to the High Court of Justice. This aspect of the case was prominently referred to by Lord Justice James who, in the course of his judgment, pointed out that the Receiver when duly constituted could obtain from the Vice-Chancellor an order authorizing him to use the name of Mrs. Proctor in any proceedings before the Lord Mayor. It is a case, not of conflict of jurisdiction between two independent Courts, but of a superior Court taking the matter out of the hands of a Court subordinate to it. That, in my opinion, is the explanation of *Northard* v. *Proctor*.

It was then contended by Mr. Hasan Imam that the effect of the order of the Calcutta High Court giving leave to the plaintiffs in the Dhanbad action to sue the Receiver was that the Calcutta High Court surrendered the Receiver, to quote the exact words employed by Mr. Hasan Imam, "to the obedience of the Dhanbad Court" to be dealt with by the Subordinate Judge as his own officer. I am wholly unable to accept the contention. It is well settled that it is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession ; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried, so that the claim of the third party may be tried in the presence of the Receiver. But, as Mr. P. K. Sen pointed out in the course of his very able and interesting argument, by giving leave to sue its officer the Court does not relinquish possession of the properties to the Court where the claim of the third party may be asserted ; and he relied upon *Marris* v. *Baker* (3) which seems to be in point. It was laid down in that case that, where a mortgagee of leaseholds has obtained the appointment of a Receiver, the lessor who, by leave of the Court, brings an action for recovery of the land against the lessee, and recovers judgment, cannot proceed to enforce the judgment as

(2) (1876) 1 Ch. D. 4 ; 45 L. J. Ch. 802 ; 33 L. J. 209.

(3) (1904) 73 L. J. Ch. 143; 52 W. R. 20.

against the Receiver in possession without the leave of the Court. Now it might be said that, if the effect of the leave to sue the Receiver was that the Court relinquished possession of the property to be dealt with in the subsequent suit instituted by leave against the Receiver, no further leave was necessary to sue out execution if the plaintiff succeeded in the action against the Receiver. But the contrary was actually decided. Buckley, J., pointed out that the question was whether the leave extended beyond proceedings to judgment—whether it included the right to issue write of possession, and he proceeded to say as follows : "In my opinion it did not. The leave given did not extend, I think, beyond proceedings for the determination of the question involved in the writ. The true way of looking at the matter seems to me to be this. Suppose that the Court, being in possession of land or chattels by its Receiver, is asked to allow proceedings to be taken between two persons to determine the title, and that leave is given. The party who succeeds ought to come again saying : 'This is my land' or 'These are my chattels, but the fruits of my victory are in your possession and I ask you to direct the Receiver to give me possession of them.' If there is nothing more in the case, the Court will give leave for possession but the party is not entitled as against the Receiver to get possession without leave—that is, without the consent of the Court in whose possession the property is." The principle that I deduce from this case is that the Court retains full control and dominion over the property, though it may give leave to a stranger to sue the Receiver. In my opinion, the learned Subordinate Judge should have deferred to the jurisdiction of the Calcutta High Court and declined to appoint a Receiver, especially as the order of the learned Subordinate Judge is without effect so far as the Calcutta High Court is concerned.

Apart from any other consideration, it seems to me that this is not a case in which a Receiver should have been appointed, especially after the undertaking given by the perties to keep down the interest and not to sell or dispose of the mortgaged properties. The plaintiffs' claim is for Rs. 8,00,000 for principal and Rs. 1,04,543 for interest. The learned Subordinate Judge has found that the value of the mortgaged properties on the 21st March 1923 was Rs. 28,00,000. He has accepted the report of certain experts appointed in another suit to value the property. The experts valued the properties (except one which was not referred to them) at Rs. 36,00,000, and not at Rs. 28,00,000, as the learned Subordinate Judge has erroneously supposed. Besides the properties valued by the experts, there is another property which the defendants value at Rs. 5,00,000. It would appear, then, that the value of the mortgaged properties may be put down at Rs. 41,00,000. The parties gave an undertaking to bring the interest upon the principal sum regularly into Court and not to sell or dispose of the mortgaged properties. Mr. Hasan Imam expressed his inability to accept the proposal made by the defendants, as there was no undertaking to pay the interest aleady in arrears. But the appointment of a Receiver will not have any other effect than that of preserving the property and keeping down the interest, and I do not see how the plaintiffs could have secured an order for the payment of interest in arrears to them by the appointment of a Receiver. In my opinion there was no justification for the order passed by the learned Subordinate Judge.

In the course of his argument, Mr. Hasan Imam pressed us to consider the position of his clients with reference to what he calls the collusive suit pending in the Calcutta High Court. I apprehend that the Calcutta High Court has complete power to determine any question as to collusion that may be urged before it. The arm of the Court is long enough to reach any deception that may be practised on it; but it is, in my opinion, intolerable that the learned Subordinate Judge should have been invited to hold on affidavits and in an interlocutory application that deception had been practised on the Calcutta High Court. It is well established that parties, whose rights are interfered with by having a Receiver put in their way, may, on making a proper application to the Court appointing the Receiver, obtain all that they may justly require. As Sir John Woodroffe points out in his valuable work on Receivers: "The Court has the power and will always take care to give a party who applies in a regular manner for the protection of his rights, the means of obtaining justice,

and will even assist him in asserting that right and having the benefit of it."

I would allow the appeal, and set aside the order of the learned Subordinate Judge. The appellant is entitled to his costs both in this Court and in the Court below. The cross-appeal is dismissed. Let the hearing of the suit be expedited.

Z. K. *Appeal allowed.*

Ross, J.—I agree.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 205 OF 1923.
AND CIVIL REVISION PETITION
No. 466 OF 1923.

November 13, 1923.

Present.—Mr. Justice Krishnan and
Mr. Justice Waller

RAMASWAMI NAIDU AND OTHERS
—APPELLANTS—PLANTIFFS—
PETITIONERS
versus
AYYALU NAIDU—RESPONDENT IN BOTH—
1ST DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XL, rr. 1, 4—"Person," meaning of—Order refusing to remain—Receiver,—Appeal, whether competent.

An order refusing to remove a Receiver already appointed dose not come either under r. 4 or r. 1 of O. XL and is not appealable The "person" in cl. (*b*) of O. XL, r. 1 refers to a person other than a Receiver.

Appeal against and petition to revise the order of the Court of the Additional Subordinate Judge of East Tanjore, at Mayavaram, dated 9th February 1923, in I. A. No. 52 of 1923 in O. S. No. 1 of 1922.

Mr. *P. R. Ganapathi Aiyar*, for the Appellants.

Messrs. *T. V. Muthukrishna Aiyar* and *Rajagopala Iyengar*, for the Respondent.

JUDGMENT.—This is an appeal against an order Refusing to remove the 1st defendant from his position of receiver in a partition suit brought against him and another.

A preliminary objection is taken to the maintainability of this appeal on the ground that no appeal lies under O. XLIII, r. 1 (*s*) of the Civil Procedure Code. The clause gives a right of appeal only against orders passed under rr. 1 and 4 of O. XL. It is contended, first, by the appellant's Vakil that this is a case which would fall under O. XLI, r. 1 (*a*) itself on the ground that they wanted not only to get the present Receiver removed but another man appointed in his place and he, therefore, contends that this is a case where the Court has refused to appoint a Receiver. We are unable to accept this contention, for, till the present Receiver is removed, there will be no scope for appointing another Receiver in his place, and, therefore, the authority cited by him, *Munilal* v. *Jagannath* (1), which deals with a case of refusal to appoint a Receiver does not apply. Refusing to remove a Receiver already appointed is quite different from refusing to appoint a new Receiver.

It was then contended that this application should be treated as one falling under O. XL, r. 1 (*b*). That clause says, "Remove any person from the possession or custody of any property" and it is argued that when the present Receiver is removed, it would necessarily result in his being removed from the possession or custody of the property in suit. That argument also we are unable to support as we think that the word "person" in clause (*b*) refers to a person other than a "Receiver," for clause (*c*) clearly shows that the property removed from the possession or custody of the person referred to in clause (*b*) is to be committed to the possession custody or management of the "Receiver" by clause (*c*). We think that is impossible to bring this case under O. XL, r. 1 and, of course, it does not fall under O. XL, r. 4. Therefore, we must hold that no appeal lies. We are fortified in this view by the rulings of the Calcutta High Court in *Eastern Mortgage Agency Co., Limited*, v. *Premananda Saha* (2) and *Sahebjada Faridun Shiko* v. *Fakir Muhammad* (3). The appeal, therefore, fails and is dismissed with costs.

It was then contended that we should interfere in revision with the order of the lower Court as the lower Court fell into a mistake

(1) 38 Ind. Cas. 785.
(2) 34 Ind. Cas. 789; 20 C. W. N. 789; 23 C. L. J. 217.
(3) 24 Ind. Cas. 862.

in thinking that the 1st defendant was not appointed a Receiver but only a manager. There is no provision for appointing a manager under the Code. When a manager is appointed it is really another name for the appointment of a Receiver under O. XL, and in this case the appointment was actually made under O. XL, Civil Procedure Code. We do not think that the lower Court fell into any error in thinking that the 1st defendant was not in fact a Receiver appointed under the Code. There is no question of jurisdiction or any acting with material irregularity in the exercise of jurisdiction arising in this petition. This petition is therefore, is incompetent and was also be dismissed.

V. N. V. *Appeal dismissed.*

S. D. *Revision rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1198 OF 1922.

February 25, 1924.

Present :—Mr. Justice Daniels.

MUNESHAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMAR NATH *alias* CHHOTEY LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Antecedent debt—Immoral or illegal debt—Burden of proof—Alienation whether can be enforced against alienor's share.

It is only where joint family property has passed out of the family under an alienation in lieu of an antecedent debt incurred by the father or in execution of a creditor's remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral. [p. 628, col. 1.]

Suraj Bansi Koer v. *Sheo Persad Singh*, 6 I. A. 88 ; 5 C. 148 (P. C.) ; 4 Sar. P. C. J. 1 ; 3 Suth P. C. J. 589 ; 4 C. L. R. 226 ; 2 Shone's L. R. 242 ; 2 Ind Dec (N.S.) 705 ; *Sahu Ram Chandra* v. *Bhup Singh*, 32 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 ; 38 M. L. J. 14 ; (1917) M. W. N. 489 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 44 I. A. 126 (P.C.) ; *Brij Narain Rai* v. *Mangla Prasad Rai*, 77 Ind. Cas. 683 ; 21 A. L. J. 984 ; 46 M. L. J. 23 ; 5 P. L. T. 1 ; 23 C. W. N. 253 ; (1921) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & A. L. R. 82 ; (1924) A. I. R. (P.C.) 50 ; 38 M. L. T. 457 (P.C.) ; *Chandradeo Singh* v. *Mata Prasad*, 1 Ind. Cas. 479 ; 31 A. 176 ; 6 A. L. J. 263 (F.B.) ; *Sahib Singh* v. *Girdhari Lal*, 73 Ind. Cas. 1024 ; 45 A. 573 ; (1924) A. I. R. (A.) 24, followed.

An alienation of joint family property by the father which is otherwise invalid cannot be enforced against the father's share in the joint family property in those Provinces in which the right of a co-sharer to dispose of his own share in joint family property is not recognised. [p. 628, col 1.]

Second appeal against the decree of the Second Additional District Judge of Gorakhpur, dated the 20th of May, 1922.

Dr. *S. N. Sen* and Mr. *K. Verma*, for the Appellants.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit in which the plaintiffs sought to recover possession of the property sold by their father Sham Lal, defendant No. 9, to Mst. Phul Kuwari in 1902 for a sum of Rs. 1,455. It is stated in the judgment of the trial Court that the vendee was the wife of Sham Lal's own cousin. The property was joint family property and the plaintiff's case was that the sale was executed without legal necessity. The sale was the subject of a pre-emption suit and the defendants are transferees from the successful pre-emptor. The pre-emption suit was decreed on payment of the full sale price. The sale in dispute was for cash paid in presence of the Sub-Registrar at the time of the execution of the deed to the extent of Rs. 1,301. The remainder of the consideration was left with the vendee for payment of three prior debts,—

		Rs.
1.	A mortgage-debt due to Raghubar Dayal ...	20
2.	Another mortgage ...	25
3.	To pay off a pro-note due to Ganga Prasad ...	109

The trial Court found that legal necessity was established to the extent of Rs. 109 only and decreed the suit for possession subject to payment of this amount. The defendants 1 to 8 appealed and the plaintiffs filed cross-objections objecting to the order directing

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them to pay Rs. 109. The Court below dismissed the appeal and allowing the cross-objections gave the plaintiffs an unconditional decree for possession. The defendants 1 to 8 have filed a second appeal to this Court.

As regards the first two items of Rs. 20 and Rs. 25 the trial Court found that they were not due from Sham Lal but from his cousin. This finding was not assailed in appeal to the Court below and is final.

As to the item of Rs. 109 the finding of the Court below is that it is not proved that there was any such debt due to Ganga Prasad. The Subordinate Judge who tried the case had said in his judgment that the pro-note was not proved but added, without referring to any evidence on the point, " I take it that Sham Lal borrowed that money and the transfer of the property for that amount would be to pay up antecedent debt." The Court below holds that the Subordinate Judge was not justified in making any such presumption. It holds that the debt is not proved. This is a finding of fact which must be accepted in second appeal.

The appellants' case as to Rs. 1,301 paid in cash was that it was borrowed to pay off arrears of *theka* money due from Sham Lal to the Hathwa Raj. Both the Courts below have held that this is not proved. The trial Court held that it was at least possible that the whole transfer was collusive and made in order to save the property from liability to sale in case of the Hathwa Raj obtaining a decree. In the sale-deed it is said that this amount is borrowed to pay off lease money *and for other necessities*. There was a suit for arrears of lease-money pending which the transfer was made. The claim was for Rs. 2,049 but it was ultimately decreed for a sum of Rs. 484 only, apart from costs. The sum of Rs. 1,301 was certainty not applied in payment of lease-money. The amount due was not realised until 1904 and 1905 (between two or three years later) by attachment and sale of Sham Lal's property The Additional Judge considers that this throws great doubt on the story put forward by the defendants. After detailing the circumstances the learned Judge says:—

"The inference is irresistible that the money borrowed, Rs. 1,301, was not borrowed for the purpose of paying off the arrears."

This, again, is a finding of fact which it is not open to the appellants to challenge in second appeal.

The learned Advocate for the appellants has pressed his case on two grounds,—

1. That the vendee advanced the money on the faith of a representation which she in good faith believed and was justified in believing, that the money was borrowed for this purpose and it is, therefore, immaterial whether it was really so applied or not.

2. That as the property has passed out of the family the sons cannot recover it except by showing that the consideration was obtained for an illegal or immoral purpose.

The first plea may be disposed of on the simple ground that no case based on a representation was set up in either of the Courts below. I am asked to arrive at a finding of fact that such representation was made though the question was never agitated before the Court of first appeal. If it were open to me to go into the question, the close relationship existing between the vendor and vendee might be a material point in deciding it. No plea as to representation was made in the written statement nor was any issue framed upon it. It is glanced at in one sentence in the trial Court's judgment where the learned Subordinate Judge, in dealing with the plea that the money was borrowed to pay up arrears of lease-money, says that the transferee should have satisfied herself that that suit was not a fictitious suit and that the money was actually due from Sham Lal. In the sequel, as I have already noted, he thought it possible that the whole transfer made by Sham Lal in favour of his cousin's wife was a collusive transaction. In the grounds of appeal to the Court below the only ground which can possibly be treated as bearing on this question is para. 5 which runs,—

"That the lower Court has regarded the fact that the consideration was really spent for legal necessity as not proved is irrelevant. The lower Court ought not to have relied on this fact."

This, however, is not a plea of representation. It asserts that the plaintiffs ought not to have relied on the omission to pay up the *theka* money as an argument against the money having been borrowed for this purpose.

It does not assert that a representation of the existence of legal necessity was made to the vendee or that she advanced the money after due enquiry under an honest belief of the truth of that representation. It is clear from the detailed judgment of the learned Additional Judge that no such plea can have been argued before him.

The second plea is entirely untenable. It is only where property has passed out of the joint family under an alienation in lieu of antecedent debt or in execution of the creditors' remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral. This was laid down in the leading case of *Suraj Bansi Koer* (1) and was reaffirmed in *Sahu Ram Chandra's case* (2) and in the very recent case of *Brij Narain Rai* v. *Mangala Prasad Rai* (3). The distinction between an alienation incurred in lieu of prior debt and an alienation entered into for cash was the basis of the decision in *Chandradeo Singh* v. *Mata Prasad* (4), which was subsequently affirmed by their Lordships of the Privy Council. The principle has been explicitly re-affirmed by this Court in the case of *Sahib Singh* v. *Girdhari Lal* (5).

At the conclusion of his argument the learned Advocate, relying on a passage in the recent case of *Brijnarain* v. *Mangal Prasad Rai*, suggested that if the alienation was otherwise invalid it could at least be enforced against the father's own share in the joint family property. This has never been the law in these Provinces and in my opinion their Lordships did not intend in the passage relied on to change what has long been settled law so far as these Provinces are concerned. The passage is, in my opinion, only applicable to those Provinces in which the right of a co-sharer to dispose of his own share is recognised.

The appeal, therefore, fails on all the grounds urged and it is accordingly dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 6 I. A. 88 ; 5 C. 148 (P. C.) ; 4 Sar. P. C. J. 1 ; 8 Suth. P. C. J. 589 ; 4 C. L. R. 226 ; 2 Shone's L. R. 242 ; 2 Ind. Dec. (N. S.) 705.

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N 693; 1 P. L. W. 557; 15 A. L. J. 487; 19 Bom. L. R. 493; 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.)

(3) 77 Ind. Cas. 689; 21 A.L.J. 984; 43 M.L J. 28; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W 72; 2 P. L R. 41; 10 O. and A. L. R. 82 (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457 (P. C.).

(4) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263 (F. B.).

(5) 78 Ind. Cas. 1024; 45 A. 576; (1924) A. I. R. (A.) 24.

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 1494 OF 1922.

February 22, 1924.

Present :—Mr. Justice Daniels.

GOBIND—DEFENDANT—APPELLANT

versus

AMMAR AND OTHERS—PLAINTIFFS—AND DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167—Jurisdiction of Civil and Revenue Courts—Decree by Revenue Court—Declaratory suit in Civil Court, maintainability of.

The Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under section 167 of the Agra Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form.

Narain Singh v. Gobind Ram, 9 Ind. Cas 1922 ; 33 A. 523; 8 A. L. J. 431; *Kishore Singh v Bahadur Singh* 48 Ind. Case 470; 41 A. 97 ; 16 A. L. J 983; *Baljit v. Mahepat*, 49 Ind. Cas. 118 ; 41 A. 203; 17 A. L. J. 60; *Ram Das v. Dubri Koeri*, 77 Ind Cas. 139 ; 44 A. 724, 20 A. L. J. 606 ; (1922) A. I. R. (A.) 336, followed.

Defendant obtained an *ex parte* decree in the Revenue Court for arrears of rent against the plaintiffs on the allegation that the latter were his sub-tenants. While the *ex parte* decree was still in force plaintiffs sued the defendant in the Civil Court for a declaration that they were joint occupancy tenants with him ;

***Held*, that the object of the suit being to obtain from the Civil Court a reversal of the Revenue Court decree for arrears of rent, the suit was not maintainable.**

Second Appeal against the decree of the District Judge of Farrukhabad, dated the 8th of May, 1922.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

GOBIND *v.* AMMAR

JUDGMENT:—This is an appeal by the defendant in a case in which the plaintiffs asked for and have been given a declaration that they are joint tenants with him in a certain occupancy holding. The only plea pressed at the hearing of the appeal is that the suit is barred by section 167 of the Agra Tenancy Act. The facts are these:—The defendant, alleging that the plaintiffs were his sub-tenants, sued them in the Revenue Court for arrears of rent and obtained an *ex parte* decree against them. While this *ex parate* decree was in force the present suit for a declaration was filed. The defendant pleaded in his written statement that the suit had been instituted on account of the claim for arrears of rent which he had brought against the plaintiffs. It appears from the Munsif's judgment that when the present suit was decided in the trial Court an application for setting aside the *ex parte* decree had been preferred and was pending. That application was afterwards allowed and the learned District Judge states in his judgment that after the Munsif's decision in the present suit the Revenue Court dismissed the suit for arrears of rent.

It is now settled law that the Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under section 167 of the Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form.

In *Narain Singh* v. *Gobind Ram* (1) the plaintiff had sought to eject the defendant as a sub-tenant in the Revenue Court but the Revenue Court had held that the defendant was a sharer in the occupancy holding. It was held that the plaintiff could not thereafter sue for the ejectment of the defendant as a trespasser in the Civil Court. In *Kishore Singh* v. *Bahadur Singh* (2) a suit for ejectment was brought against the respondents in the Revenue Court on the ground that they were sub-tenants. While that suit was pending they sued in the Civil Court for a declaration that they were co-tenants with the appellants in the occupancy holding. It was held that the suit was not entertainable. This is a very similar case to that now before me. The same principle is laid down in *Baljit* v. *Mahepat* (3) and has been recently re-affirmed in the case of *Ram Das* v. *Dubri Koeri* (4).

The present suit is barred by the principle laid down in these rulings. It was brought with the effect of setting aside a decree for ejectment which was then in force. It is irrelevant that the plaintiffs have since been able to get from the Revenue Court a pronouncement that they are not liable to ejectment as sub-tenants. To see whether the suit is maintainable we have to look to the date when it was instituted.

It may further be remarked that it is not entirely correct that the plaintiffs could not obtain from the Revenue Courts substantially the same relief which they seek in this suit. They could do so by means of a suit under section 95 of the Tenancy Act against the landholder for a declaration of their right as tenants. In such a suit the defendants could have been made parties as persons claiming through the landholder.

The suit being barred by the principle laid down in the rulings cited above the appeal must be and hereby is allowed and the suit dismissed. As on the merits the plaintiffs have been found to be in the right I make no order as to costs.

Z. K. *Appeal allowed.*

(1) 9 Ind. Cas. 1022; 33 A. 623; 8 A. L. J. 481.
(2) 48 Ind. Cas. 470; 41 A. 97; 16 A. L. J. 983.
(3) 49 Ind. Cas. 118; 41 A. 208; 17 A. L. J. 60.
(4) 71 Ind. Cas. 139; 44 A. 724; 20 A. L. J. 606; (1922) A. I. R. (A.) 386.

BADRI NARAIN SINGH *v.* DWARKA PRASAD

PATNA HIGH COURT.

FIRST CIVIL No. 199, 207, 208 AND 212 OF 1922.

Augugt 16, 1923.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

No. 199, BADRI NARAIN SINGH—JUDGMENT-DEBTOR—APPELLANT

No. 207, RAJENDRA NARAIN SINGH—JUDGMENT-DEBTOR—APPELLANT

No. 208 BADRI NARAIN SINGH—JUDGMENT-DEBTOR—APPELLANT

No. 212 INDERDEO NARAYAN SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

DWARKA PRASAD AND OTHERS (IN ALL CASES)—DECREE-HOLDERS—RESPONDENTS.

Hindu law—Joint family—Mortgage suit against father and sons—Compromise—Son's shares liable to sale under decree—Specification of shares—Decree-holder, right of, to sell shares of sons.

In a mortgage-suit against a Hindu father and his sons a compromise was arrived at between the plaintiff and the sons, whereby it was agreed that the father's name should be struck out and that if the sons failed to pay the decretal amount the plaintiff would be entitled to sell their shares in the property;

Held, that this amounted to an agreement on the part of the sons to put their shares at the disposal of the decree-holder and operated as a specification of their shares, and that the decree-holder was, therefore, entitled under the compromise decree, to sell the shares of the sons in the property as they stood on the date of the compromise.

Deen Dyal Lal v. *Jugdeep Narain Singh*, 3 C. 198 ; 1 C.L.R 49 ; 4 I.A 247 ; 3 Sar. P. C. J. 730 ; 3 Suth. P. C. J. 468 ; 1 Ind. Jur. 604 ; 1 Ind Dec. (N. S.) 715 (P. C.). *Suraj Bansi Koer* v. *Sheo Prasad Singh*, 5 C. 148 ; 6 I. A. 88 ; 4 Sar. P. C. J. 1 ; 3 Suth. P. C. J. 589 ; 4 C. L R. 226 ; 2 Shome L. R. 242 ; 2 Ind. Dec. (N. S.) 705 (P. C.), followed.

Appeals from an order of the Subordinate Judge of Gaya dated the 10th June 1922, and the 15th July, 1922.

Messrs. *Kailaspati* and *B. K. Sinha*, in all cases, for the Appellants.

Mr. *S. K. Mitra* and Mr. *P. N. Sinha*, in all cases, for the Respondents.

JUDGMENT.

Ross, J.—These are four appeals against orders of the Subordinate Judge of Gaya. Appeal No. 208 of 1922 is directed against the order of the 10th June 1922, and the other three appeals, namely, 199, 207, and 212 of 1922, are against the order of the 15th July, 1922. The appeal against the order of the 10th June relates to that portion of the order which requires the decree-holder to define the share of the sons in the properties in the sale proclamation. The other three appeals relate to the order disallowing certain objections by the judgment-debtors to the execution. In order to understand these objections it is necessary to state a few facts.

There was a decree in a suit on a mortgage which was brought against the mortgagor and his sons and two *ijaradars*. The suit was decreed *ex parte* against the father and on compromise against the sons and the *ijaradars* The defect in the proceedings was that the *ex parte* decree against the father was never made final ; but in the High Court the parties agreed that the name of defendant No. 1, that is, the father, should be removed from the names of the judgment-debtors against whom execution was taken out ; and, consequently, we are now concerned only with the judgment-debtors who are parties to the compromise, that is, the sons and the *ijaradars*.

Now, the objection to the order of the 10th June 1922 is that as the sons are of a Mitakshera joint family their shares are undefined and cannot be defined in the sale proclamation. It is to be observed, however, that in paragraph 6 of the petition of compromise which was entered into by the sons without joining with the father, it was expressly stipulated that on failure to pay the entire money due to the plaintiffs, the plaintiffs should be competent to bring the mortgaged properties to sale and realise the money. This implies an agreement on the part of the sons to put their shares at the disposal of the decree-holders and, therefore, amounts to a specification of their shares. The shares at that time were a three-fourths share. That has been advertised for sale and has now actually been sold. The order is, therefore, not open to

attack in this part. The right of the mortgagee to put up the shares for sale is supported by the decisions of the Privy Council in *Deen Dyal Lal* v. *Jugdeep Narain Singh* (1) and *Suraj Bansi Koer* v. *Sheo Prasad Singh* (2).

The other objections are against the order of the 15th July 1922. The first contention is that the debt must be proportionately reduced because the father's share has been exempted. But the decree that is being execut ed is the decree on the compromise and in that compromise the parties thereto undertook to discharge the whole debt and are liable for it.

The next objection is, that one son has died since the mortgage-decree was passed and, consequently, the share ought to be reduced from three-fourths to two-thirds. But the share that is liable is determined by the mortgage and after that it cannot be subject to lapse or reduction on account of the death of one of the co-parceners.

Then, it is said that the Subordinate Judge has gone behind the decree in ordering the sale of the *ijara* interest. But the sale of the *ijara* interest follows as a matter of course because it was subsequent to the mortgage which is being satisfied.

The last objection was that the executing Court had no jurisdiction and that the execution ought to have been taken out in the Court of the Second Subordinate Judge and not in the Court of the Third Subordinate Judge, as was done in the previous execution. Whatever may have been done in the previous execution, there is no doubt that the present execution has been brought in the proper Court because it relates to a *pargana* which is within the jurisdiction of the Third Subordinate Judge. And the previous execution case was transferred to the Court of the Third Subordinate Judge by the order of the District Judge to whom this *pargana* had been assigned and therefore the present execution case was properly brought in that Court.

(1) 8 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P.C. J. 730; 3 Suth. P.C.J. 463; 1 Ind. Jur. 504, 1 Ind. Dec. (N. S.) 715, (P.C.).

(2) 5 C 148; 6 I A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.). 705, (P. C.).

These were all the objections that were raised and they must all be overruled. The appeals are dismissed with costs.

Jwala Prasad, J.—I agree.

Z. K. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 712 OF 1923.

February 22, 1924.

Present:—Mr. Justice Ryves and Mr. Justice Mukerji.

P. CHIRAUNJI LAL—DECREE-HOLDER —APPELLANT

versus

GANGA SAHAI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908) Sch. I, Art. 182 (5)—Execution of decree—Affidavit as to incumbrances, whether application to take step in-aid of execution.

An affidavit filed by the decree-holder to the effect that there are no incumbrances on the property sought to be sold in execution does not amount to an application to take a step-in-aid of execution within the meaning of Article 182 (5) of Schedule I to the Limitation Act, so as to extend limitation for the execution of the decree.

Gulsari Lal v. Ram Bhajan, 52 Ind. Cas. 116 ; 22 O. C. 75, distinguished.

Execution Second Appeal from the decree of the District Judge of Meerut, dated the 18th January 1923.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *S. N. Gupta*, for the Respondents.

JUDGMENT.—This is a second appeal in an execution case. The appellant is the decree holder. A petition to execute the decree was filed by him on the 1st of June 1918. That was an applicatien asking the Court to transfer the decree to the Collector as the property was ancestral property. The last application was filed on the 12th August 1921 and it was objected to on the ground that it was, on the face of it,

clearly barred by limitation. It is sought by the decree-holder to bring it within limitation on two grounds: (1) It is said that on the 24th September 1918 the decree-holder filed an affidavit in the Court of the Collector to the effect that there were no incumbrances on the property ; (2) The next circumstance is that on the 13th November 1918 the Court after considering the Tahsildar's report and perhaps the affidavit, directed that the property should be sold in one lot. It appears from the order-sheet of the Collector's Court that on the 9th August 1918 the decree-holder was directed to file an affidavit to show whether there were any incumbrances or not on the property and the Tahsildar was asked to report if persons were willing to take the property on lease. It is argued that, on the 24th September 1918, when the affidavit was filed, there must have been an application made by the decree-holder to have the property sold. There was no written application ; that is admitted ; but we are asked to infer that there must have been an oral application to this effect. We find in the order-sheet that the 24th September was the date fixed for disposing of the matter and that on that date it was recorded that the decree-holder was not present. On the back of the affidavit, however, there is an endorsement of the Court directing that it should be filed. This is dated the 24th September 1918. It, therefore, seems clear that after the order had been written in the order-sheet this document was filed some time later on that date It seems to us impossible to hold that there must have been an oral application made when that affidavit was filed asking for the sale. The affidavit did nothing more than state that there was no incumbrance on the property and it was in answer to the usual direction of the Court before the final sale of the property whether it was possible to dispose of it otherwise. Stress has been laid on the case of *Gulzari Lal* v. *Ram Bhajan* (1) but the facts there are different. In that case there was an entry in the order-sheet showing that the decree-holder requested that the sale might proceed and it was held that this was evidence of an oral application. In this case there is no such entry and we are unable to hold that any application was made on behalf of the decree-holder. The result is that we dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 52 Ind. Cas. 116 ; 22 O. C. 75.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION NO. 40-B OF 1923.

February 22, 1924.

Present :—Mr. Kinkhede, A. J. C.

WILAYAT ALI KHAN—APPLICANT
versus
MAROTI AND ANOTHER—NON-APPLICANT.

*Civil Procedure Code (Act V of 1908) s. 84—Redemption suit—Interest from date of suit—Discretion of suit—*Damdupat, *rule of, applicability of.*

Under section 84 of the Civil Procedure Code a Court has a discretion in a redemption suit to award interest from the date of suit to the due date fixed for redemption even in cases to which the rule of *Damdupat* applies at the date of suit.

Narayan v. *Nathmal*, 65 Ind Cas. 275 ; (1922) A. I. R. (N.) 155; 17 N. L. R. 200, followed.

Application for amendment of decree in second Appeal No. 110-B of 1922 dated 20th April 1923, decided by Mr. Kotval, A. J. C.

Mr. *J. C. Ghosh*, for the Applicant.

Mr. *M. R. Dixit*, for the non-Applicant.

ORDER.—The only point to be considered in this petition is whether the decree fixing the price of redemption at Rs. 5,777-11-0 and payable on 20th October 1923 is drawn up in accordance with the judgment of this Court. The operative part of the judgment which was passed by Mr. Kotval, A. J. C., on 20th April 1923, is as follows :—

> " The decree of the lower Appellate Court is reversed and plaintiffs' claim decreed with costs throughout. The usual decree for preliminary decree for foreclosure in respect of Rs. 2,800 for principal and interest will be drawn up. I fix the 20th October 1923 as the date on or before which the payment should be made."

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I have worked out the details of the aforesaid price of redemption. They are as follows :—

Rs. 2,800, the amount of principal and interest due up to date of suit (6th July 1920) after giving up Rs. 182-5-0 by which the interest exceeded the principal sum according to the rule of *Damdupat*.

Rs. 2,212, simple interest on Rs. 2,800 at Rs. 2 per cent. per mensem from date of suit to the due date fixed.

Rs. 274, plaintiffs' costs of first Court.
Rs. 240-11-0, Do of first appeal.
Rs. 251,, Do of second appeal.

Total. Rs. 5,777-11-0.

The suit was dismissed by the first two Courts, but it was decreed in second appeal. In paragraph 7 of the plaint the plaintiffs had asked for a decree for Rs. 2,800 and interest thereon at Rs. 2 per cent. per mensem from date of suit to date of payment to be fixed by Court. It is argued on behalf of the defendants-applicants that as there is no express direction in the judgment for calculating interest from date of suit to the due date fixed, and, further, as no rate of interest is also specified, Mr. Kotval, A. J. C., must be deemed to have refused to award any interest *pendente lite*. Reliance is placed in support of this contention upon the rule of *Damdupat* which restricts the interest claimable by plaintiffs to a sum equal to the principal sum only. It is contended, further, that on the same principle the amount of the price of redemption must not be in excess of what is claimed subject to the rule of *Damdupat* as applied at the date of suit. On the other hand, the plaintiffs contend that the expressions " the plaintiffs' claim decreed with costs " clearly import a conscious decision to grant to plaintiffs a decree for their entire claim including interest *pendente lite*.

The defendants draw my attention to the following clause in the judgment: " the usual preliminary decree for foreclosure in respect of Rs. 2,800 for principal and interest will be drawn up." Their learned Advocate interprets this clause to mean that the intention was to fix the price of redemption at Rs. 2,800 only, besides costs. The decree as drawn up exactly fits in with the expression "the plaintiffs' claim decreed with costs throughout " and is in conflict with the other clause " the usual preliminary decree, etc., will be drawn up." If the word "interest" in the latter clause stands for " interest before and after suit " then the two clauses also are reconcilable. In view of the discretion vested in a Court by section 34 of the Civil Procedure Code in the matter of awarding interest after suit even in cases to which the rule of *Damdupat* applies at the date of suit, I am not prepared to hold that Mr. Kotval, A. J. C., did not intend to award any interest from date of suit to the due date fixed for redemption at the simple rate of interest at Rs. 2 per cent. per mensem. That such interest is allowable and allowed is clear from his own ruling in *Narayan* v. *Nathmal* (1). Viewing the decree in this light, I do not see any variance between it and the judgment.

The application for amendment, therefore, stands dismissed with costs. I allow Rs. 30 as Counsel's fee.

G. R. D. *Application dismissed.*

(1) 65 Ind. Cas. 275 ; 17 N. L. R. 200 ; (1922) A. I. R. (N.) 155.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1448 OF 1922.

February 15, 1924.

Present :—Mr. Justice Mukerji.

Musammat DURGA KUNWAR—PLAINTIFF —APPELLANT

versus

Musammat CHUNNA KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) Ch. II—Family arrangement, construction of—Life estate and remainder over in favour of living persons, validity of—Limitation Act (IX of 1908) Sch. I, Art 140—Suit by remainderman to recover possession of property alienated by life-tenant—Limitation, commencement of—Appeal—Alternative view, whether can be put forward.

By an arrangement entered into between a Hindu widow and the next reversioner of her husband it

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was agreed that the latter should remain in possession of certain property as trustee for the widow during his lifetime, without power of alienation and that the widow should receive a certain sum as maintenance. It was further provided that, after the reversioner's death, the property should go to his sons, if any should survive, and in default of sons it should go to the widow. The reversioner made an alienation during his lifetime, and after his death the widow brought a suit for possession of the property against the transferees of the reversioner's transferee describing the reversioner as a trustee and stating that the cause of action had accrued to her on the death of the reversioner. The trial Court dismissed the suit as time-barred. In appeal the widow urged that the reversioner was only a life-tenant and as the widow was not entitled to possession till his death, limitation began to run only from his death;

Held, (1) that the arrangement entered into between the widow and the reversioner was perfectly legal and did not offend against any of the provisions of Chapter II of the Transfer of Property Act;

(2) that the reversioner being merely a life-tenant, the widow's right to claim possession accrued on his death and limitation began to run from the date of his death;

(3) that the widow was entitled to put forward an alternative view of her case before the Appellate Court as it was based on the allegations which were contained in the plaint.

Balmakund v. *Dalu*, 25 A. 498; A. W. N. (1903) 112 (F. B.), *Ilahi Khan* v. *Sher Ali Khan*, 26 A. 331, *Syedani Wahumda Khatun Chowdhurani* v. *Mahomed Elahabad Khan Pani*, 23 Ind. Cas. 332; 17 C. W. N. 427 (P. C.), *Radha Mohan Mundul* v. *Jadoomonee Dossee*, 23 W. R. 369; 3 Sar. P. C. J. 482, referred to.

Second appeal from the decree of District Judge of Farrukhabad, dated the 20th of May 1922.

Mr. *Baleshwari Prasad*, for the Appellant.

Messrs. *K. N. Katju* and *A. P. Dube*, for the Respondents.

JUDGMENT.—The plaintiff in the Court of first instance is the appellant here. She brought this suit for recovery of certain property on the following allegations. Raj Bahadur and Kunwar Bahadur were two first paternal cousins. Raj Bahadur was the sole owner of the property in dispute. In the life time of Raj Bahadur there was a litigation between him and Kunwar Bahadur in which Kunwar Bahadur lost. On the death of Raj Bahadur, however, Kunwar Bahadur again laid claim to his property. The dispute was referred to three arbitrators on the 15th of August 1895 and they made an award the next day. (This is a registered document and a copy of which is on the record). By this document Kunwar Bahadur was to remain in possession of the property as a trustee for the plaintiff and was to pay her a certain amount of maintenance. On the death of Kunwar Bahadur the plaintiff became entitled to the possession of the property. But in his life-time, Kunwar Bahadur made a transfer and his transferees made further transfers. The widow of Kunwar Bahadur and the present holders of the property are the defendants in the suit.

Both the Courts below dismissed the suit on the ground of limitation. The learned Munsif decided certain other points raised by the defendants but the learned District Judge did not enter into those matters. The lower Appellate Court held that either Kunwar Bahadur was a full owner or was a trustee as is stated by the plaintiff herself. In either view, the alienation having taken place so far back as in 1897, the suit could not be treated as being within time.

In this Court it has been urged that, under the terms of the award, the right to recover actual possession accrued to *Musammat* Durga Kunwar, the appellant, only after the death of Kunwar Bahadur and that the suit was not barred by time. It is common ground that Kunwar Bahadur died on the 31st of May 1916.

The learned Counsel appearing for some of the respondents has urged that to allow the appellant to argue this point would be to allow her to set up a new case altogether. He has cited several cases but I do not propose to notice all of them, for the simple reason that each of these cases was decided on its own facts. In the case of *Ilahi Khan* v. *Sher Ali Khan* (1), two sets of plaintiffs brought a suit for recovery of their respective shares in a house by means of partition. It was found that one of the defendants and one set of the plaintiffs had been out of possession. The set of plaintiffs who were found to be in possession asked that their share should be augmented by reason of the fact that the other parties to the suit had lost their share by adverse possession on the part of the co-owners. It was held that this was a new case and it could not be urged. The Full Bench case

(1) 26 A. 331.

of *Balmakund* v. *Dalu* (2), was distinguished. The Privy Council case of *Syedani Mahomeda Khatun Chowdhurani* v. *Mahomud Elahabad Khan Pani* (3), is also distinguishable. In that case a lady claimed the setting aside of a deed of gift and asked for an account in respect of the profits of the entire property covered by the gift. It appears that she was going on a pilgrimage and, before doing so, she transferred the entire propery to her nephew by way of a gift and the nephew executed an agreement that, in case she came back alive, he would give her one-quarter of the income from the property. The plaintiff's suit for the setting aside of the gift failed. Then she said that she ought to get at least one-quarter of the income from the property. Their Lordships of the Privy Council said that the general issue as to whether the defendant was liable to render an account of the entire property did not cover the case for rendition of account in respect of the quarter share. This case also is quite distinguishable.

For the appellant the case of *Radha Mohan Mundul* v. *Jadoomonee Dossee* (4), decided by their Lordships of the Privy Council, has been cited. In that case a lady sued for possession of certain property as an heir to her late husband. It was found that the property was an endowed one but her husband was one of the Shebaits. It was found that even if she could not succeed as an heiress she could certainly succeed as a Shebait, on succession to that title on the death of her husband. She was allowed to succeed on the latter title. In the Full Bench case of *Balmakund* v. *Dalu*, the plaintiff brought a suit for recovery of property on the ground that he had leased it out to the defendant. The lease was not proved, then the plaintiff asked to be allowed to succeed on the ground of his title to it. It was held that he was entitled to succeed. It will thus be seen that each case must be decided on its own facts. In the case before me, the plaintiff set up specifically her title and her right to possession under the award. The only point on which she differs from her allegations made in the plaint is this. In the plaint she said that the position of Kunwar Bahadur was that of a trustee for herself. Now her learned Counsel urges that Kunwar Bahadur had only a life interest in the property and no more. Can we then say that the plaintiff is really so changing her case that it would be a just and proper act to estop her from urging what were the positions of the respective parties under the award. Construction of a document is not an easy matter. Eminent Judges have taken different views of the same document. Examples need not be quoted. The plaintiff is a woman who probably does not even know the characters in which the award is drawn up. She was acting only on legal advice in saying that the position of Kunwar Bahadur was that of a trustee. Under the advice of other Counsel she is now saying that under the same award Kunwar Bahadur's position was that of a life tenant only. She distinctly based her claim on the award and she distinctly stated that her cause of action arose on the death of Kunwar Bahadur. She is not altering or amending any of these allegations. In my opinion, the plaintiff is entitled to urge the new view and it is open to this Court to look into the award and to find for itself what were the legal positions of the parties to the award.

The award has been read out more than once and it has been commented upon. It appears that several cases were instituted by the appellant and Kunwar Bahadur against each other, on the death of Raj Bahadur, the husband of the appellant. The arbitrators decided that these cases should be withdrawn. They said that Durga Kunwar should have possession over the moveables; that her name should be recorded in the revenue papers, and that she should get a substantial amount of maintenance, namely, Rs. 800 and odd a year. The arbitrators decided that Kunwar Bahadur was to be in possession and to manage the property but must not have any power of alienation. This is very important. They further decided that on the death of Kunwar Bahadur if any son survived him that son should get the property, and in default of the son, the property should go to the two widows, namely, the appellant and the widow of Kunwar Bahadur in equal shares. Whether we regard the award as the handy work of the three arbitrators or as an agreement between the two claimants, there can be no two opinions about

(2) 25 A. 498; A. W. N. (1903) 112, (F. B.).
(3) 28 Ind. Cas. 882; 17 C. W. N. 427, (P. C.).
(4) 23 W. R. 369; 8 Sar. P. C. J. 482.

its binding character. If Durga Kunwar's statement in the plaint be true that there was a litigation between Raj Bahadur and Kunwar Bahadur in respect of this property and Kunwar Bahadur lost, the property in suit was the absolute property of Raj Bahadur and Durga Kunwar was the only heir. Kunwar Bahadur would be the reversioner. The reversioner and the life owner Durga Kunwar could certainly agree between themselves as to how the property was to be enjoyed. The only limitations to their agreement were those that are imposed by the provisions of Chapter II of the Transfer of Property Act. I have carefully examined the award and I do not find that any of the provisions of Chapter II of the Transfer of Property Act have been contravened. It was open to the parties or the arbitrators to decide that Kunwar Bahadur would have a life interest and that on this death the property would go to his son, if one survived him, and in default it would go to the persons living at the death of Kunwar Bahadur. This was perfectly a legal arrangement. It was distinctly stated in that award that, so long as Durga Kunwar got her maintenance, she had no right to have the arrangement set aside. The mere fact that Kunwar Bahadur sold the property could not give her any right to bring a suit for setting aside the award and recovery of possession. Even if she could bring such a suit, there was no bar to her suing now on the death of Kunwar Bahadur. The cause of action for the suit arose on the death of Kunwar Bahadur and not earlier. It will, however, be a matter to see whether Durga Kunwar is entitled to the entire property or to only half the property, the other half going to respondent No. 1, Chunna Kunwar, the widow of Kunwar Bahadur.

Such being my opinion the appeal succeeds. I set aside the decree of the Court below which was on the preliminary point of limitation. I remand the appeal under O. XLI, r. 23, Civil Procedure Code, to the Court below with the direction that it will re-enter it on the register and dispose of it according to law. Costs here and hitherto will abide the result.

Z. K. *Appeal remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE NO. 12 OF 1923.

November 30, 1923.

Present :—Mr. Prideaux, A. J. C.

MAROTI KUNBI—APPLICANT

versus

BAPUJI AND OTHERS—NON-APPLICANTS.

Landlord and tenant—Tenancy of fractional share of field, validity of.

There can be no tenancy in respect of a fractional share of a field or fields not defined by metes and bounds and a suit for joint possession of an undivided share in a field on the basis of a lease does not lie.

Case-law discussed.

Application for review of decree in Second Appeal No. 352 of 1919 dated 20th December 1922, decided by Additional Judicial Commissioner.

Mr. *D. T. Mangalmurti*, for the Appellants.

Sir *Bipin Krishna Bose* and Mr. *Chitale*, for the Respondents.

The facts of the case will appear from the following judgment of the learned Additional Judicial Commissioner delivered in the appeal, namely :—

The appellant was the plaintiff and sued in the Court of the 2nd Munsif, Arvi, for joint possession of a third share of certain *sir* fields situated at *mouza* Khambit on the ground that defendants Nos. 1 and 2 leased an undivided one-third land to him in perpetuity. Both Courts have held, on the authority of *Sumera* v. *Pemchand* (1), that such a suit does not lie and dismissed the claim. In that case it was held that, under the Central Provinces Tenancy Act, there can be no tenancy in respect of a fractional share of a field or fields not defined by metes and bounds. I am referred to *Nilkanth* v. *Bhagwant* (2). That case does not seem to me to be applicable. The appellant has applied asking that if, in the opinion of this Court, the relief prayed by him cannot be granted, he prays that permission be granted to him for amending his plaint by adding a prayer that defendants be made to partition the fields in dispute and demarcate the one-third that is leased to him and to put him in possession of it. I see no reason to grant this

(1) 44 Ind. Cas. 845 ; 14 N. L. R. 62.
(2) 42 Ind. Cas. 270 ; 18 N. L. R. 175.

prayer. The case had proceeded *ex parte* against the defendant and to allow this amendment would be to change the nature of the suit. There is no doubt that, under the authority quoted in *Sumera* v. *Pemchand* (1), the case has been rightly decided. This appeal fails and is dismissed with costs.

ORDER.—I have had this case re-argued and am exactly of the same opinion as I was before. It is certain that the applicant is not suing as a proprietor or a part-proprietor. It is equally certain that his claim for joint possession of a one-third of the *sir* fields in suit is based on his position as a tenant. The conclusion come to in *Sumera* v. *Pemchand* (1) finds echo in other cases under the Bengal Tenancy Act, where the language in substance is the same with reference to a holding. In *Baidya Nath De Sarkar* v. *Sheikh Ilim* (3) it was held that the term "holding" as used in section 30 of the Bengal Tenancy Act means an entire holding and in *Haribole Brohmo* v. *Tasimuddin Mondul* (4) it was laid down that an undivided share of lands comprising a holding does not fall within the definition of a holding given in the Bengal Tenancy Act. Another case in point is *Hari Charan Bose* v. *Runjit Singh* (5) It cannot be said that what plaintiff claims in the present suit is a holding. It seems to me that the case of *Sumera* v. *Pemchand* (1), above referred to, does apply, and is an effective answer to the plaintiff's case laid.

I again see no reason for granting permission for amending the plaint by the addition of a prayer for partition of the field, and to demarcate the one-third said to have been leased to the plaintiff. The lease itself contains the extraordinary provision that the lessor reserved the occupancy rights in the *sir*. I see no reason to change or alter my judgment of the 20th December last.

I dismiss this application of review. The applicant will pay his own and the non-applicants' costs. I fix Rs. 50 as pleader's fees.

G. R. D. *Application dismissed.*

(3) 2 C. W. N. 44; 25 C. 917 ; 18 Ind. Dec (N. S) 597.
(4) 2 C. W. N. 680.
(5) 25 C. 917 n. ; 1 C. W. N. 521 ; 18 Ind. Dec. (N. S.) 598.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1551 OF 1923.

February 18, 1924.

Present:—Mr. Justice Daniels.

BALKARAN LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MALIK NAMDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 53, O. XLI, r. 4—Hindoo Law—Joint family—Nephew taking property by survivorship, whether liable as legal representative—Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties.

A plaintiff professing to appeal under O. XLI, r. 4 of the Civil Procedure Code, is not entitled to proceed with his appeal without making the other plaintiffs parties thereto as respondents

Balaram Pal v *Kanyska Majhi*, 53 Ind. Cas. 548; *Ambika Prasad* v. *Jhinak Singh*, 171 Ind. Cas. 321 ; 45 A. 286 ; 21 A. L. J. 91 ; (1923) A. I. R (A) 211, followed.

It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under section 53 of the Civil Procedure Code. The section does not apply to the case of a nephew succeeding by survivorship.

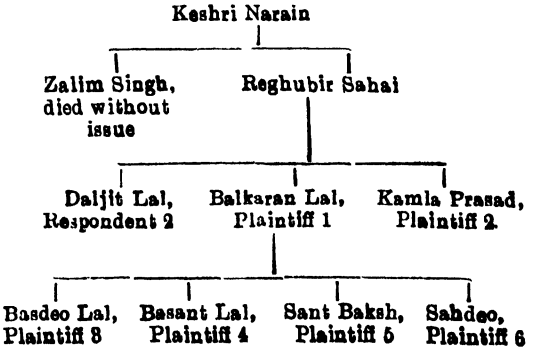
Jaggannath Singh v. *Moti Lal*, 73 Ind. Cas. 958 ; 45 A 455 ; 21 A. L. J 353 ; (1923) A. I. R. (A) 589, followed.

Second appeal from the decree of the Second Additional Judge of Gorakhpur, dated the 5th of May, 1922.

Messrs, *Jang Bahadur Lal* and *Shiva Prasad Sinha*, for the Appellants.

Mr. *S. D. Sinha*, for the Respondents.

JUDGMENT.—The relationship of the parties to this suit would appear from the following pedigree :—



BALKARAN LAL *v.* MALIK NAMDAR

Daljit Lal and Zalim Singh mortgaged the suit property in year 1898 to the defendant Malik Namdar. Malik Namdar subsequently brought a suit on his mortgage impleading the mortgagors and Daljit Lal's son Basdeo Lal. The suit was compromised and resulted in a decree for sale of the property. This decree was made absolute in the year 1912 in proceedings to which the principal appellant Kamla Prasad was also a party as was also the first appellant Balkaran Lal. The plaintiffs in the suit out of which this appeal arises were,—

(*a*) Daljit Lal and his son Basdeo Lal,

(*b*) Balkaran Lal and his three sons, and

(*c*) Kamla Prasad.

Their claim is to recover the property on the ground that the decree absolute for sale obtained by Malick Namdar in 1912 is not binding on them, the property being joint family property which was mortgaged without legal necessity.

The learned Subordinate Judge held that there was legal necessity for the sale and dismissed the suit on this ground. Kamla Prasad alone appealed but stated in his memorandum of appeal that he was appealing on behalf of all the plaintiffs under O. XLI, r. 4. The learned Additional Judge has dismissed the appeal on two grounds; first, that Kamla Prasad was bound by the final decree of 1912 to which he was a party, and second, that he was not entitled to appeal on behalf of the other plaintiffs.

Before dealing with the other points I may note that the view was expressed by two Judges of this Court in *Ambika Prasad* v. *Jhinak Singh* (1) that a plaintiff professing to appeal under O. XLI, r. 4 is not entitled to proceed with his appeal without making the other plaintiffs parties thereto as respondents. The passage is on page 289. The learned Judges say,

"The objection is sufficiently met by another case, that of *Balaram Pal* v. *Kanysha Majhi* (2). This case seems to us to be absolutely in point. It was laid down there that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, r. 4 of O. XLI of the Code of Civil Procedure does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto."

In this view it does not appear what *locus standi* the remaining plaintiffs have to appeal to this Court against a decree to which they were not parties. In his appeal to the Court below Kamla Prasad joined no one as a respondent except the defendants Malik Namdar and Daljit Lal.

In answer to the first finding of the learned Judge it is argued on behalf of Kamla Prasad that he must have been joined in the appeal in his capacity of a member of the joint family as legal representative of Zalim Singh. I have not been referred to any judgment to show how he came to be joined, but as Zalim Singh had died before the final decree was passed it may be taken as probable that this was correct. It is, therefore, urged that it was not open to him to urge any plea which Zalim Singh himself could not have urged, and Zalim Singh being one of the original mortgagors could not have pleaded that the mortgage was without legal necessity. It was, however, open to Kamla Prasad to plead that he was not the legal representative of Zalim Singh and that the decree was not binding on him as he claimed under an independent title. It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under section 53 of the Code of Civil Procedure and it has recently been held by a Bench of this Court that the section does not apply to a nephew. [*Jagannath Singh* v. *Moti Lal* (3)], Kamla Prasad was the nephew of one of the mortgagors and the brother of the other. It appears to me, therefore, that it was open to him to plead that he held under an independent title and could not be joined as a party in the proceedings for preparation of the final decree. Not having done so he must be held to be bound by the decree. If he was bound by the decree he was not entitled to appeal from it under O. XLI, r. 4 on behalf of plaintiffs who were not parties to the decree, *e.g.*, Sant Bakhsh and Sahdeo, while those who were parties are equally bound by it. In this view, the decree of the Court below is correct and I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 71 Ind. Cas. 821; 45 A. 286; 21 A. L. J. 915; (1923) A. I. R. (A) 211.

(2) 53 Ind. Cas. 548.

BANI *v.* NARSOO

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL NO. 370-B OF 1922.

February 25, 1924.

Present:—Mr. Kinkhede, A. J. C.

Mt. BANI—DEFENDANT—APPELLANT

versus.

NARSOO AND ANOTHER—PLAINTIFFS—RESPONENTS.

Execution of decree—Duty of executing Court—Construction of decree—Hindu Law—Widow, alienation by—Re-marriage of widow—Reversioner, possession taken by—Alienation held to be without necessity—Mesne profits righ , to.

An executing Court has only to interpret the decree under execution. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment on which it is based.

Plaintiff obtained a lease from a Hindu widow for a certain number of years. On the re marriage of the widow defendant, who was the next reversioner, got into possession of the land. In a suit by the plaintiff to recover possession it was held that the lease was not for necessity and was not binding on the defendant and that the latter was, therefore, entitled to possession of the land. It was, however, further directed that the defendant must pay to the plaintiff a certain sum of money which had been found to have been binding on the property:

Held, that under the decree defendant was entitled to continue in possession of the property and was also entitled to mesne profits, and plaintiff was not entitled to mesne profits of the land but was only entitled to the sum of money found by the Court to have been binding on the property.

Appeal against the decree of 1st Additional District Judge, Akola, in Civil Appeal No. 540 of 1921, dated 3rd July 1922.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—One Narain was the last male holder of Survey No. 38, area 10 acres 30 *gunthas*, rent Rs. 22 of mouza Karla. He died in the rainy season of 1918 after sowing the crops: on 29th November 1918, which was soon after his death, the field was leased to plaintiffs by his widow Saru for 35 years in consideration of Rs. 1,500 out of which Rs. 1,053-8-6 were paid to Narain's creditors. The widow re-married in April or May 1919 and the defendant, who is Narain's sister, became entitled to immediate possession of the property as a reversionary heir to the estate of Narain. Bani accordingly entered into possession of the land in July 1919. The plaintiffs, therefore, sued to recover back possession of the land for the term of the lease. This suit was instituted on 12th September 1919. The defence was that Saru was not justified in alienating the property and that the transfer by lease could not enure beyond her lifetime, and that, she was willing to pay Rs. 819-1-6 to plaintiffs on account of the consideration necessary which was utilized towards the liquidation of Narain's debts. This offer was made on 20th April 1920.

The first Court held that, inasmuch as the consideration of the lease partly utilized in payment of the debts of Narain, the lease was binding as against the reversioner. The first Court thought that for that part of the consideration which consisted of Rs. 1,053 8-6 the lease must be held for the reduced term of 20 years. The plaintiffs accordingly got a decree in the following terms:—

> "That the defendants do put plaintiff in possession of the field till 1941 A. D. or if he claims mene profits for these two years then till 1939 A. D. when he shall deliver possession thereof to defendant No. 1."

Against this decree, dated 19th March 1921, defendant No. 1 filed an appeal to Additional District Judge on 16th June 1921 and urged following grounds:—

1. That the lower Court should not have awarded possession to the plaintiffs, but only put the defendants on terms, if necessary.
2. That the lower Court has erred in law in awarding possession as a lessee to the plaintiffs to the prejudice of the rights of the appellant.
3. That the lower Court should have retained possession of the appellant as owner thereof.
4. That the lower Court should not have awarded mesne profits to the plaintiffs, and it has also not arrived at the correct amount, but should have fixed it at the estimate given by the appellant.

The plaintiffs filed the following cross-objections on 2nd August 1921:—

1. That the learned Munsif should have decreed possession to the respondents Nos. 1 and 2 (plaintiffs) for the full term of their lease, *viz.*, 35 years, and should not have reduced the term to 20 years.

2. That the learned Munsif should have held the plaintiffs' lease to be for adequate consideration and for full value.

Each party was thus dissatisfied with the decree as given by the first Court and each desired its reversal so that they or she may get the right to possess the land declared in their or her own favour. The appeal was heard on 24th August 1921 and the judgment was delivered on 29th August 1921 by R. S. S. B. Chitnavis I may reproduce a few passages from it:

> 'In the present case no attempt is made by plaintiffs to prove the necessity for Mt. Saru to enter into this transaction of lease. . . There is no evidence that the creditors had pressed Saru for those debts. Narain died before he gathered the harvest. There is no evidence given, as to what Saru did with the produce of the year 1918-19. The very fact that she remarried within six months of the execution of the deed of lease shows that she did not care to find if the transaction would be prudent and beneficial. As a matter of fact, the lower Court has found that the lease for 35 years was not justified at all in view of the letting value of the land. On these findings of the lower Court the only course open to it was either to set aside the lease asking the defendant to refund the amount in respect of which legal necessity was established or to uphold the lease as it is. It was not in the power of the Court to grant a new lease on the original trunk."

The plaintiffs' contention before the lower Appellate Court was that the transaction should not be set aside as the major portion of the consideration is justified by legal necessity. The lower Appellate Court finds that "the present lease appears to be purely imprudent and is not justified at all. It was, so to say, a reckless transaction. . . She did not care to see if the transaction was proper and fair. I hold that the transaction is not justified by necessity, that it was imprudent and not binding on the appellant. Mt. Bani is, however, bound to refund to plaintiffs-respondents the sum of Rs. 1,053-8-6 which the latter have paid to Narain's creditors as she is benifitted to that extent." The lower Appellate Court, therefore, set aside the decree for possession and on 29th August 1921 passed a money-decree in lieu thereof for payment of Rs. 1,053-8-6 within two months and directed delivery of possession in the event of non-payment of the amount in time.

The plaintiffs were not satisfied with this and, therefore, came up to this Court in second appeal No. 10-B of 1922, but their appeal was dismissed under O. XLI, r. 11, Civil Procedure Code, on 11th April 1922. An application for review of judgment was also made but was withdrawn on 19th December 1922.

Instead of waiting for the confirmation of the decree dated 19th March 1921 of the first Court in appeal, the plaintiffs, on 22nd March 1921, applied for possession of the field until 1924 and got possession on 5th April 1921. The appeal of the defendant No. 1 was successful and she deposited the amount into Court on 19th September 1921 and on 6th October 1921 possession of 'the land with crops thereon were delivered to her. The Court, after fixing the value of the crops at Rs. 950, decided on 5th November 1921 that defendant No. 1 was entitled to the value of the crops. Possession of the land with crops was redelivered to defendant No. 1 on 6th November 1921.

Against this order dated 5th November 1921 an appeal was preferred by the plaintiffs and it was held that the crops were the property of plaintiffs, and defendant No. 1 had no right to them. The present appeal by defendant No. 1 is against this order on the execution side. The order has the force of a decree and hence second appeal lies. The decision of this appeal hinges upon the right interpretation of the judgment and decree passed by the Appellate Court on 29th August 1921. The lower Appellate Court thinks that in the Appellate Court each party had partially succeeded. That the Appellate decree involved clear implication a recognition of the plaintiff's right to possession till payment of Rs. 1,053-8-6 to them. It decreed defendant No. 1 to deliver possession because she was at date of suit in possession. From the order for delivery of possession it did not, therefore, follow that the Appellate Court recognized as lawful the defendant's possession until payment of the amount. The conclusion arrived at was that plaintiffs were entitled to

remain in possession until defendant No. 1 paid or tendered the amount of Rs. 1,053-8-6 and that defendant No. 1 had no right to demand or take possession before such payment.

In my opinion, the lower Appellate Court has not correctly interpreted the judgment and decree dated 29th August 1921. The decree and the judgment, instead of affirming the plaintiffs' right to possession negatives it in very strong terms. The following observations in particular in the judgment of R. S. S. B. Chitnavis, Additional District Judge will clearly show that, in the opinion of the learned Additional District Judge, the lease was "purely imprudent" and "not justified at all." "It was, so to say, reckless transaction." The widow "did not care to see if the transaction was proper and fair. . . . the transaction is not justified by necessity. . . . it was imprudent and not binding on the appellant. Mt. Bani is, however, bound to refund to plaintiffs-respondents the sum of Rs. 1,053-8-6. . . . . as she is benefited to that extent."

These extracts leave no doubt as to the meaning of the adjudication given by the Appellate Court on 29th August 1921. In face of this strong and vehement condemnation of the lease, it cannot be contended for a moment that that Court did think of affirming the right of the lessee to retain possession of the land for the term of the lease or even for a shorter term on until payment of the amount by the reversioner. It declared that the lease is not binding on the reversioner. The effect of this declaration was to hold that the lease gave the lessee no right to possess the land beyond the widow's lifetime (here beyond the date of her civil death by remarriage) and affirmed the right of the next reversioner to immediate possession on such death. This contingency happened in April or May 1919. That judgment nowhere says that the defendant Bani's act of entering into possession was unlawful and that, therefore, she must vacate, but it has simply held that before ordering her to vacate, she should be given a chance to pay up the amount which formed the valid consideration of the lease. The whole tenor of the judgment is from one end to the other a negation of the rights created under the lease. The direction of the Court to defendant No. 1 to reimburse plaintiff with the amount of the debts paid out of the consideration of the lease, is not a direction intended to enforce the terms of the lease but only a recognition of the equity which a reversioner suing to recover back alienated lands is usually ordered to do to the transferee who was out of pocket and whose transfer is adjudged null and void or is set aside. That the Judge looked upon this equity in favour of the plaintiffs-respondents Nos. 1 and 2 as nothing higher than one entitling them to a money claim is clear from the use of the expression "money-decree granted to them" at the end of the judgment.

Under these circumstances, there is no scope for any other interpretation being put on the judgment and decree. The executing Court has only to interpret the decree. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment on which it is based. The mere fact that, in view of the recent Privy Council decision in *Banwari Lal* v. *Mahesh* (1), there was scope for holding that the possession of the alienee could be treated as perfectly lawful is no ground for putting that construction upon the judgment and decree which proceeded upon the very negation of such a view. If the matter had to be decided apart from and independently of the decision already arrived at on 29th August 1921 and not as an executing Court, I dare say there is much force in what the lower Appellate Court Mr. D. K. Kolatkar, Additional District Judge) has written, but I am not prepared to accept his view as correct in preference to the view already taken on 29th August 1921, which is nothing short of an entire condemnation of the lease as being not binding against defendant No. 1. The parties are conclusively bound by it on the principle of *res judicata* and they cannot reagitate it on the execution side.

I, therefore, hold that the decree, dated 29th August 1921, while reversing the decree of the first Court at the instance of the defendant No. 1 did not intend to affirm the alinee's right to possession at all but, on the contrary, negatived it, and affirmed the reversionary heir's right to immediate possession and that the direction in the decree for payment of Rs. 1,053 8-6

(1) 49 Ind. Cas. 540; 41 A. 63 at p. 68; 21 O. C. 228; 23 C. W. N. 577; 6 O. L. J. 168; (1919) M. W. N. 490 45 I. A. 234, (P. C.).

within two months, did not in any way qualify her right to such possession. The further direction for delivery of possession in default of payment was only in the nature of a forfeiture clause for enforcement of timely payment, or a provision for a contingency which might have never happened in this case. It could not and did not in any way put the alienee's rights on a higher footing than it could otherwise have been. Looked upon as a forfeiture clause it was liable to be relieved against and the time fixed for payment extended. It could never have been the intention of the Court passing the decree to award possession of the land for the full term of 35 years for failure to pay within two months.

In the view I take of the decree, dated 29th August 1921, I think, the lower Appellate Court was bound to hold that the plaintiffs were not entitled to the crops. Their right to the land being negatived they had no right to raise and enjoy its usufruct as against the defendant No. 1 who was declared to be the rightful owner thereof. I, therefore, declare that the appellant Bani (defendant No. 1) is entitled to the sum of Rs. 950 which has by agreement of parties been fixed at the value of the crops raised by the plaintiffs.

The appeal succeeds and it is allowed with costs. Costs in lower Courts will be paid by the plaintiffs. Pleader's fee Rs. 15.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL NO. 95 OF 1921.

February 19, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAGHUBAR DAYAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA—PLAINTIFF—RESPONDENT.

Army Regulations, Vol II, Appendix IV, para 35 (c)—Regulations, whether have force of law—Sale of house without sanction of Commanding Officer, validity of—Cantonment tenure, land held on—License.

The collection of rules known as the Army Regulations cannot be treated as rules having the force of law ; they are departmental rules issued with a view to the regulation of administrative business in the Army Department. [p. 645, col. 2.]

Kaikhusru Aderji v. *Secretary of State for India*, 12 Ind. Cas. 117; 36 B. 1 ; 15 C. W. N. 909 ; 10 M. L. T. 97 ; (1911) 2 M.W N. 28 ; 14 C.L.J. 268 ; 13 Bom. L. R. 788 ; 8 A. L. J 1219 ; 21 M. L. J. 1100 ; 38 I. A. 204, (P.C), distinguished

The condition laid down in para. 35 (c) of Appendix (IV) of Volume II of the Army Regulations cannot, therefore, operate as *per se* to invalidate a transfer which is good under the law. [p. 646, col 1.]

A person, however, who has taken a grant of Cantonment land or accepted a transfer of a house in a Cantonment subject to the limitation imposed by this condition is bound by the condition. [p 646, col. 2.]

A person who holds land merely upon Cantonment tenure has no status other than that of a licensee. [p. 647. col. 1.]

Kaikhusru Aderji v. *Secretary of State for India*, 12 Ind. Cas. 117 ; 36 B. 1 ; 15 C. W. N. 909 ; 10 M.L.T. 97 ; (1911) 2 M. W. N. 28 ; 14 C. L. J. 268 ; 13 Bom. L. R. 788 ; 8 A. L. J. 1219 ; 21 M. L. J. 1100 ; 38 I. A. 204, (P. C.), relied upon.

Appeal against the decision of the Subordinate Judge, Meerut, dated the 27th November 1920.

Mr. *O'Conor* and Dr. *K. N. Katju*, for the Appellants.

Babu *L. M. Banerji*, for the Respondent.

JUDGMENT.

Lindsay, J.—This appeal has arisen out of a suit filed by the Secretary of State for India in Council in the Court of the Subordinate Judge of Meerut for the purpose of obtaining a declaration that a deed of sale executed by the first defendant, Raghubar Dayal, in favour of the second defendant, Mr. Thomas Singlehurst, on the 28th July 1919 and registered on the 9th August 1919 was null and void and ineffectual on the ground that the previous consent of the Military authorities had not been obtained, and that the transfer was detrimental to the interests of the Military officers in the Meerut Cantonment.

The reason for the suit is indicated in para. 6 of the plaint.

Under section 11 (c) of the Cantonments (House Accommodation) Act of 1902 (Act II of 1902) which was in force at the time the suit was brought, no notice under section 6 of the Act can issue in respect of a house in Cantonment occupied by the owner ; in other words, where the owner of such a house is in actual occupation he cannot be required, by notice under section 6, to let the house to a Military officer. The declaration sought for in the plaint was, therefore, being asked for in order

to have it established that the Military authorities were not under any legal obligation to treat the second defendant, Singlehurst, as the owner of the house conveyed by the deed in question for the purposes of the Act just referred to.

The house is described as Bungalow No. 42 Bedford Row, in the Meerut Cantonment.

It is not disputed in this case that the land upon which this bungalow stands is Cantonment land and, therefore, the property of Government. Nor is it disputed that at the time when this conveyance was executed the vendor, Raghuber Dayal, was entitled to be treated as the owner of the house.

The case for the plaintiff was that the relations between him and the defendant, Raghubar Dayal, were governed by certain rules set forth in Appendix IV, Volume II of Army Regulations, India, para. 35.

The rules in question purport to regulate the conditions upon which land in Cantonments was granted prior to the introduction of the Cantonment Code in the year 1899. It is declared that the conditions are to be subscribed to by every grantee of Cantonment land as well as by every person to whom the grant may be subsequently transferred. The particular condition with which we are here concerned is laid down in the following terms :—

> " If the ground has been built upon, the buildings are not to be disposed of to any person who does not belong to the Army until the consent of the Officer Commanding the Station has been previously obtained under his hand."

It is upon this condition that the plaintiff rests his case. No previous sanction to the transfer now in question having been obtained from the authority mentioned in the condition, it is claimed that the plaintiff (and under him the Military authorities) has the right to ignore the transfer.

The first and second defendants resisted the suit on the same grounds. It was denied that the house had ever been sold to the defendants or their predecessors subject to the condition just mentioned, and it was claimed in substance that the house was held and had been held free of any of the conditions imposed by the Army Regulations cited in the plaint.

It was pleaded that these Regulations had not the force of law and could not be resorted to in order to affect the right of transfer as laid down in the Transfer of Property Act. It was also pleaded that there was no cause of action for the suit ; that the plaintiff was not entitled to maintain a suit for declaration; and, in any case, that the declaration should not be granted on the ground that the Military authorites in withholding sanction had acted in an unjust, illegal and arbitrary manner.

The Subordinate Judge has found in favour of the plaintiff. He was of opinion that the suit was maintainable ; that the plaintiff had a cause of action ; that the relations of the parties were governed by the Army Regulations quoted in the plaint ; that the first defendant was bound by the condition requiring previous consent to the transfer, and that such consent not having been obtained the plaintiff was not obliged to recognize the transfer and to treat the defendant, Singlehurst, as the owner of the house for the purposes of the Cantonments (House Accommodation) Act, 1902. In the result, the Court below gave the plaintiff a decree declaring that the sale-deed in dispute was not binding and is ineffectual as against the Military authorities of the Cantonment.

The memorandum of appeal submitted to this Court embodies the various pleas which were raised by way of defence in the Court below. The purely technical pleas have not been strongly pressed before us nor, indeed, could they have been.

It being admitted that the land on which the house in dispute has been erected is the property of the plaintiff it could scarcely be contended that the plaintiff has not such an interest in the property in dispute as would entitle him to maintain a suit for declaration under section 42 of the Specific Relief Act.

And, clearly, if the relations between the parties are governed by the Army Regulations the plaintiff had a cause of action for it is plain that the transfer to the second defendant was made in spite of an express refusal of the Military authorities to accord sanction to the sale. Mr. O'Conor has argued the case on the merits and has contended that the Military authorities have no right to withhold sanction ; that the Regulations upon which the plaintiff relies have not the force of law and cannot interfere with the right to transfer the house ; that the grant of the land was not made subject to the

conditions contained in these Regulations and that the want of sanction cannot invalidate the sale or justify the plaintiff in ignoring it so as to deprive the purchaser, Singlehurst, of the protection afforded by section 11, clause (c) of the Cantonments (House Accommodation) Act, 1902.

In the course of the arguments we have been referred to the history of the site of the bungalow in dispute and it will be as well here to set out the relevant facts in this connection. There was produced in the Court below a set of the registers relating to the transfer of houses in the Meerut Cantonment and these books have been inspected by us during the hearing of the appeal.

The earliest entry we can find is contained in a register which, so far as we can ascertain, must have been prepared for the first time soon after the year 1833.

On the 16th Sepetember 1833, a General Order was issued by the Commander-in-Chief directing that a register should be kept in the office of the principal Staff officer in certain Cantonments, including Meerut, for the purpose of recording all transfers of houses, bungalows or gardens in Cantonments. It was ordered that all proprietors of houses, etc., should forward to the Staff Officer concerned a memorandum stating when they purchased or become proprietors of the houses, from whom they obtained them and the dimensions of their different compounds. It was further directed that all future transfers of houses should be entered in the register. (See the compilation of orders printed in the *Gazette of India* of the 5th November 1898, Part V, page 371).

There can be little doubt that the first volume of the registers produced before us must have been prepared in accordance with these instructions. We find, then, that the first entry relating to the site of the house now in question shows that a house on this plot was in the occupation of a gentleman named McGarison (?) who was a Civil Surgeon.

On the 18th December 1844 we find it stated that the house on this site was transferred by one Charles Madden, Civil Surgeon, to Major Matthew Smith of H. M.'s 9th Foot.

On the 29th July 1852 this officer transferred the house to Lt.-General Sir Joseph Thackwell, G. C. B.

From this date till the 7th February 1874 the house seems to have remained the property of the Thackwell family.

On this latter date, according to an entry in another volume of the register, the house, which was then in ruins was sold by the Cantonment Magistrate at public auction and was purchased by one E C. Roberts, a person who did not belong to the Army.

Roberts, on the 20th November 1895, sold the house to a Mrs. Steventon who, on the 2nd July 1901, made a gift of it in favour of a minor named D. M. Bower.

On the 21st March 1912, G. T. Bower, the certificated guardian of the minor owner, sold the house to Raghubar Dayal, the first defendant in the present suit, and for the purposes of this case it is important to notice what took place on this occasion.

The Cantonment Magistrate having been informed of this proposed transfer wrote both to the guardian and to Raghubar Dayal pointing out that, in accordance with Army Regulations, bungalows in Cantonments could not be sold without first obtaining the sanction of the Officer Commanding the Station. Both parties were further informed that the land being the property of Government could not be sold and that no sanction would be given to the transfer unless a declaration was made in writing that the land was not being sold and that all that was being transferred was the bungalow together with the out-houses. (See the correspondence at p. 34 of the printed record).

Bower, the guardian, replied to the Cantonment Magistrate by letter Ex. 4, dated the 29th March 1912, that he "noted" that the bungalow could not be sold without the sanction of the Officer Commanding. He further stated that both he and the purchaser (Raghubar Dayal) were aware that the land was the property of Government and could not be sold. (See page 35 of the printed record.)

After this correspondence the Cantonment Magistrate obtained the sanction of the Officer Commanding at Meerut and this fact was notified to Bower by letter (Ex. 6) dated the 23rd April 1912.

It is clearly established, therefore, that when Raghubar Dayal acquired this house in the year 1912 he was made aware of the fact that the Military authorities were applying the rules laid down in the Army Regulations

nd were insisting that the conditions contain-
d in the Regulations governed the transfer of
ne property and in the circumstances it did
ot lie in the mouth of Raghubar Dayal to
lead, as he did plead in para. 12 of his written
atement, that "the bungalow in dispute was
ever sold to any predecessor of the defendants
r to himself, subject to the condition stated in
lause (*c*) of rule 35, Army Regulations India
'ol. II."

That was without doubt a false plea. Raghu-
ar Dayal was well aware that the sale to him
ad been made subject to the condition in
lause (*c*).

That falsity of this statement is further
emonstrated by the fact that on the 29th July
919 when he was arranging to sell this
ouse to Singlehurst he made an application
o the Contonment Magistrate asking him to
btain the sanction of the Officer Cammand-
ng the Station to the sale of the house and
raying that the sale should be registered.
Ie quoted the Army Regulations in this appli-
ation and obviously knew all about them
see p. 45 of the printed record). He admits
his knowledge in a later letter sent by him
o the Cantonment Magistrate on the 12th
ugust 1919.

We may further note that in another letter,
rinted at pages 51 *et seq* of the record,
Raghubar Dayal described himself to the Con-
onment Magistrate as a practising Barrister
f nearly twenty years standing with consi-
erable knowledge of Cantonment Law.

Whatever be the legal consequences of the
notice given to Raghubar Dayal when he was
urchasing in the year 1912, it is clear on all
ands that he knew that he was taking subject
o the condition that the exercise of the right
o transfer the house he was buying could
nly be made with the previous sanction of
he Officer Commanding the Station.

With regard to the plea that these Army
Regulations relied upon by the plaintiff have
no statutory authority and have not the
orce of law, we think it is well-founded, and
we are unable to argee with the Subordinate
Judge who took the contrary view. He refers
o the Bombay Regulations which were cited
before their Lordships of the Privy Council in
the well-known Poona case reported in *Khiakhusru Aderji* v. *Secretary of State* (1) and seems to have thought that the Army Regulations with which we are dealing in this case stand on the same footing But that is not so. The Bombay Regulations in question were statutory enactments made under the powers reserved to the Governor-in-Council prior to the introduction of the Government of India Act, 1833.

The Army Regulations with which we are here concerned cannot, so far as we can ascertain, be traced to any statutory origin.

The various rules and orders to which the collective name of Army Regulations, India, was subsequently given were all collated and set out in an Appendix to the Cantonments (House Accommodation) Bill which was introduced in the Council of the Governor-General in India for the purpose of making Laws and Regulations on the 4th November 1898.

The Appendix is to be found in the *Gazette of India* of the 5th November, 1898 at pp. 366, *et seq.*

These orders which issued from time to time between the years 1789 and 1887 are all set out here and are described in various ways, *e. g.*, General Orders, Extracts from Proceedings of the Governor-General-in-Council, General Orders by the Commander-in-Chief, Resolutions of the Military Board, etc. They cannot, in our opinion, be treated as rules having the force of law: they appear rather to be departmental rules issued with a view to the regulation of administrative business in the Army Department.

The particular rules which we have to consider in this case, *i. e*, the rules regulating the occupation of land and the disposal of premises and buildings were first promulgated by a General Order of the Governor-General in Council, No. 179, dated the 12th September 1836 and these rules were re-published from time to time with amendments and variations till they assumed their present shape in Army Regulations, India, 1887, section 17 (see page 394' of the *Gazette of India*, Part V of the 5th November 1898.)

The General Order of 1836 imposed practically the same restrictions upon the transfer of

(1) 12 Ind. Cas. 117; 36 B. 1; 15 C. W. N 909; 10 M. L. T. 97; (1911) 2 M. W. N. 28; 14 C. L. J. 268; 18 Bom. L. R. 718; 8 A. L. J. 1219; 21 M. L. J. 1100, 38 I. A. 204 (P. C.).

houses in Cantonments as those which are set up by the plaintiff in the present case. It was expressly laid down that where Cantonment land had been built upon, the buildings could not be disposed of to any person not belonging to the Army until the consent of the Officer Commanding the Station had been previously obtained under his hand.

Now, while it might be conceded that this rule, having no force as law could not operate as *per se* to invalidate a transfer which is good under the ordinary law, it may, nevertheless, be that a person who has taken a grant of Cantonment land subject to this rule may be bound by it. It is true that in the present case we have no evidence of the terms in which the grants of the land upon which the bungalow in dispute now stands was first made. No document of grant is forthcoming-nor indeed do we know when the grant was made. There is, however, little doubt that a house had been erected on the land by the year 1833 and before the promulgation of the General Order of 1836.

Up till the year 1874 when the house was transferred to a Civilian named Roberts, the house and the site had remained in occupation of persons who actually belonged or were deemed to belong to the Army.

Since the date of the transfer to Roberts the house has changed hands several times, the transferee in each instance being a person not belonging to the Army, and it is the fact that each of these transfers, down to the transfer in favour of Raghubar Dayal in 1912, has been recorded in the register of transfers maintained by the Cantonment Magistrate. We cannot imagine that any of these transfers could have been made without the previous sanction of the Officer Commanding the Station. It must be presumed that the Cantonment Magistrate in each case acted in accordance with the Army Regulations which were certainly binding upon him as a Military Officer—and we have direct evidence in the case of the transfer to Raghubar Dayal that the previous sanction of the Officer Commanding the Station was sought and obtained before the transfer was registered. We have already pointed out that the conditions governing the transfer of the house were brought to Raghubar Dayal's notice and accepted by him. We have referred, moreover, to the fact that Raghubar Dayal sought previous sanction when he was about to transfer to the defendant Singlehurst.

While there is, therefore, no available evidence to show what conditions were attached to the grant of the site of the house when it was first built, there is in our opinion ample evidence to show that Raghubar Dayal took the house in 1912 subject to the limitation imposed by the rule upon the right of transfer —and we hold that, in the circumstances, he is bound by the condition.

In the Poona case referred to above *Kaikhusru Aderji* v. *Secretary of State for India* (1) it was held that the appellants and their predecessors-in-title held merely upon Cantonment Tenure and had no status therefore other than that of licensees. That, in our opinion, is the status of Raghubar Dayal and of his successors-in-interest since his death. It is not claimed here, as it was in the Poona case, that the land is not the property of Government. On the contrary, it is admitted freely that the land does belong to the Government. Raghubar Dayal and his predecessors held no lease, it is not pretended that they did, and, that being so, they could not be more than licensees, and, therefore, bound by the conditions of the license. Each transfer as it was made and sanctioned amounted to nothing more than the transfer of a license. That was the view taken by Russell, J., in the judgment of the Bombay High Court, and we understand that view to have been accepted by their Lordships of the Privy Council.

At page 9 of the report, dealing with the meaning of the word "sanctioned" endorsed upon the document of transfer in favour of the predecessor-in-title of the appellants, he observed as follows :—

"What is the meaning of the word 'sanctioned' in Ex. 71 ? . . . . The only meaning I have been able to attribute to that word upon Ex. 71 is that, in accordance with the Rules and Regulations then prevailing upon the subject, the Brigadier-General permitted and ratified the surrender by Beyts, and the admittance of Dorabji Pastonji. I cannot believe that it was intended to refer merely to the transfer of one name in place of another in the register, for otherwise the register would be a purely useless and unnecessary document. By the use of the word 'sanctioned' I take it what the Brigadier General meant was that, inasmuch as Mr Beyts had surrendered all his rights to this

Cantonment property the Brigadier-General was willing to substitute Dorabji Pastonji for him under the then prevailing orders and regulations under which, as we know, it was entirely *ultra vires* for the Brigadier-General to allow or to connive at allowing the vendee of those rights to acquire any proprietary rights whatever in the land itself."

Adopting the view laid down in this passage of the judgment, we hold that each transfer in the present case made with the previous assent of the proper Military authority amounted merely to the admission of a new licensee upon the conditions prevailing at the time with respect to the transfer of houses in the Meerut Cantonment.

Raghubar Dayal, therefore, came in as a licensee in 1912 and took the premises in dispute subject to the condition that he had no right to transfer them without the previous sanction of the Officer Commanding the Station.

The transfer now under consideration having been made without such sanction and in violation of the condition the plaintiff is not bound to recognize it.

We are of opinion, therefore, that the decision of the Subordinate Judge is correct and should be affirmed, and we dismiss this appeal accordingly with costs including in this Court fees on the higher scale.

Sulaiman, J.:—The plaintiff's case as set forth in the plaint was that all the land in Meerut Cantonment was the property of Government and was acquired between the years 1811 and 1815, that under certain Army Regulations 'if the ground has been built upon, the buildings are not to be disposed of to any person who does not belong to the Army, until the consent of the Officer Commanding the Station has been previously obtained', and that the defendant No. 1 by a deed dated the 28th of July 1919 sold the bungalow in dispute to defendant No. 2 without having obtained any such consent. The plaintiff, therefore, prayed that the sale-deed might be declared null and void and ineffectual inasmuch as it was executed without obtaining the previous consent of the Military authorities, and was detrimental to the interest of the Military Officers.

The defendants did not deny that the site belonged to the Government. They did not specifically set up any lease or specific grant in their favour but took their stand on the broad ground that they had a transferable interest in the house.

The learned Subordinate Judge has given the plaintiff a declaration that the sale-deed of the house is not binding on, and is ineffective as against, the Military authorities.

There is no direct evidence to show under what conditions the land was originally occupied by the predecessor-in-title of the defendants. Nor is there any evidence to show for how long before 1842 this house had existed. There is no lease or written grant that can be traced. The previous history of the devolution of this house has been fully set forth in the judgment of my learned colleague. All that is known is that this land lies within the Cantonment and has been occupied by a house which has been transferred from time to time with the consent of the Military authorities.

I agree that the Army Regulations relied upon by the plaintiff have not the force of law by themselves to render the transfer altogether invalid. They, however, have a special bearing on the case which I propose to consider.

The Regulations of 1807 required that no bungalow or quarters within the Cantonment was to be sold to or occupied by any one not belonging to the Army, and that if any individual other than an Army Officer purchased it he must remove the materials. But the house as such was in no case to be made over to a Civilian. Under the Regulations of 1833 a register was to be kept in which transfers of such houses were to be duly entered. The General Order of the Governor-General in Council No. 179, dated the 12th of September 1836, is particularly important inasmuch as the Regulations thereby brought into force for the first time authorised transfer to a non-military officer under certain restrictions. A right of resumption subject to a payment of compensation was reserved, the ground itself could not be sold, but the house might be transferred without restriction by a Military or Medical officer to another such Military or Medical officer, and if the ground had been built upon the house was not to be disposed of to any one not belonging to the Military Department without the sanction of the Commanding Officer, and in case of sales of houses over Rs. 5,000

in value the sales had to be subject to the sanction by the Government of India.

There can be no doubt that the Regulations of 1836 were in full force till long after 1842 when the existence of this house is distinctly established. As the house is situated within the Cantonment and as there were these old Regulations in force under which originally a house could not be sold to a Civilian at all and later on it could be sold only with the sanction of the Commanding Officer, it is fair to presume, in the absence of any direct evidence as to the actual terms on which the site was originally occupied, that the permission was subject to this reservation. It is unthinkable that Military Officers who, at any rate, were themselves bound by those Regulations would have made a grant of a site in defiance of the Regulations in force. The defendants are not setting up lessee's rights in the land. They can at best be mere licensees whose predecessors were allowed to occupy the land by building a house on it subject to certain restrictions. My learned brother has shown how the successive transfers of this house prior to the transfer in question were duly entered in the register of houses which fact in a way implies the sanction of the military authorities.

Under section 56 of the Indian Easements Act a license as such cannot be transferred. It is clear, therefore, that the legal effect of the past sanctions was simply to continue the license in favour of the transferees. It was, so to speak, a fresh license with the coming in of each new transferee. It would follow, therefore, that defendant No. 2 cannot claim the benefit of that license unless the plaintiff agrees to renew the license in his favour, that is to say, the defendant No. 2 can have no right to insist on retaining the house as a place of residence and in that way occupy the site unless he obtains the consent of the plaintiff.

On the other hand, it has to be noted that even under the Regulations of 1807 if a house situated in the Cantonment was sold to an individual other than a Military officer, the transferee was entitled to remove the materials of the house

The Regulations of 1836 in no way affected the rights of the occupiers of houses to transfer the materials. Nor is there anything in the previous history of this house which would suggest that the proprietary interest in the materials of the house did not vest in the persons who had occupied it from time to time, or were not transferable.

The defendant No. 1, who was indisputably the owner of the house and was occupying the site with the consent of the plaintiff, has by a registered sale-deed transferred the house as it stands with all the materials *et cetera*. He has purported to transfer the right of residence plus the proprietary interest in the materials of the house. So far as the materials go, they have under the registered deed been sold absolutely to the defendant No. 2. And I know of no ground under which it can be said that the sale of those materials is null and void or ineffectual. Neither the plaintiff nor the Military authorities can refuse to recognise that ownership in the materials has passed to the defendant No. 2. But I have already remarked that the right of residence cannot pass to the defendant No. 2 unless the plaintiff agrees to it.

The decree passed by the Court below is not very happily worded as it declares that the sale-deed of the house is not binding and is ineffective as against the Military authorities. If I had thought that by this the learned Subordinate Judge meant that the military authorities could ignore the sale-deed absolutely and treat the defendant No 1 as still the owner of the house then I would not have wholly agreed with him. I, however, think that all that he meant was that the defendant No. 2 had no absolute right to occupy the site without the consent of the Military authorities and on such terms as they choose to impose on him.

I also would, therefore, uphold the decree of the Court below and dismiss the appeal with costs.

By the Court :—The appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

BHAGWAN DAS *v.* ALLAN KHAN

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1451 OF 1922.

February 27, 1924.

Present:—Mr. Justice Daniels.

B. BHAGWAN DAS—DEFENDANT—APPELLANT

versus

ALLAN KHAN—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation—Concurrence of members in charge of property—Necessity—Presumption.

The concurrence of all the adult members of a joint Hindu family in an alienation raises a presumption of legal necessity, and the presumption would apply equally where one of the members is working away from home and an alienation is effected by all the remaining members who are in charge of the property and is challenged by the former.

Balvant Santaram v. *Babaji*, 8 B. 602 ; 9 Ind. Jur. 227 ; 4 Ind. Dec. (N. S.) 778, relied on.

Second appeal against the decree of the District Judge of Badaun, dated the 19th of April, 1922.

Dr. *M. L. Agarwala* and *S. B. Johari*, for the Appellant.

Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for sale on mortgage. The mortgage was executed in 1909 by Dalpat Rai and his younger son Shadi Lal. The suit was contested by Dalpat Rai's elder son, the appellant Bhagwan Das, on the ground that it was executed without legal necessity. It has now been found that the property was joint family property. The plaintiff produced evidence which the learned Munsif accepted as proving the existence of legal necessity. The learned District Judge was unable to rely on this evidence because in his opinion it proved nothing more than a representation by the mortgagors of the existence of the necessity. This does not appear to be strictly accurate. The evidence of one of the witnesses as quoted by the learned Munsif shows the existence of actual necessity at the time. This witness who was an Honorary Magistrate gave evidence that the mortgagors at the time of execution of the deed were in straitened circumstances and in need of money for their subsistence and in order to carry on their cultivation.

The learned District Judge goes on to hold, accepting the finding of the learned Munsif on this point, that the appellant was working away from home and that his father and brother were left at home and were in charge of the family affairs and property. It appears that the appellant was employed on the Railway and had been away at Allahabad for a long period leaving the family property in charge of his father and younger brother. The learned Judge considered that this state of affairs was sufficient to shift the burden of proof on to the appellant. In my opinion, this view is not inconsistent with the law on the subject. It has been held by the Privy Council that no invariable rule can be laid down but that the onus is liable to shift on proof of particular circumstances. Looking at the matter from a common sense point of view, it is highly unlikely that the father and the younger brother who were in charge of the property would combine, in the absence of the plaintiff, to alienate it without any necessity in order to defraud him. The concurrence of all the adult members of a family in a transaction has been more than once held sufficient, *e.g.*, *Balvant Santaram* v. *Babaji* (1), to raise a presumption of legal necessity and in the particular circumstances of this case the Court below was, in my opinion, justified in holding that the concurrence in the transaction of Shadi Lal who was of age and was the only son present at home at the time of the transaction has the same effect.

I accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 8 B. 602 ; 9 Ind. Jur. 227 ; 4 Ind. Dec. (N. S.) 778.

GULAM DASTGIR *v.* AHMED KHAN

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 196-B OF 1922.

February 29, 1924.

Present:—Mr. Kinkhede, A. J. C.

GULAM DASTGIR—DEFENDANT No. 2 —APPELLANT
versus
AHMED KHAN AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Hindu Law—Joint Family—Transferees from co-parceners, dispute between—Joint possession, decree for, whether can be passed.

In a case where the dispute is as between transferees from co-parceners a decree for partial partition or joint possession can be passed.

' *Amritrao* v. *Govind*, 21 Ind. Cas. 590; 9 N. L. R. 145; *Iburamsa Rowthan* v. *Thirumalai Muthuveera Thiruvenkatasami Naick*, 7 Ind. Cas. 559; 34 M. 269; (1910) M. W. N. 380; 8 M. L. T. 260; 20 M. L. J. 743, relied on.

Appeal against the decree of Additional District Judge, Akola, in Civil Appeal No. 397 of 1921, dated 15th November 1921.

Mr. *V. R. Pandit, B. B.*, for the Appellant.
Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—The principal points for determination of this case were:—

(1) By whom was the site in dispute acquired, whether by Gangai or Chahadu?

(2) If by Gangai, whether her three sons Chahadu, Narayan and Khandu succeeded to the property by inheritance in equal shares or whether it was co-parcenary property with a right of survivorship in their hands?

(3) Whether Chahadu acquired any title by adverse possession?

(4) Whether defendant No. 2, who is a transferee from the defendant No. 1, has acquired any title by estoppel, or is he at any rate entitled to rely upon the provisions of sections 41 and 51 of the Transfer of Property Act?

The plaintiff's title was based upon a purchase from Mahadu, the son of Narayan, under a sale-deed, dated 16th December 1919, Exhibit P-1, while the defendant No. 2 bases his title on two documents executed on 14th November 1917 and 7th September 1918. He has constructed a big house after the purchase. The Courts below have both held that the site in question was acquired by Gangai and that it devolved on the three sons in equal share, and that Chahadu was not proved to be in adverse possession for over 12 years before he sold, and that there was no estoppel and that sections 41 and 51 of the Transfer of Property Act had no application to the facts of the case. The lower Appellate Court differing from the first Court held that plaintiff's vendor Mahadu could transfer only 1|9th share and that plaintiff was entitled to mere declaration and not to joint possession.

I have been taken through the plaint and the pleadings and have perused whatever evidence both oral and documentary the parties desired me to peruse. I am satisfied that though there are some errors still the findings arrived at are in the main correct and as they are findings of fact I am precluded from interfering with them in second appeal as there is evidence proper for consideration which justifies them. No doubt, the Court of appeal has wavered in arriving at his findings on some of the points, but I do not think the appellant-defendant No. 2 is prejudiced by this, as on the two main points (i) as to Gangai having acquired the site in dispute, and (ii) as to the extent of each son's share his decision is in accord with the findings of the first Court. In face of Chahadu's own admission in the witness-box and of the other evidence on record that the brothers lived on the site in dispute, I think the lower Courts were right in holding that there could be no title by prescription or estoppel, or under sections 41 and 81 of the Transfer of Property Act.

The plaintiff neither appealed nor filed cross-objection against the decision of the first Court, and I must take it that the finding that plaintiff's vendor's father Narayan took 1|3rd was unchallenged before the Additional District Judge. The question whether the share was enlarged or not owing to jointness or separation between the sons at Gangai's death was, therefore, unnecessary to be decided at the appellate stage. The defendant No. 2's appeal, therefore, fails and is dismissed with costs.

The only point that remains to be considered is whether plaintiff should not have been given a decree for joint possession to the extent of 1/3rd instead of a mere declaration that he is entitled to 1|9th share. I think the lower Appellate Court was wrong in disturbing the decree of the first Court awarding joint possession to plaintiff to the extent of 1|3rd shera. That Mahadu purported to sell the share of himself and his two brothers to plaintiff is clear. The defendant No. 2 who is not a transferee from the minors cannot question the plaintiff's right to joint possession to the extent of 1|3rd share. In a case where the dispute is as between transferees from co-parceners, even a partial partition could be decreed : *Amritrao* v. *Govind* (1), *Iburamsa Rowthan* v. *Thirumalai Muthuveera Theruvenkatasami Naick* (2). Much more could a decree for joint possession be given. On plaintiff's cross-objection the decree of lower Appellate Court will be set aside and that of the first Court restored.

The respondent will get costs of his cross-objection from the appellant. I do not like to disturb the equitable order passed by the lower Appellate Court as regards costs of the lower Courts.

G. R. D. *Appeal dismissed.*

(1) 21 Ind. Cas. 590 ; 9 N. L. R. 145.
(2) 7 Ind. Cas. 559 ; 34 M. 269 ; (1910) M. W. N. 980 ; 8 M. L. T. 269 ; 20 M. L. J. 748.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1517 OF 1922.

February 26, 1924.

Present :—Mr. Justice Daniels.

BHAGWANA—DEFENDANT—APPELLANT
versus
Lala SHIB SAMETRI PRASAD—
PLAINTIFF—RESPONDENT.

Landlord and tenant—Notice to quit—Statement that mesne profits would be claimed in case of delay, whether invalidates notice.

A notice of ejectment informed the tenant that he was required to vacate the premises by a certain date and that, if he failed to do so, a suit for his eviction would be filed and rent by way of mesne profits would be claimed ;

***Held*, that the last clause meant that, if there were any delay in the tenant vacating the premises in accordance with the notice, he would be liable for damages for his continued occupation, and that the notice was not invalidated by the addition of this clause.**

Bradley v. *Atkinson*, 7 A. 899 ; 5 A. W. N. (1885) 288 ; 4 Ind. Dec. (N. S.) 990, distinguished.

Second appeal against the decree of the Subordinate Judge of Meerut, dated the 18th November, 1922.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

Messrs. *Panna Lal* and *S.B. Johari*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for ejectment from two shops belonging to the temple of Savitri Ji of which the plaintiff is the manager. Most of the questions in dispute in the Courts below are now concluded by findings of fact. This appeal has been urged before me on three grounds.

1. That the notice to quit given by the plaintiff was invalid on the ground that it did not terminate on the expiry of a month of the tenancy as required by section 106 of the Transfer of Property Act.

2. That the notice was invalid under the Full Bench ruling in *Bradley* v. *Atkinson*, (1) because it gave the defendant an option to pay enhanced rent.

3. That the notice was invalid because it was not signed by the plaintiff but by his general attorney and because the heading of the notice does not state that the plaintiff was giving notice in his capacity of manager.

There is no force in any of these pleas. The first point was not raised anywhere in either of the two Courts below and the appellant is not entitled to raise it now, all the more as there is no evidence on the record to show that the notice did not expire with a month of the tenancy. The appellant's plea in fact is based on the fact that in the notice it is stated that the rent was payable on the 1st of each month. It seems clear on a perusal of the notice that the plaintiff in issuing the

notice understood that to be the date on which the tenancy ended. The question on what day of the month the tenancy ended is a question of fact as to which no evidence was led and there was no controversy in the Courts below. I accordingly reject this plea.

As to the second point, a perusal of the notice shows that it is by no means on all fours with the notice which was considered in the Full Bench ruling in *Bradley* v. *Atkinson* (1). In that case the person giving the notice said that if the premises were not vacated he would sue for ejectment and for recovery of rent at an enhanced rate. In this case the notice definitely informed the defendant that he is required to quit the premises on the 1st of August 1921 and that if not a suit for his eviction will be filed and rent by way of mesne profits (wasilat) will be claimed. This merely means that if there is any delay in the defendant quitting the premises in accordance with the notice he will be liable for damages for his continued occupation. It in no way invalidates the notice and indeed this point, like the first, was not raised in the Court below.

As to the third point the fact that the shops belonged to the temple of Savitri Ji is clearly stated in the body of the notice and the notice is not invalid because it is signed by the authorised agent of the plaintiff instead of by the plaintiff himself.

There is no force in the appeal and I accordingly dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 7 A. 899, 5 A. W. N. 1885, 288 ; 4 Ind. Dec. (N.S.) 990.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1433 OF 1922.

February 25, 1924.

Present :—Mr. Justice Daniels.

LAKHAN SINGH—PLAINTIFF—APPELLANT

versus

LAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 102—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Arts. 6, 11—Suit for money based on hypothecation bond, nature of—Amount claimed under Rs. 500—Appeal, second, whether lie.

Where a plaintiff asks for a simple money-decree on the basis of a hypothecation-bond and expressly abandons all claims against the mortgaged property, the suit is a pure money suit and does not fall under Article 6 or Article 11 of Schedule II to the Provincial Small Cause Courts Act, and where the amount claimed is less than Rs. 500, a second appeal will be barred under section 102 of the Civil Procedure Code.

Sukhdeo Prasad v. *Lachman Singh*, 24 A. 456 ; A. W. N. (1902) 114, distinguished.

Second appeal against the decree of the District Judge of Badaun, dated the 21st of June, 1922.

Mr. *S. A. Haider*, for the Appellant.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT :—In this case a preliminary objection is taken that no second appeal lies. The amount in dispute in the case was Rs. 252-10-0 only and the plaintiff asked for nothing more than a simple money-decree. It is true that the bond on which his claim was based was a hypothecation-bond but he expressly abandoned all claim against the mortgaged property and framed his suit purely as a money suit. Under these circumstances, section 102, Civil Procedure Code, applies and no second appeal lies. The appellant pleads that the suit should be treated as falling under Article 6 or 11 of the Second Schedule to the Provincial Small Cause Courts Act. Neither of these Articles is applicable. Article 6 applies to suits for sale or foreclosure and to suits for redemption but to no other kinds of suit. Article 11 applies only to suits for the enforcement of a right to or interest in immoveable property. No such right is sought to be enforced in this case The ruling in *Sukhdeo Prasad* v. *Lachman Singh* (1) cited by the appellant is inapplicable. There the suit was framed as an ordinary mortgage-suit in which sale of the property was asked for. It was only at a later stage of the case that the plaintiff withdrew his relief for sale of the property and expressed his willingness to be content with a simple money-decree. I give effect to the preliminary objection and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 24 A. 456 ; A. W. N. (1902) 114.

QAMAR HUSAIN *v.* ABAS ALI

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 131 OF 1921.

March 11, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

QAMAR HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABAS ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897) s 7, scope of—Partition, private—Large area left undivided—Collectorate partition, whether barred.

Section 7 of the Bengal Estates Partition Act contemplates a complete partition of the lands of the estate by private arrangement, that is to say, the division by private arrangement must have been substantially of the whole estate.

Shah Tajammul Ali v. *Mussod Ali*, 5 Ind. Cas. 776 ; 11 C. L. J. 291 ; 14 C. W. N. 682, relied on.

Where a large area of land is left *ijmal* at a private partition, the private partition will not be a bar to a Collectorate partition.

Appeal from a decision of the Subordinate Judge, Saran, dated the 28th February 1921.

Mr. *S. C. Mitter*, for the Appellants.

Messrs. *L. N. Singh, Jodubans Sahay, Permeshwar Dayal* and *S. Ali Khan Harashur Prosad Sinha*, for the Respondents.

JUDGMENT.

Ross, J.—This appeal against a decree of the Subordinate Judge of Saran in a suit brought by the plaintiffs-appellants for a declaration that Mahal Bhawarajpur, Belahi and Mohsilpur, *Tauzi* No. 63 in the district of Saran had already been privately and regularly partitioned with the consent of all the proprietors and that the defendants had no right to get a fresh partition made, and that the dismissal of the plaintiffs' petition objecting to the making of a fresh partition by the Collectorate was illegal and that the *patti* formed by partition and allotted to the plaintiffs could not be partitioned afresh by the Collectorate.

The plaintiffs' case is that long ago *Tauzi* No. 63 was privately partitioned so far as culturable lands were concerned, and that 284 *bighas* of saltpetre lands, tank, river, etc., which were not capable of being partitioned, were left *Ijmal* ; the four *pattis* were formed *patti* Madar Baksh 4-annas, *patti* Mir Ali and Waris Ali 4-annas, *patti* Didar Baksh, Wazir Ali and others 2-annas and *patti* Teg Ali and Eyad Ali 4-annas making in all 14-annas of which it is said *Tauzi* No. 63 consisted, the other 2 annas of the *Mahal* being *Tauzi* No. 62. In 1832 the proprietors applied for a partition by the Collector and an *Amin* came and made a regular Survey of all the *pattis* and prepared a *khasra* which was accepted by all proprietors. But on account of some technical defect the partition case was dismissed in 1841 ; and the *Tauzi* was not separated, but the proprietors continued to be in possession of the lands in their respective *pattis* while the *Ijmal* lands remained joint. The two four-annas *pattis* Madar Baksh and Teg Ali and Eyad Ali subsequently became united in a single proprietor and there are now three *pattis* of 8-annas, 4-annas and 2-annas in the separate possession of their owners. It is said that in the Settlement proceedings of 1895 *khewats* and *khatians* were prepared *patti* by *patti*. The plaintiffs are the owners of the 2-annas *patti* which consists of 290 *bighas* 11 *kathas* and 11 *dhurs* of land. The defendants Nos. 1 to 6 and No. 9 applied to the Collector for fresh partition and the plaintiffs' objections under sections 7 and 77 of the Estates Partition Act (Act V of 1897) were rejected by the Revenue Officers.

The defendants denied that all the lands of *Tauzi* No. 63 were privately and regularly partitioned. It is said that the *Batwara* proceedings referred to in the plaint were not given effect to and remained incomplete. The Record of Rights shows that a good deal of *Abadi* and other lands from which income is derived are in joint possession of all the proprietors and that, therefore, the plaintiffs are not entitled to the benefits of sections 7 and 77 of the Estates Partition Act. It is also alleged that different proprietors have kept different lands in their occupation simply for convenience of cultivation. The learned Subordinate Judge found that in the *Batwara* of 1832 the *Shamilat* lands were 263 *bighas* 18 *kathas* and 16 *dhurs*, but that the areas given in the Cadastral Survey and Revisional Survey were different, and that it is not clear whether the

partial *pattibandi* of *Tauzi* No. 63 was in respect of lands or tenants. He held that section 7 of the Estates Partition Act was not a bar to the partition. He gave a modified decree to this extent that the parties are in separate possession of certain lands regarding which he makes a suggestion that this fact may be taken into consideration as far as possible in affecting partition.

The question for decision is, whether this interpretation of section 7 of the Estates Partition Act of 1897 is correct. That section lays down : " Where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate shall be made under this Act except

" (*a*) on the joint application of all the proprietors, or (*b*) in pursuance of a decree or order of a Civil Court."

The Revenue Authorities, within whose special jurisdiction the partition of the estates rests, have held the view that this section is no bar to a Collectorate partition. That opinion is entitled to all respect and the Civil Court will not interfere with the decision of the Revenue Authorities except on the clearest proof that that decision was wrong. It was held in *Shah Tajammul Ali* v. *Mussod Ali* (1) that section 7 contemplates a complete partition. Now, it is admitted that an attempt was made to have a complete partition between 1832 and 1841 which was not carried out. If there had been a complete private partition before that date it is difficult to see why, if all the proprietors joined in seeking a Collectorate partition, the proceedings should have been left incomplete. It is admitted in the present case that a large area of 284 *bighas* was left *Ijmal*. This area is practically as large as the 2-annas *patti* of the plaintiffs; and, in view of this outstanding *Ijmal* property, it cannot, I think, be said that there has been a complete partition of the lands of the estate by private arrangement. It may be that section 7 does not require that all the lands of the estate should have been divided, but at all events the division by private arrangement must have been substantially of the whole estate. In view of the comparatively large area that was left undivided, some of which is rent producing land, I do not think that it can be held that the Revenue Authorities were in error in holding that a Collectorate partition could be made.

I would, therefore, dismiss this appeal with costs.

Das, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 5 Ind. Cas. 776 ; 11 C. L. J. 291 ; 14 C. W. N. 682.

ALLAHABAD HIGH COURT.

FIRST APPEAL No. 350 OF 1921.

February 28, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BALDEO PRASAD AND OTHERS—DEFENDANTS
versus
Raja FATEH SINGH AND OTHERS—PLAINTIFFS.

Hindu Law—Widow, alienation by, for spiritual benefit of husband, validity of.

A Hindu widow can alienate any reasonable portion of her husband's property in which she has a life estate for pious or religious purposes, or for the spiritual benefit of her husband. She has a larger power to disposition for religious or charitable purposes, which are supposed to conduce to the spiritual welfare of her husband, than what she possesses for purely worldly purposes. [p. 655, col. 2.]

Khub Lal Singh v. *Ajodhya Misser*, 31 Ind. Cas. 433 ; 43 C. 574 ; 22 C. L. J. 345 ; *Lachhmi Kunwar* v. *Durga Kunwar*, 46 Ind. Cas. 566 ; 16 A. L. J. 646 ; 40 A. 619 ; *Govind Upadhya* v. *Lakhrani*, 68 Ind. Cas. 221 ; 19 A. L. J. 492 ; 43 A. 515, followed.

First appeal from the decree of the Subordinate Judge of Shahjahanpur, dated the 31st May 1921.

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

Messrs. *Gulzari Lal* and *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—The dispute in this appeal is confined to a 13 *biswas* and odd share in the

village Chalautha which was held by Mst. Chetni, the widow of Kanhai Lal, and the questions for consideration are whether she had made a valid *Suphal Sankalap* of the same in favour of Lachman Prasad, a priest of Gaya, so as to bind the members of the family, to which her husband belonged or his reversionary heirs.

Kanhai Lal had died in the lifetime of his father Shib Dayal. The allegation of the plaintiffs was that Shib Dayal and Kanhai Lal lived separately, that the property in dispute was the separate property of Kanhai Lal, and that on his death it devolved on Mst. Chetni as a Hindu widow. They denied that any gift had been made or could have been validly made by Mst. Chetni in favour of Lachman Prasad. Shib Dayal died in 1902, Mst. Chetni died in 1916. One of the plaintiffs, Ram Lal, claimed to be the son of one of the sisters of Kanhai Lal, and also claimed to have acquired by purchase the shares of the sons of the other sisters of Kanhai Lal. The other plaintiff, Raja Fateh Singh, claimed to have purchased a half share of the property in question from Ram Lal. There were two other plaintiffs, who claimed to have derived their title under a deed of gift made by Ram Lal and Raja Fateh Singh. The defendants are the transferees and successors-in-interest of Lachman Prasad. Their case was that Shib Dayal and Kanhai Lal lived jointly, that after the death of the latter the property in dispute was entered in the name of Mst. Chetni, his widow, who remained in possession as an adverse owner, and that she had a right to make a valid gift of the same for the spiritual benefit of her deceased husband. They denied that the plaintiff, Ram Lal, or the persons from whom he claimed to derive his title were the nearest reversionary heirs of Kanhai Lal.

The Court below found that Shib Dayal and Kanhai Lal lived separately, that the property in dispute was the self-acquired property of the latter, that on the death of Kanhai Lal Mst. Chetni inherited the same as a Hindu widow and that she could not have acquired an adverse title thereto. It further held that no gift was shown to have been made or could have been validly made by Mst. Chetni in favour of Lachman Prasad and that the plaintiffs, as the lawful successors-in-interest of her husband had a right to recover possession of the property in question.

The correctness of these findings is challenged here. There can be no doubt that Ram Lal and his vendors were the nearest reversionary heirs of Kanhai Lal. The evidence on the record satisfactorily establishes that Shib Dayal and Kanhai Lal lived separately and carried on a separate cloth business and that the property in dispute was the self-acquired property of the latter. In fact, on the death of Kanhai Lal,an application was made by Mst. Chetni, for a succession certificate to collect certain debts due to her deceased husband. Shib Dayal resisted that application on the ground that Kanhai Lal lived jointly with him; but the District Judge of Shahjahanpur who heard the application came to the conclusion that Shib Dayal and Kanhai Lal lived and carried on business separately, that each of them was assessed to income-tax, and that Mst. Chetni was entitled to collect the debts due to her husband. Shib Dayal took no steps thereafter to establish his title against Mst. Chetni by a suit and allowed Mst. Chetni to remain in separate possession of the disputed property from the time of the death of her husband. Indeed, her name was recorded in the place of her deceased husband in respect of the disputed property in the revenue papers and she was in receipt of the profits of the same on her account. She had only a life-interest in the said property; but she could alienate any reasonable portion of the same for pious or religious purposes or for the spiritual benefit of her husband.

As pointed out in *Khub Lal Singh* v. *Ajodhya Misser* (1) a Hindu widow has a larger power of disposition for religious or charitable purposes, which are supposed to conduce to the spiritual welfare of her husband, than what she possesses for purely worldly purposes. In *Lachhmi Kunwar* v. *Durga Kunwar* (2), a gift made by Hindu widow for the spiritual benefit of husband, after she had returned from a pilgrimage, was upheld, and in *Govind Upadhya* v. *Lakhrani* (3), a similar gift was made by a widow on her return from a pilgrimage to Gaya was treated as valid and

(1) 31 Ind. Cas. 488; 43 C. 574; 22 C. L. J. 345.
(2) 46 Ind. Cas. 566; 16 A. L. J. 646; 40 A. 619.
(3) 63 Ind. Cas. 221; 19 A. L. J. 499; 43 A. 515.

binding on the reversionary heirs of her husband.

The question therefore is whether such a gift was really made. The evidence produced on behalf on the defendants-appellants to prove that a gift had been made by Mst Chetni in favour of Lachhman Prasad, a priest of Gaya, has, in our opinion, been rejected by the learned Subordinate Judge on insufficient grounds. Raghubar Dayal states that he went with Shib Dayal and Mst. Chetni to Gaya about 35 or 36 years ago and that the gift was made in his presence by both of them in favour of Lachman Prasad. No deed of gift appears to have been written at the time. But there was a mutation of names effected in pursuance of an order of the 13th February 1885 in favour of Lachman Prasad. A copy of an extract from the mutation register has been filed in proof of that entry. There is no satisfactory explanation why this mutation of names was effected in favour of Lachman Prasad, if no gift had been made in his favour. The learned Counsel for the plaintiffs refers to the written statement of the defendants-appellants, wherein the gift aforesaid is stated to have been made after the death of Shib Dayal. Being vendees from the transferees of the original donee, it is possible that they may have been misinformed as to the actual date of the gift. The extract from the mutation register shows that the transfer must have been made some time before the 13th February 1385.

Shib Dayal was then alive. He never challenged the gift or the right of the donee or his transferees in his lifetime. Ram Lal states that there was a priest of Gaya named Lachhman Prasad who lived at one time in Pawayan. Lachhman Prasad transferred his rights in favour of Khaga Lal and Ram Lal, who resold the same to the defendants-appellants on the 24th December 1897. The gift aforesaid is, in our opinion, satisfactorily established and the plaintiffs have no right to recover possession from the donee or his transferees.

The evidence adduced by the plaintiffs goes to show that Kanhai Lal was possessed of considerable property. Sita Ram, one of the witnesses for the plaintiffs, states that Kanhai Lal had property worth Rs. 30,000, or Rs. 40,000. Ajudhya Prasad, another witness, states that he had property of the value of Rs. 50,000. Puttu Lal, another witness, estimates the value of the property of Kanhai Lal at Rs. 60,000 or Rs. 70 000 including groves and muafi land. Ram Lal, one of the plaintiffs himself, states that the landed property of Kanhai Lal yielded an income of Rs. 500 or Rs. 600 per year. The property comprised in the above gift is assessed at a revenue of Rs. 93-5-4. The plaintiff valued it at Rs. 3,000, but a property yielding approximately a profit of about Rs. 100 a year could not have been of that value in 1885. It is not clear what was the revenue assessed on that property at that time. In 1897 it was sold for Rs. 595 and that value bears a very small proportion to the total value of the property which Mst. Chetni had inherited from her husband.

The appeal must, therefore, be allowed and the claim with regard to the 13 *biswas* and odd share of the village Chilauta dismissed with costs here and hitherto to the defendants-appellants including fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 589 of 1922.

February 16, 1924.

Present :—Mr. Kinkhede, A. J. C.

GOPALA BAPU AND OTHERS—DEFENDANTS—APPELLANTS

versus

DOMA BAPU AND OTHERS—DEFENDANTS—RESPONDENTS.

Damages—Water collected on land—Overflow—Injury to neighbour's land—Land not capable of cultivation—Damages, whether can be awarded.

A person who for his own purposes brings on his land and collects and keeps there such a quantity of water as is likely to do mischief if it escapes, must keep it in at his peril, and if he does so, and does not succeed in confining it to his own property, he

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is answerable for all the damage which is the natural consequence of its escape, though the escape may not be due to any fault or negligence on his part [p. 658, col. 1.]

Rylands v. *Fletcher*, (1868) 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220, relied on.

There is, however, no logic in making a person liable in damages for causing an alleged injury to a thing which from its nature is incapable of sustaining such injury. For instance, a person cannot be held liable for causing damage to another by rendering his land unfit for cultivation by reason of submersion owing to the overflow of water from the former's land, where it is found that the submerged land was not capable of cultivation at all. [p. 658, col. 2.]

Against the decree of District Judge, Bhandara, in Civil Appeal No. 35 of 1922, dated 9th September 1922.

Mr. *C. B. Parakh*, for the Appellants.

Mr. *D. T. Mangalmoorti*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the present respondents for damages said to have been caused to them by reason of the loss of an alleged prospect of raising *dhan* and *kathan* crops in an area 11-55 acres appertaining to fields which are described with reference to their old Nos 256, 256|2, 258 to 261 and 274|2 and 275|1 of *mauza* Morgaon, owing to the defendants' wrongful act of submersion of the said land by the water of their tank in their adjoining village called Nilagondi. The damages claimed are in respect of the years 1917-18, 1918-19, 1919-20 and 1920-21, the suit being instituted on 16th February 1921.

Between these parties there has been a lot of previous litigation in which the plaintiffs' right to discharge the suplus water accumulating in their own tank into the defendants' adjoining tank on lower level has been affirmed and the defendants have been held to be under an obligation to maintain the level or height of the column of water in their own tank to such extent and in such manner as will keep the plaintiffs' aforesaid land free from submersion. This litigation commenced in 1911 and went up to three Courts, and was also followed by a second one in 1917 which also had come up to this Court. The rights and liabilities as declared by the decree passed in the litigation of 1911 must, therefore, be considered to have been decided once for all as between the parties, and neither party can resile from the position so declared by the decree and reagitate the question so far as the question of the rights and liabilities of the parties are concerned. The only question, therefore, open for consideration is, whether in the years in suit the plaintiffs have succeeded in establishing that there was such an infringement of their rights as entitled them to demand compensation from the defendants for what is termed submersion of their lands by reason of the surplus water of the defendants' tank having been allowed to remain accumulated therein so as to trespass upon the plaintiffs' land beyond the particular limit fixed or defined by the previous decision between the parties.

The Court of first instance, in a careful judgment, dismissed the plaintiffs' suit holding that the defendants were not responsible for the submersion and that they could not be expected to check the overflow more than what they did. That Court had made a careful local inspection and had taken the help of a Commissioner for determining the area submerged. It was held that only 2-26 acres out of new Nos. 427, 423, 422|3 and 422|4 were under water and that field No. 422|2 and major portion of field No. 422|3 were unfit for cultivation being full of lime-stone and that plaintiff never made any attempt to cultivate this submerged land but wished to make the tank of the defendants a source of recurring income to themselves by claiming compensation from them. The District Judge has, however, reversed that judgment and passed a decree for Rs. 144 on account of the years 1918-19, 1919-20.

It has been correctly pointed out by the lower Appellate Court that the defendants built a tank on their own land for collecting water for their own use, and it was, therefore, incumbent upon them not to allow the water of their tank to overflow the plaintiffs' land or to cause damage to the same. The plaintiffs' tank is on a higher level while that of the defendants is on a lower level. The flow of water being naturally downwards, the water from plaintiffs' tank naturally flows into the defendants', and this imposes upon the defendants a continuing obligation to take special care to see that the level of the water of their tank does not reach above a particular height, so as to keep the plaintiffs' aforesaid area free

from submersion. The submersion is, thus a source of continuing damage to the plaintiffs, which are likely to render the defendants liable to them for compensation not only for acts of commission but also for acts of omission, if it be proved that the damage is the direct and natural consequence of their act or omission, or a direct relation of cause and effect is established between the two. The lower Appellate Court, relying upon *Rylands* v. *Fletcher* (1), has pointed out, and I think rightly, that a person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does so, and does not succeed in confining it to his own property, he is answerable for all the damage which is the natural consequence of its escape, though the escape may not be due to any fault or negligence on his part.

The view taken by the lower Appellate Court of the rights and liabilities of the parties as determined in the abstract by the previous decisions is certainly correct. But in applying it to facts of each year he was not quite correct. It cannot be said that, invariably, the same or uniform results must follow from the infringement of these rights even though the circumstances and atmospheric conditions of each of the years in suit may be or are bound to be different, according as there is scanty or unusual or unprecedented or abnormal downpour of rainfall. It was, therefore, necessary for the plaintiffs to prove, and for the Court to decide with reference to the state of things obtaining in each of the years in suit, how far by reason of the defendants' acts or omissions the plaintiffs' rights have been proved to the infringed, and what damages were consequent on such infringement. Then, again, the extent of injury caused to plaintiff must necessarily depend upon the extent of the additional submerged area of land fit for raising *dhan* or *kathan* crop, situate beyond the particular limit defined by the previous decision, in each of the years in the suit. In this connection, the question whether the particular land said to be submerged was otherwise fit for cultivation, in any part of the year or years in suit, either for the *dhan* crop or for *kathan* crop, is very pertinent, because on it must depend the standard of assessment of damages payable to plaintiffs for such lands. Whether the damage said to have been caused to plaintiffs is due to the unfitness of the soil for cultivation, and whether this unfitness, is due to the presence of lime-stone, or exists in the soil from its very nature, or has come into existence as the direct and necessary consequence of its submersion, is a factor which cannot be treated as immaterial, in determining the extent of defendants' liability for damages, as the lower Appellate Court seems to have erroneously thought. If the land had never been a source from which plaintiffs derived any income in the past owing to its being uncultivable land from its very nature, or being full of lime-stone, I do not see how its submersion with water escaping from the defendants' tank could place on the shoulders of the defendants any obligation to compensate the plaintiffs for the loss of a so-called prospect of sowing *dhan* or *kathan* on such land. There never was or could be such a prospect, and, therefore, none was lost, so far as these lands were concerned. Plaintiffs have assessed their damages on the basis of the land being fit for sowing *dhan* or *kathan* crop. In order to succeed they must, therefore, establish this as the primary condition of their maintaining a claim for damages in respect of such lands. The inundation or submersion cannot be the direct and immediate cause of the loss of the prospect of raising a crop on lands which were never fit for raising any such crop. There is absolutely no logic in making a person liable in damages for causing an alleged injury to a thing which from its nature is incapable of sustaining such injury. We are concerned only with the loss of prospect of raising *dhan* crop because the lower Appellate Court has accepted the view of the first Court that the submersion continued only till the sowing time of *kathan* crop, so that there could be no injury whatever to the *kathan* crop if they were regularly sown on the land.

The District Judge has found that only 3·60 acres of land was submerged under water; thir consisted of 94 out of field No. 423, and 266 out of fields Nos. 422|2, 422|3 and 422 4. It has also been found that plaintiffs have not sown any *dhan* crops since 1908 to 1921. In fact, no cultivation was ever attempted by

(1) (1868) 8 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220.

them. As rightly remarked by the lower Appellate Court, it is very unlikely that plaintiff's could not do the cultivation of these fields owing to the submersion. It can, therefore, be safely taken as not established that the alleged loss of the prospect of sowing *dhan* crops was not the direct consequence of the submersion of the lands bearing Nos. 422|2, 422|3 and 422|4.

As regards these and the rest of the land, in the absence of any evidence to show that submersion was maliciously brought by the defendants by doing any positive acts of wrong, it cannot be said that any damage was claimable from the defendants on the ground that the act was an act of aggression on their part. The submersion cannot, under these circumstances, be wilful or be the direct and immediate cause of the loss alleged to have been suffered by the plaintiffs. The next position to be considered is whether the damage is attributable to any neglect of duty cast upon the defendants by the former decisions. The defendants cannot, ordinarily, escape from the consequences of their own neglect or omission to take due care to see that the level of their tank is kept at a sufficiently low height so as to prevent '94 area out of field No. 423 from being inundated by the water of their own tank. It was open to the defendants to show that owing to causes over which they had no control such as unusual or unprecedented or abnormal or sudden rainfall they could not avoid the subersion, in spite of their best endeavours to let off the surplus water from the waste weir and by other breaches or sluices. In the absence of any evidence or finding to that effect, I think, I am justifiedi n presuming that the submersion of the area of '94 out of field No. 423 was due to the neglect of the defendants to let off the excess water from the out-lets. The District Judge has rightly found the defendants liable in damages for allowing the water which should have legitimately passed on to lower level to remain locked on higher level. The plaintiffs are, therefore, entitled to claim damages for the area of '94 of an acre which remained submerged owing to their neglect. The rate is fixed by the District Judge. The damages at that rate come to Rs. 19.

The next question is for what years I can award at this rate. I cannot assume that the same atmospheric conditions prevailed in the different years in suit, so I shall not be justified in adopting a uniform standard of assessment of damages for all years, as appears to have done by the lower Appellate Court, and make the defendants liable for the so-called damage to the land at the uniform rate for each year. I have no materials before me for holding that the 94 acres of land was invariably under water in the past in each of the years in suit. However, this appears to me to be a fit case in which, under these circumstances, an award of nominal damages for the infringement and Rs. 10 as nominal damages ought to satisfy the requirements of the case. I have already held that the District Judge's award of damages in respect of lands which from the very nature or from the presence of limestone are unfit for cultivation of any kind is unsustainable.

There is no force in the contention raised by the appellants regarding limitation. I, therefore, direct that the decree passed by the lower Appellate Court be modified by substituting the figure of Rs. 10 in place of Rs. 144. The appeal succeeds only partially. The costs of this appeal will, therefore, be borne as incurred. The costs in the lower Courts will be borne and paid in proportion to success and failure in this Court.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1038 OF 1922.

February 19, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

MUHAMMAD NAZEER *alias* BHIKHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh MUHAMMAD SULAIMAN—PLAINTIFF—RESPONDENT.

Custom—Pre-emption—Partition, effect of—Custom whether abrogated.

MUHAMMAD NAZEER *v.* MUHAMMAD SULAIMAN

The effect of a partition may be to deprive a certain number of those who were formerly entitled to pre-empt of their right, but a partition does not entirely abrogate a custom of pre-emption. The custom may still apply to other classes whom the partition has not deprived of the right of pre-emption. It will continue to apply to all who, notwithstanding the partition, continue in the same relation or relations as formerly entitled them to claim pre-emption.

Dalganjan Singh v. *Kalka Singh*, 22 A. 1 (F.B.); A. W. N. (1899) 111; 9 Ind. Dec. (N.S.) 1035; *Digambar Singh* v. *Ahmed Sayeed Khan*, 28 Ind. Cas. 84; 18 A. L. J. 286; 19 C. W. N. 893; 17 M. L. T. 193; 2 L. W. 803; 21 C L. J. 237; 23 M. L. J. 556; 17 Bom. L. R. 893; (1915) M. W. N. 581; 37 A. 129; 42 I. A. 10 (P. C.), referred to.

Second appeal against the decree of the Subordinate Judge of Jaunpur, dated the 27th March, 1922.

Mr. *Iqbal Ahmad*, for the appellants.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.— The appellants vendees were defendants in a suit brought by the plaintiff-respondent, Sheikh Muhammad Sulaiman, to pre-empt a sale of property in two villages, Rafipur and Khwajpur, made in their favour by the third defendant, Salika Bibi.

This lady is a first cousin of the plaintiff and she and the plaintiff are co-sharers in the same *mahals* in the two villages. The purchasers have shares in these villages but in different *mahals*. The plaintiff relied upon the custom set out in the *wajib ul-arzes* prepared at the last revision of Settlement in or about the year 1884. (The District is permanently settled).

It is admitted that, since these *wajib-ul-arzes* have been prepared, there has been a perfect partition of both the villages in suit and it is this fact which has been relied upon by the defendants-appellants in order to defeat the plaintiff's claim. It is common ground that no fresh *wajib-ul-arzes* were prepared after partition and so it was contended that the custom had been abrogated. In the alternative, it was pleaded that if the custom was still in force the plaintiff had no better right than the defendants-purchasers as all are owners of shares in the two villages.

This defence was accepted by the trial Court and the plaintiff's suit was dismissed. In appeal this decision was reversed and the suit decreed.

In this Court three pleas are taken in the memorandum of appeal.

It is said in the first ground that the existence of the custom has not been proved. The second ground takes the same point in a different way : it is said that the Court below should have found that the custom had been abrogated by the partition.

Lastly, we have a plea that in any case the plaintiff has no right superior to that of the purchasers.

It is not possible to sustain the argument that a partition abrogates a custom of pre-emption. That is settled by the Full Bench decision in *Dalganjan* v. *Kalka* (1) and also by the Privy Council Decision in *Digambar's case* (2).

The question is whether the custom as recorded in the old *wajib-ul-arz* has survived the partition and whether it can be applied to the altered state of things brought about by the partition. It has been argued before us that if the custom as recorded before partition cannot be applied in its entirety in the altered conditions effected by the partition it must be deemed to have been abrogated. We do not think there is anything in either of the rulings cited above to justify this proposition.

A custom may survive but its scope may be narrowed, as it often is when partition is effected. As is apparent from the decision in *Dalganjan's case* (1).

The effect of a partition may be to deprive a certain number of those who were formerly entitled to pre-empt of their right but it never seems to have been suggested that it results from this that the custom is entirely abrogated. It may still apply to other classes whom the partition has not deprived of the right of pre-emption. A partition is the act of parties and it is difficult to see why, if some of the sharers in a village choose to seek a partition and bring about by their own act their exclusion from a right they formerly enjoyed, the other sharers who remain

(1) 22 A. 1 (F. B.) ; A. W. N. (1899) 111 ; 9 Ind. Dec. (N S.) 1035.

(2) 28 Ind. Cas 84 ; 18 A. L. J. 286 ; 19 C. W. N. 893 ; 17 M. L. T. 193 ; 2 L. W. 803 ; 21 C. L J. 237 ; 23 M. L. J. 556 ; 17 Bom. L. R. 893 ; (1915) M.W.N. 581 ; 37 A. 129 ; 42 I. A. 10. (P. C.).

within the co-parcenary body should be deprived of the right they had. The proper view appears to be that the old custom persists and is applicable to all who, notwithstanding the partition, continue in the same relation as formerly entitled them to claim pre-emption.

The *wajib-ul-arz* of Khwajapur provided for a right of pre-emption, first, in favour of sharers who were members of the same family next, in favour of "*hissedaran qaribi*" and after that in favour of "*hissedaran deh*".

In the case of Rafipur the scheme was somewhat different. The first right was given to sharers, members of the same family—the next to sharers in the same *patti* the third to sharers in the same *thok* and the last to "*hissedaran deh*". Now that new *mahals* have been formed some of these classes of pre-emptors have necessarily disappeared, *e.g.*, the "*hissedaran deh*". But there can be no difficulty in holding that the custom is still applicable as regards the class denoted by the expression "*sharik khandani*" who in both villages have clearly the best right of all. The vendees can only claim as "*hissedaran deh*" but under the altered constitution of both the villages they would not be entitled to pre-empt in a *mahal* in which they had no share.

The plaintiff here is clearly a "*sharik khandani*" of the vendor: they are, as has been said, first cousins and undoubtedly belong to the same family being descended from a common grandfather.

The plaintiff is entitled to the benefit of the custom which, so far as the class to which he belongs is concerned, must be deemed to have survived the partition.

The decree of the lower Appellate Court is correct. The appeal fails and is dismissed with costs including, in this Court, fees on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 157 OF 1922.

February 27, 1924.

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

BILAST CHANDRA ROY—PLAINTIFF —APPELLANT

versus

RAJENDRA CHANDRA DAS ROY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859) s. 33, applicability of—Bengal Touji Manual, rule 61—Contract Act (IX of 1872) s. 50—Payment of revenue by Revenue Money Order—Time of payment—Payment to Post Office, whether payment in time.

Under the rules contained in the Bengal Touji Manual, 1918, the question whether a remittance of land revenue remitted by Revenue Money Order reaches the Collector in time depends not on receipt of the money or even of the money-order form at the Treasury, but on the date when the Post-Master fills the Treasury voucher. [p. 665, col. 1.]

Under rule 61 of the Bengal Touji Manual, 1918, read with section 50 of the Contract Act, a payment of land revenue to the Post Office by means of a Revenue Money Order before the last day of payment is a good payment in time. [p. 665, col. 1.]

In order that section 33 of the Bengal Land Revenue Sales Act may come into operation there must have been a sale for arrears of revenue. Where an estate is sold at a time when there are no arrears of revenue, the sale is not a sale for such arrears, and section 33 will have no application to such a case. [p. 665, col. 2.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 23th February 1922.

Babu *Jogesh Chandra Roy* (with him Babu *Troilakyanath Ghose*), for the Appellant.

Babu *Tarak Chandra Chakravarthy* (with him Babu *Kalikunvar Chakravarthy*), for the Respondents.

JUDGMENT.—The plaintiff Bilas Chandra Roy who is the appellant before us was the owner of an entire estate bearing *Touzi* No. 9299 in the Dacca Collectorate. The revenue of the estate is Rs. 88 1-1 payable in three instalments and the amounts and the latest days of payments, fixed under section 3 of Bangal Land Revenue Sales

Act XI of 1859, of these instalments are Rs. 60-4-0 on the 12th January Rs 16-9-1 on the 28th June. On the 26th June 1919 the plaintiff himself paid Rs. 11-4-0 at the Dacca Post Office with a Revenue Money-Order form duly filled in according to the rules contained in the Bengal Touzi Manual, 1918, on account of the revenue payable on the 28th June. On the 6th July the plaintiff received Exhibit 12 the acknowledgment portion of the money-order which, instead of being a receipt for the payment of revenue, contained an intimation endorsed in red ink in the following trems:—"Received after expiry of due date. The amount is kept in revenue deposit. The *Mahal* should be released by filling an application otherwise it will be sold at auction sale." This endorsement is dated the 2nd July. The 29th and 30th June and 1st July were holidays. Within two or there days of receiving this acknowledgment at Munshiguni, where the plaintiff is a practising pleader, he wrote to Rasik Chandra Gangopadhya, defendant No. 2, who is his *Am-muktear*, requesting him to file an application for converting the revenue deposit to revenue in respect of *Touzi* No. 9299. Rasik did not answer this latter until 13th September when he wrote the post-card, Exhibit 114, which reached the plaintiff a day or two later. During this interval on about the 23rd August a young son of the plaintiff died suddenly. Also, before this post-card was written the plaintiff's estate had been advertised for sale for arrears of revenue, the sale date being fixed for the 22nd September. In this post-card, the defendant Rasik, after explaining his delay in writing on account of his not getting a copy wanted for some other matter, wrote "For Mahal Nos. 9299 and 221 two petitions and two *Agentnama*.....will be necessary. Also the receipt for the deposit of money and something for extra expenses and for the *Muktear* and his clerk will be necessary". On the 15th September the plaintiff sent Rs. 2 by money-order to Rasik. A day or two later the plaintiff sent his clerk Satis Chandra Choudhuri (P. W. No. 6) to Rasik at Dacca with an *Agentnama* and three blank demy papers signed by the plaintiff. No application was filed by the defendant No. 2 in accordance with the plaintiff's instructions but on the 21st September he sent the post-card, Ext. 17, to the plaintiff. In this he informed him that the sale of *Mahal* No. 9299 for arrears of revenue was fixed for the next day and that in order to prevent the sale it would be necessary to pay a fine and also over Rs. 100 for cesses in arrear. The plaintiff was, therefore, asked to send Rs. 125 by Telegraphic money-order at once. This post-card did not reach the plaintiffs until the 24th September as he had left Munshiganj for his home in Maijpara on the 20th. On the 22nd September the plaintiff's estate was sold by auction at the revenue sale for an arrear of Rs. 7-1-8. There was Rs. 4-2-4 to the plaintiff's credit in the Collectorate accounts when the instalment of Rs. 11-8-0 was payable this explains why the arrear was this smaller amount. The estate was bought by defendant No. 1, a pleader's clerk for Rs. 530. The value of the estate is over Rs. 5 000. On the 19th November, 1919, the plaintiff appealed to the Commissioner of the Dacca Division to have the sale set aside under section 2 of Act VII (B. C.) of 1868 and section 26, of Act XI of 1859. This appeal was dismissed on the 29th May 1920 and the sale was confirmed on the 5th June following. On the 22nd January 1921 the plaintiff brought the present suit which was dismissed by the Subordinate Judge, 4th Court, Dacca, on the 23rd February 1922 and he has appealed to this Court.

The above is a statement of facts of the case which are either now undisputed or which, if disputed, we hold to have been established by the evidence on the record. Where there is a variance between the evidence of the plaintiff and the second defendant we have no hesitation in accepting the plaintiff's version. The lower Court has doubted his veracity on the ground that he has made discrepant statements as to whether he wrote his first letter to defendant No. 2 two or three days after the 6th July or a day or two before receiving Exhibit 14, this defendant's post-card of the 13th September. We find no such discrepancy. The sentence "This post-card letter I received a day or two after the writing of this "letter" must mean that the plaintiff received it a day or two after it was written. This is the grammatical meaning of the sentence and the meaning given to it by the learned Subordinate Judge is inconsistent with the plaintiff's evidence that Exhibit 14 is a reply to his first letter. If it was a reply it could not have been received a day or two after the plaintiff wrote his letter. Also, the contents of Exhibit

14 indicate that it was a reply to a letter from the plaintiff received sometime previously. Exhibit 14 also shows from its reference to several matters that this defendant's denial that he was then acting as the plaintiff's Revenue Agent is false. The contents of the second post-card, Exhibit 17, are not what he would have written if, as he says in his evidence, he found *Touzi* No. 9299 in the *Bakiat* list two days before he wrote the letter.

The plaintiff brought this suit to set aside this revenue sale. He also asked for a declaration that the sale certificate issued to defendant No. 1 did not affect his title to certain specified *Mouzas*. In the alternative, he asked for a decree directing a reconveyance of the estate. There were also prayers for recovery of possession and mesne profits. The grounds on which he claimed these reliefs were that the sale was void as there were no arrears of revenue at the time of the sale; that the sale was the result of a fraudulent conspiracy between the two defendants; that the sale was bad on account of failure to serve the notices required by law, and that notices did not properly describe the estate. At the hearing of the appeal six points were argued:

(1) that on the evidence it should be held that the plaintiff's money-order reached the Collectorate before the time for payment expired;

(2) that the payment to the Post Office of Rs. 11-4-0 by Revenue Money-Order was valid payment in time;

(3) that a fraudulent conspiracy between the two defendants has been proved;

(4) that notices required by law were not served at all;

(5) that the 28th June was the date of payment of the June *kist* to which section 2 of Act XI of 1859 is applicable and not the latest day of payment fixed under section 3 of that Act;

(6) that the sale-certificate conveys no title to the property in suit.

We hold that the first of these points has been established. The plaintiff has proved by his own evidence corroborated by that of the Head Clerk of the Money-Order Department of the Dacca Post Office that he delivered Rs. 11-4-0 with a Revenue Money-Order form properly filled up and addressed to the Collector on the 26th June 1919. The time of payment is not stated in the evidence but is given in the plaint as between 11 a. m. and 12 noon. As to what actually happened in the Post Office after the receipt of the money and money-order there is no evidence, but it was not possible for the plaintiff to adduce further evidence on the point since it is hardly possible that any of the Post Office officials should have any recollection of this individual transaction and all documents relating to it were destroyed before this suit was instituted. From the Head Clerk's evidence and the rules in the Bengal Touji Manual, 1918, it appears that the ordinary procedure would be as follows: Ordinarily, Revenue Money Orders are sent to the Collector the next day but if they are given on the last date for payment they are all hunted up and sent on that very day to the Collector. The actual money received by the Post Office is not sent to the Collector with the money-orders. A list or lists of these money-orders is prepared in triplicate and also a Treasury voucher (Form A|C-12) representing the total value of the money-orders as entered in all the lists. The duplicate copy of the list with the money-orders and Treasury voucher are taken by the postman to the Collectorate Accountant at the Treasury. On receipt of these documents they are checked and compared and if found correct the Accountant will at once cut off the portions of each money-orders containing the coupon and acknowledgment, sign and date the money-orders (as payee) and return the paid money-orders to the postman. The Accountant will retain the lower portion of each money-order including the coupon and acknowledgment the duplicate list or lists and the Treasury voucher. Forms of Revenue Money-Order and of the triplicate list are given in Appendix A of the Bengal Touji Manual, 1918, as Forms 17 and 18. After this the Treasury Officer will make the necessary adjustment of account between the Post Office and the appropriate department to whom the money is to be credited. The acknowledgments and coupons which were cut off by the Accountant will then be examined in the Collectorate. If a remittance of land revenue is received in the Treasury after the sunset of the latest day of payment a note

red ink that the payment is " too late for the latest day of payment." This, as stated above, is what was done in the present case.

Even assuming that the question whether this payment of revenue by money-order was in time or not, depended on whether the money order reached the Treasury on the 28th, we are unable to agree with the learned Subordinate Judge that the plaintiff has failed to prove that the money-order reached the Treasury before sunset on 28th June 1919. There was obviously some omission to follow the ordinary procedure either in the Post Office or the Collectorate. The learned Subordinate Judge has applied the presumption that official acts have been regularly performed to the acts of the Collectorate. We think, on the evidence in this case, it should be applied to the acts of the Post Office officials. It is proved that the money-order was delivered with the money on the 26th June. The evidence of the Head Clerk of the Money Order Department that such money-orders are ordinarily sent to the Collector the next day was not attacked in cross-examination nor was any suggestion made to him of irregularity in the Post Office. The Collectorate or Treasury is only a quarter of a mile from the Post Office. A strong presumption, therefore, arises in the plaintiff's favour that the money-order reached the Collectorate on the 27th June. To rebut this presumption there is no evidence that it reached the Treasury after the 28th. Neither the clerk who wrote the red ink endorsement nor any other officer of the Collectorate has been examined to prove when the money-order was received. There is, therefore, in support of the defendants only the presumption that the Collectorate officers performed their official acts regularly and that they would not have acted as they did unless the money orders had arrived too late. This presumption is far weaker and insufficient to rebut the presumption in the plaintiff's favour.

We also hold that the appeal should succeed on the second point, that the payment to the Post Office of Rs. 11-4-0 by Revenue Money-Order was a valid payment in time. The learned Subordinate Judge would have decided this point in the plaintiff's favour had he not held himself bound by the decision of a Divisional Bench of this Court in *Baikantha Nath Dutt* v. *Ganga Prosad Patnaik* (1). In that case a *zemindar* sent his revenue by money-order through the Post Office at Bhadrak, in the Balasore District, for payment to the Collector of Cuttack. By mistake, the money was sent to the Collector of Balasore and consequently reached the Collector of Cuttack too late. In our opinion, this case is distinguishable from the present case on two grounds. In the first place, the legal effects of a payment of revenue by money-order must depend on the rules in force at the time such payment is made. We have not been able to obtain a copy of the rules in force in 1893, when the payment was made in the case cited. There has been at least one other edition of the Bengal Touji Manual published between then and 1918, the edition which contains the rules governing the present case. But it is clear from the judgment in that case that there was one very material difference between the system then in force and the present system. From the frequent references to payment of money in the judgment it is evident that the payment by the Post Office to the Collectorate was then a cash payment and not, as it is now, a payment by transfer in the accounts. In the case of a cash payment, in the absence of any rules to the contrary, the time of the payment of revenue would be the time the remittance was received by the Collector. In the case of a payment by transfer it is necessary to examine the rules to decide when the money paid to the Post Office is to be held to have been received by the Collector. Though the concluding paragraph of r. 98 provides that " the acceptance of the money-order after the latest date of payment is to be treated in the same manner as the receipt of a personal payment of revenue after the latest date of payment ;" this is qualified to an extent almost amounting to contradiction by the foot-note to r. 102 which is in the following terms : " It is to be understood that date of receipt of the money-order in the Treasury is the date of the Treasury voucher by which it is paid and not necessarily the date on which the acknowledgment is examined, signed or returned." Now, this Treasury Voucher should be made across the acknowledgment in

(1) 4 C. W. N. 108.

(Form A-C 12) is filled in, and filling in includes dating, by the Post Master before it leaves the Post Office. Under the existing rules, therefore, the question whether the remittance reaches the Collector in time depends not on receipt for the money or even of the money-order form at the Treasury but on the date when the Post Master fills in the Treasury Voucher. On the evidence in the present case there is a still stronger presumption that this was done before sunset on the 28th June 1919 than there is to support the inference we have already drawn that the money-order form reached the Treasury before this time.

But we further hold that, apart from what in fact happened after the money was paid by the plaintiff at the Post Office, that payment was a good payment in time. With all respect to the learned Judges who decided *Bakuntha Nath Dutt's case* (1) the question appears to us to depend, not on whether the Post Office can be considered the agent of the Collector authorised to give a valid receipt for arrears of revenue but on whether the payment was made in a manner and at a time prescribed or sanctioned by Government. Section 50 of the Indian Contract Act IX of 1872 provides: " The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions" Illustration (*d*) to that section is " A desires B who owes him Rs. 100 to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A." Rule 61 of the Touji Manual prescribes payment by means of a revenue money-order as one of the manner in which a payment of land revenue may be made. This rule must be read subject to the other rules as summarised in the " Instruction for the remittees' guidance" printed on the Revenue Money-Order Form. The only one of these instructions which it is suggested the plaintiff did not follow is the fifth which relates to the time of payment "Remittances of land revenue should be made a sufficient time before the *kist* day to ensure their reaching the Treasury on or before that day. Remitters are advised to allow ample margin on this account, for the acceptance of money-orders for land revenue after the *kist* day will not exempt an estate from sale, except according to the rules applicable to personal payment of revenue after *kist* day." We are unable to hold that the condition prevents the plaintiff from establishing that his payment at the Post Office was a payment in the manner and time prescribed so that it would take effect from the time of payment there. It might be an arguable point whether this instruction prescribes that a remittance should be made in sufficient or in ample time to ensure reaching the Treasury on or before *kist* day. In the present case the payment at the Post Office on the 26th was in ample time to ensure its reaching the Treasury on the 28th June when it is remembered that the distance between these two places was a quarter of a mile. This brings us to the second point on which *Baikuntha Nath Dutt's case* (1) is distinguishable as it was then held that the plaintiffs could not be acquitted from blame because he should have acted upon the warning contained in r. 6, which is similar to the present Instruction 5, and should have left ample margin of time for accidents in transit. What is an ample margin of time must depend on the facts of each case. In the present case this margin was undoubtedly ample.

For the respondent it is contended that section 33 of Act XI of 1859 bars the plaintiff from taking these first two grounds because they were not declared and specified in Ext E. the plaintiff's memorandum of appeal to the Commissioner. But in order that this section may come into operation it is necessary that there should have been a sale for arrears of revenue. In the present case there was no arrear of revenue and, consequently, the sale which was held was not a sale for such arrears.

As the appeal must succeed on these grounds it is not necessary to discuss at length the other four grounds urged on behalf of the appellants on these points. We are in substantial agreement with the lower Court. The question of fraud is rendered more difficult on account of the false defences set up by both defendants. There can be no doubt that they were on more friendly terms than they admit and also that intending purchasers were discouraged from bidding by the cond defendant But though we differ from the learned Subordinate Judge in giving more credit to the plaintiff's evidence we agree with him in

holding that there was no conspiracy to defraud the plaintiff. It is suggested that the second defendant deliberately abstained from filing a petition, which would prevent the sale, in order that the first defendant might make some money by buying in the estate and surrendering it to the plaintiff. This would be as much a fraudulent conspiracy as it would have been if they had intended to divide the estate between them. But on a consideration of all the evidence we think that the second defendant honestly believed that it was useless to file a petition on the plaintiff's behalf unless he were in a position to pay the arrears of cesses. We believe that it was not until it was too late to stay the sale that he entered into an agreement and took action to enable the first defendant to buy the estate at a low price and that he did this thinking he was acting in the plaintiff's interest The trouble probably arose on the first defendant demanding an amount which the plaintiff thought unreasonable. As regards the fourth, fifth and sixth points urged before us it is unnecessary to add anything to what has been written in the judgment of the lower Court.

We accordingly decree this appeal. The cross-objection taken by the first defendant on the ground that he should be allowed his costs necessarily fails and is dismissed. The plaintiff will be granted a decree setting aside the revenue auction sale of Estate No. 9299 of the Dacca Collectorate hold on the 22nd September 1919, and for declaration of his title to this estate and for recovery of possession and for mesne-profits which will be assessed in the lower Court.

The plaintiff will get his costs both in this and the lower Court from defendant No. 1, defendant No. 2 who did not apper in this Court will bear his own costs in the lower Court.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1295 OF 1922.

February 11, 1924.

Present :—Mr. Justice Daniels.

MUKHTAR AHMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus.

KABIR AHMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of deed—Sale certificate—Conflicting descriptions—Decree, whether may be referred to—Civil Procedure Code (Act V of 1908), s. 47—Dispute between judgment-debtor and auction-purchaser, nature of.

Where there are two descriptions of the property sold in the sale certificate which cannot be reconciled with each other, it is open to the Court to look at the decree in the suit and to determine which of the descriptions really governs the sale.

[p. 667, col. 2.]

Barhamdeo Singh v. *Ram Narain Singh*, 22 Ind. Cas. 280 ; 19 C. L. J. 182, followed.

A dispute between a judgment-debtor and an auction-purchaser as to the extent of the property sold at the auction sale does not fall within the purview of section 47 of the Civil Procedure Code.

[p. 668, col 1.]

Bhagwati v. *Banwari Lal*, 1 Ind. Cas. 416 ; 31 A. 82 ; 6 A. L. J. 71 ; 5 M. L T 185 ; *Munna Lal* v. *The Collector of Shahjahanpur*, 74 Ind. Cas. 995 ; 45 A. 96 ; (1923) A. I. R. (A.) 470, followed.

Second appeal against the decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Allahabad dated the 17th July, 1922.

Mr. *Zafar Mehdi*, for the Appellants.

Messrs. *Bhagwati Shankar*, *Sami-ud-din*, *Maheshwari Dayal* and *Brij Behari Lal*, for the Respondents.

JUDGMENT.—The facts of this case are somewhat complicated and are stated in full in the judgment of the Court below. So far as they are necessary for the purposes of this appeal they are these.

One *Musammat* Zaiban Bibi owned a share amounting to 1-anna 6-pies 6-*karants* 8-*jan* in the village of Bharwari in the Allahabad District. She died in 1896 leaving two daughters, Salim-un-nissa and Rahim-un-nissa, as her sole heirs. Her brother-in-law, Zia-ul-haq, took possession of

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the entire property. *Musammat* Rahim-un-nissa filed a suit and obtained possession of her share of the inheritance namely 9-pies 3-*krants* 4-*jan*, Mst. Salim-un-nissa did not file a suit but on Zia-ul-haq's death in 1902 she claimed her share in the mutation proceedings A compromise was entered into by which she was awarded a 7-pies share and the remaining 2-pies 3-*krants* 4-*jan* remained in posession of the heirs of Zia-ul-haq. While Zia-ul-haq was in possession of the entire property he had mortgaged 9-pies of it to one Mukarram Husain. Mukarram Husain filed a suit on his mortgage and obtained a decree for sale in respect of this 9-pies. In the meantime, there had been a partition of the property and the 9-pies 3-*krants* 4-*jan* to which each of Zaiban Bibi's daughter was originally entitled became after the partition a share of 2-annas 9-pies 1-*krant* 2-*jan* 11-*tond*. In the auction sale which took place in execution of Mukarram Husain's decree the property was purchased by the present appellants Mukhtar Ahmed and others. In the sale certificate the 9-pies share was correctly stated but it was incorrectly described as corresponding to 2-annas 9-pies 1-*krant* 2-*jan* 11-*tond* which was really the equivalent of the entire 9-pies 3-*krants* 4-*jan* share as had existed formerly. The revenue of the share was, however, correctly given and was the revenue corresponding to the original 9-pies share which the Court was entitled to bring to sale under the decree. Both the Courts below have held that the words " 2-annas 9-pies 1-*krant* 2-*jan* 11-*tond* " in the sale certificate are merely a misdescription due to a clerical mistake and that what really passed was the original share of 9-pies in respect of which the decree was granted. Two suits were brought, one by the heirs of *Musammat* Salim-un-nissa and the other by the heirs of Zia-ul-haq, against the representatives of the auction-purchasers to recover the difference of 3-*krants* 4-*jan*. In connection with these two suits three appeals were filed to the Court below, two by the heirs of Zia-ul-haq and one by the defendants. The Court below has held that the 3-*krants* 4-*jan* share belongs to the plaintiffs in the two suits in proportion to their share in the entire property. As between the two sets of plaintiffs there is no longer any controversy. The defendants have filed three connected appeals to this Court against the decrees passed by the Court below on the three appeals preferred to it.

Both suits were filed within twelve years of the date of the auction-sale so that no question of limitation arises.

Seven grounds are taken in the memorandum of appeal but the points which have been actually argued are three only. They are,—

1. That as the plaintiffs in the two suits were parties to the sale proceeding they are bound by the description of the property given in the sale certificate.

2. That in any case their remedy was by application under section 47, Civil Procedure Code and not by suit. If the remedy was by application under that section, it would now be time barred.

3. That the heirs of *Musammat* Salim-un-nissa are estopped by reason of a *Kabuliat* executed by them in favour of the auction-purchasers in respect of ex-proprietary plots.

On the first question it appears to me clear law that where there are in the sale certificate two descriptions of the property which cannot be reconciled it is open to the Court to look at the decree in the suit and to determine which of those discription really governs the sale. This has been expressly held in a Calcutta case *Barhamdeo Singh* v. *Ram Narain Singh* (1). The same principle is laid down in section 97 of the Evidence Act which says that where the language used applies partly to one set of existing facts and partly to another evidence may be given to show to which of the two it was meant to apply. In this case the finding of the Courts below is supported by the presumption that what the Court intended to sell was that which it was authorised by law to sell and there is no legal ground for disturbing that finding, which is clearly in accordance with the justice of the case.

The second point is concluded against the appellant by the Full Bench ruling in *Bhagwati* v. *Banwari Lal* (2) which has been followed in the recent case of *Munna Lal* v. *The Collector of Shahjahanpur* (3) The dispute

(1) 22 Ind. Cas. 280; 19 C. L. J. 182.
(2) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.
(3) 74 Ind. Cas. 995; 45 A. 96; (1923) A. I. R. (A.) 470.

here, as learned Judge of the Court below points out, is not between the parties to the suit but between the judgment-debtors and their representatives the auction purchasers.

As regards the third point I have examined the *Kabuliat* in question. It says nothing whatever as to the extent of the share. It merely acknowledge the title of the auction-purchasers to specific *sir* plots in respect of which an ex-proprietary tenancy had arisen.

All the grounds of appeal which have been urged, therefore, fail and I dismiss the appeals with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 33 OF 1922.

January 23, 1924.

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

J. C. GALSTAUN—PLAINTIFF—APPELLANT

versus

SONATAN PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Equitable mortgage—Deposit of title-deeds—Pro note given by debtor, whether inconsistent with mortgage—Handwriting, comparison of—Opinion formed by Judge in absence of evidence, danger of—Execution of decree—Sale—Purchaser, whether takes subject to equities against judgment-debtor.

A debtor handed over the title-deeds of certain property to his creditor saying that the latter was to hold them as security against the liabilities already incurred and that should be incurred thereafter by the debtor. He subsequently signed a memorandum in respect of the deposit of the title-deeds with the creditor;

***Held*, that an equitable mortgage by deposit of title-deeds was created in favour of the creditor as soon as the title-deeds were handed over to him.**

There is nothing inconsistent in a debtor executing a promissory-note in favour of his creditor and at the same time making a deposit of title-deeds by way of security for payment of the debt. [p. 674, col. 1.]

The practice of a Judge declaring whether a disputed signature agrees with the other signatures of a certain person without the assistance of any evidence but merely on his own inspection cannot be approved. It is especialy undesirable that a Judge should take upon himself the task of comparing signatures in order to find out whether there has been a forgery in a case, where there is nothing to showon the record that the signature was alleged by any person to be a forgery. [p. 672, col. 1.]

Evidence relating to dissimilarity of signatures is peculiarly fallacious, where the dissimilarity relied upon is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position, as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a place more or less inclined—nay, the materials, as pen, ink, etc, being different at different times—are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of this sort few individuals write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person. [p. 672, col. 1.]

A purchaser at a sale in execution of a decree purchases the property subject to all the equities against the judgment-debtor and cannot take up the position of a *bona fide* purchaser for value without notice.

Appeal against the decree of Subordinate Judge, Dacca, dated the 23rd September 1921.

Babu *Provas Chandra Mitter*, with him Babus *Charu Chandra Biswas* and *Manindra Kumar Bose*, for the Appellant.

Babu *Jogesh Chandra Roy*, with him Babus *Rajendra Chandra Guha* and *Debendra Chandra Pal*, for the Respondents.

JUDGMENT.—This is an appeal against the judgment and decree of the Subordinate Judge, 2nd Court, of Dacca, by the plaintiff. The suit was brought for the purpose of enforcing a mortgage by deposit of title deeds of certain properties at Gopechur made by one J. B. Sookias in favour of the plaintiff on the 22nd May 1914. The plaintiff's case is that he had been advancing money to J. B. Sookias for the purpose of carrying on business in jute and this transaction commenced sometime in 1906. On the 12th March 1912 there was an adjustment of the account

of the monies due to the plaintiff from J. B. Sookias and this adjustment was made of the dues up to the 30th October 1911 when Rs. 75,000 odd was found to be due to the plaintiff from J. B. Sookias. Sookias acknowledged his liability to pay that sum with interest at 10 per cent. per annum with six-monthly rests affixing his signature to the account made up on the 12th March 1912. It was stated that this account with Sookias was kept in abeyance by the plaintiff, by which term it appears the parties meant that no further advance of money would be made to Sookias which would be debited in that account. Sookias used to carry on his business at a place called Nabigunge at that time. On the 15th September 1913 J. B. Sookias purchased some lands which are described as Gopechur property for Rs. 9,800. Gopechur is about 2 or 3 miles distant from Nabigunge and he transferred his business to that place. The plaintiff then alleges that a second account was opened between him and J. B. Sookias on the 26th November 1913, and then, on the 22nd May 1914, J. B. Sookias deposited his title-deeds with regard to the Gopechur property with the plaintiff in Calcutta as security for the debts he then owed the plaintiff as well as for future advances. Then, it is alleged that on the 30th June 1914, Sookias gave the plaintiff a memorandum with regard to this deposit of title deeds, and this document has been described as a letter of hypothecation Then, in 1916, J. B. Sookias fell ill and was in hospital in Calcutta. When he was in hospital the plaintiff states that on the 3rd July 1916 adjustments were made with regard to both the accounts that he had with Sookias which were made up till the 30th June 1916. It was alleged that on the first account Rs. 1,27,000 and odd was due to the plaintiff and with regard to the second account Rs. 45,000 and odd was due by the plaintiff to J. B. Sookias. Sookias acknowledged these adjustments on that day and put his signature to the accounts in acknowledgment of his liability. J. B. Sookias died on the 6th August 1916 and the plaintiff brings this suit for the enforcement of the mortgage which was alleged to have been made by Sookias on the 22nd May 1914.

The defendants Nos. 1 and 4 represent the estate of J. B. Sookias, the defendant No. 1 being the minor son of Sookias represented by his grand-mother defendant No. 4 who has taken Letters of Administration to the Estate of J. B Sookias. The defendant No. 2 was a creditor of Sookias who had attached the disputed property in execution of his decree for money and had sold it in execution, the purchaser being the defendant No. 3. It is alleged that defendant No. 2 was made a party as the sale in execution of his decree had not been confirmed when the suit was brought. The suit was contested by the defendant No. 3 alone. The defendant No. 2 alleged that he had been unnecessarily joined as a party and he only asked for his costs. The other defendants Nos. 1 and 4 appeared but did not contest the suit and they admitted the claim of the plaintiff. Defendant No. 3 only appears in this Court to contest the appeal.

The defendant No. 3, who is the auction-purchaser of the Gopechur properties which are the subject of the alleged mortgage in favour of the plaintiff, has denied all the facts stated by the plaintiff in his plaint. He even denied the fact that the plaintiff had advanced any money to J. B. Sookias and also the fact of the several adjustments mentioned by the plaintiff of the accounts which he had with Sookias. More specifically, defendant No. 3 alleged that Sookias had not made the deposit of title-deeds as alleged by the plaintiff, nor did he sign the letter of hypothecation alleged to have been given to the plaintiff on the 30th June 1914.

It will not be necessary to deal with many of the statements made in his written statement having regard to the arguments that have been addressed to us by the parties in this Court. A large number of issues was raised in the Court below but the important issues which have been argued before us are issues 5 and 9. Issue 5 runs thus:—"Does the plaintiffs' mortgage, as alleged in the plaint, amount to an equitable mortgage and did J. B. Sookias give this Gopechur property to the plaintiff in equitable mortgage as alleged, and, if so, what sum is due to the plaintiff on such mortgage?" The 9th issue was:—"Were the aforesaid accounts adjusted and accepted as correct and signed by J. B. Sookias as alleged by the the plaintiff; if so, can the defendant No. 3 ask the Court to go behind the adjustment?"

GLASTAUN v. SONATAN PAL

The learned Subordinate Judge held that the plaintiff had advanced monies to J. B. Sookias at an interest of 10 per cent. per annum and compound interest with six-monthly rests and that there were two running accounts of the transactions between them and that the accounts were adjusted and accepted as correct and signed by J. B. Sookias. With regard to the last portion of issue No. 9 we need not deal as the learned Judge found that the defendant No. 3 can question the account and upon the evidence he arrived at a sum which he found was due to the plaintiff. Neither of the parties before us challenged that account. The appellant did not do so on the allegation that, as there was no possibility of his recovering any amount of money in excess of what was found due by the Subordinate Judge out of the estate of Sookias, it would be useless waste of time to take us through the accounts for the purpose of increasing his own dues. The respondent, however, attacked the finding of the Subordinate Judge with regard to the first portion of the 9th issue in support of the decree in his favour. His contention was that the adjustments spoken of by the plaintiff on the 3rd July 1916 were not true and the signatures of J. B. Sookias in the two adjustments, which were marked Ex. 6 and 7, were not genuine. His argument was that on the 25th March 1916 Sookias had written a letter to Galstaun in which there is this passage:—"As I am anxious to see all accounts cleared up to date with your goodself, on arrival will go through it thoroughly"; and he further stated in that letter that he was leaving Naraingunge for Calcutta on Monday the 27th March 1916. It is urged that, as Sookias wanted to go through his accounts thoroughly on the 25th March 1916, it was not likely that he was able to do so on the 3rd July, when he was lying ill in hospital, within such a short time as he is stated to have taken in looking over the accounts. The fact that the accounts were adjusted has been proved by the plaintiff and his manager Basil. The plaintiff says in his evidence:—"About 15 or 20 days before his death I had some conversation with him about his business. It may be a month before his death. The conversation was about accounts. I told him that Basil would take my account to him and if he found it correct I asked him to certify its correctness. I sent Mr. Basil with the book. The next morning Basil showed me the book with the certificates of J. B. Sookias. These accounts bear the certificates. The certificates are, in my opinion, in the handwriting of J. B. Sookias." Basil says in his evidence that, "the certificate of acceptance and correctness of the account was written and signed by J. B. Sookias in my presence. That it was also signed and dated in my presence. There was another acceptance on that date. The certificate of acceptance and correctness of this account was also written and signed and dated in my presence. This was at the Presidency General Hospital in Calcutta." This evidence is supported by T. B. Sookias, who was examined as a witness for the plaintiff. This witness is a brother of J. B. Sookias. We do not see any reason why this evidence should not be accepted. There is no reason to suppose that Sookias did not know how his accounts stood with the plaintiff and that he could not examine the accounts when they were placed before him by Basil. We, therefore, hold, agreeing with the Subordinate Judge, that there were accounts between the plaintiff and J. B. Sookias which were adjusted and accepted by J. B. Sookias on the 3rd July 1916 and that the interest that was agreed to be paid was 10 per cent. per annum with six-monthly rests.

The real question of importance in this case is involved in issue 5. The Subordinate Judge has held that there was no deposit of title-deeds by way of security by Sookias with Galstaun on the 22nd May as alleged, and the document, bearing date 30th June 1914, was not signed by Sookias but was a forged instrument, and we shall have to deal with this question in some detail. The evidence with regard to the deposit of title-deeds as well as of the memorandum is mainly that of the plaintiff. His evidence is that, sometime in 1914, he pressed J. B. Sookias for security knowing that he had purchased the Gopeehur property and had built on it with moneys which had been advanced by the plaintiff to Sookias, and thereafter Sookias brought the title-deeds respecting the Gopeehur property and handed them over to the plaintiff saying that the plaintiff was to hold them as security against the liabilities incurred and that should be incurred thereafter by Sookias to the plaintiff. He says that on the 22nd

May Sookias made over his title-deeds at the office of the plaintiff 57, Radha Bazar Street, Calcutta in a bundle. The plaintiff examined the topmost document which was the conveyance obtained by Sookias of the property. The bundle was wrapped up in a piece of cloth. The plaintiff then says that he kept the bundle in a safe, and when Sookias handed over the documents to the plaintiff he said that he did so as security for the amounts he owed the plaintiff and which he would further owe him. At that time the plaintiff's manager Basil was present. Subsequently, Mr. J. B. Sookias gave him a letter and that letter, he said, was signed in his presence. In this matter he has been corroborated by his manager Basil,and it is unnecessary to state the evidence of Basil in detail. T. B. Sookias also gives evidence in support of the fact that J.B. Sookias brought the title-deeds from Gopechur in May or June 1914 and he told the witness at that time that he was going to hand over the documents to the plaintiff and he says that he left Gopechur with a bundle containing documents. If this evidence is believed there cannot be any doubt that a mortgage was created in favour of the plaintiff by Sookias.

It is necessary to state that, as against this positive evidence, there is no evidence on behalf of the defendant contradicting this except in one particular. It has been alleged by some of the witnesses for the defence that J. B. Sookias was in possession of the title-deeds of Gopechur about the months of August and September of the year 1914. The evidence is to this effect, that these witnesses asked Sookias if he had purchased the Gopechur property and they wanted to see the title-deeds in order to satisfy themselves that Sookias had actually purchased the Gopechur property in order that they might supply him with Jute on credit, and, on being so asked, Sookias did actually produce before them his title-deeds for their inspection on different occasions. The evidence, on the face of it, seems to be incredible, for the reason alleged as to why the documents were asked for by those witnesses could not possibly be true. Sookias had already been doing business at Nabigunge, which is only at a short distance from Gopechur, from 1906. The dealers of that place had been doing business with him from that time. The defendant No. 3 in his own evidence says that he had commenced to deal with Sookias in 1912 and from 1912 to 1914 he does not say that there was any circumstance which led him to consider that Sookias had ceased to be such a good customer as he was before the purchase of his property in September 1913. There was no reason whatsoever then for his asking for the production of the title-deeds in 1914 for the purpose as alleged. The Subordinate Judge has not also accepted this evidence as he says, " defendant No. 3 has adduced some oral evidence to show that after the date of the alleged deposit of title-deeds they were shown at Naraingunge by J. B. Sookias to him and his witnesses Nos. 5 and 9. I do not attach any weight to the evidence." We are also of opinion that this evidence is untrue.

The fact, therefore, remains that there is positive evidence on behalf of the plaintiff and there is no evidence on the other side contradicting it. In such a case unless the circumstances are such that the evidence on behalf of the plaintiff cannot be true, we should not be disposed to hold that this uncontradicted evidence should be rejected. But the Subordinate Judge has referred to certain circumstances from which he comes to his conclusions and it is, therefore, necessary for us to deal with the grounds on which the Subordinate Judge has held that the plaintiffs' evidence should not be accepted and the document, Ex. 5, dated the 30th June 1914, is a forged instrument.

We should deal, first, with the signature on the letter, Ex. 5. The Subordinate Judge says, after looking into certain undisputed signatures of J. B. Sookias: —" He used to sign with a flourish below his signature and this flourish is drawn from the last letter of his name. All these undisputed signatures are in a bold and running hand and the flourish in the signature is not easy to imitate. The alleged signature in Ex. 5 does not appear to have been made with a running hand It appears to have been made in rather a halting hand. Certainly the flow of writing in this signature is much less than in the undisputed signatures. The latter 'B' and the next letter 'S' in the alleged signature are clearly in a halting hand." Then, lower down, he says : " The flourish below this signature does not resemble the flourish below any of the undisputed signatures. It appears to be an imitation of the flourish below one of the signatures made in the hos-

pital, to wit, the signature in Ex. 6." Ex. 6 is the signature in one of the adjustments of account acknowledged by J. B. Sookias on the 3rd July 1916. We may say at the outset that no expert evidence was given in this case on behalf of the defendant for the purpose of comparing this disputed signature with the admitted signatures of Sookias. The observations which the Judge has made have been made on his own view of the signatures. The practice of a Judge declaring whether a diputed signature agrees with the other signatures of a certain person without the assistance of any evidence but merely on his own inspection, has been disapproved by experienced Judges in many cases. It is especially undesirable that the Judge should take upon himself the task of comparing signatures in order to find whether there has been a forgery in such a case, where there is nothing to show on the record that this signature was alleged by any person to be a forgery. It is also difficult to say that, because certain letters in the disputed signature appeared to have been written in a halting hand, in the opinion of the Subordinate Judge, that it should be a forgery. In this connection we think that the observations of Sir John Nicholl in the case of *Robson* v. *Rocke* (1), are appropriate. He says, speaking of evidence relating to dissimilarity of signatures: "But such evidence is peculiarly fallacious, where the dissimilarity relied upon is not that of a general character, but merely particular letters; for the slightest peculiarities of circumstance or position, as, for instance, the writter sitting up or reclining or the paper being placed upon a harder or softer substance, or on a place more or less inclined—nay, the materials, as pen, ink, &c., being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of this sort few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person." This seems to have been the experience of most persons about their own signature which they make at different times. We have carefully examined the signatures ourselves. We do not think that the disputed signature is such that it can be said to be a forgery. Speaking of dissimilarities, we may point out that the signatures in Ex. 67 (*a*) to 67 (*d*) which purport to have been made at the same time on the same document by Sookias and which are undisputed show dissimilarities and the same observations may be made with regard to those signatures as have been made by the Subordinate Judge with regard to the signature on Ex. 5.

We must then deal with the observations of the Subordinate Judge with regard to the contents of the document, Ex. 5. The learned Subordinate Judge seems to have made too much of what he calls two slight inaccuracies in composition and those are the use of the word 'owed' when it ought to have been 'owe,' and the fact that a comma had been placed after the word 'account' instead of a full stop, and the letter 'a' following ought to have been a capital letter instead of a small letter. From this he comes to the conclusion that this draft could not have been made by an Attorney, because he says that an Attorney must be presumed to have good knowledge of English. But the Subordinate Judge seems to overlook the fact that these mistakes might have been made by the typist. It is a well known fact, and which we see almost every day, that typed petitions presented in Court contain serious errors due to the typists' mistakes, and even in this document, Ex. 5, in the list of the documents there will be found, even on a cursory view, that there are various mistakes due to the typists' errors. With regard to this we may also state that no question was asked during the plaintiffs' cross-examination about these inaccuracies. Now, even assuming that this document was drafted as it appears before us, there is no reason to suppose that it was a forgery. The plaintiff says in his evidence that he spoke to some Attorney, whom he could not remember, who made the draft. If the plaintiff wanted to forge a document he would have only to ask the Attorney for a draft of a memorandum for deposit of title-deeds by way of security and he would have got it. The fact, therefore, that there are these inaccuracies in the document does not lead to the conclusion that it was not a genuine document.

(1) (1824) Add. 58 at p. 79; 162 E. R. 215.

GLASTAUN v. SONATAN PAL

The Subordinate Judge next seems to draw some inference against the plaintiff because of the draft not having been produced in this case. We do not attach any importance to this fact. Such a draft would not be preserved by any man of business in ordinary circumstances. In some cases drafts of documents may be necessary and their production highly important, as, for instance, where a Will is alleged to have been executed by a testator on his death-bed: and the question is whether the fair copy of the Will was in accordance with the draft approved by the testator. But we do not see any reason why the draft of a memorandum of the fact that title-deeds have been deposited as security should be preserved.

The learned Judge then makes certain observations with regard to the transaction being unbusinesslike. We do not see that it was unbusinesslike in any way having regard to the course of dealings of business-men in similar transactions. Mortgages by deposit of title-deeds are not allowed by the law in the Moffusil. They can only be made in certain towns specified in the Transfer of Property Act, and suits based on equitable mortgages in Moffusil towns are very rare, and it seems to us that the learned Subordinate Judge is not quite familiar with the way how these transactions are conducted in the Cities. Supposing Sookias were alive and the suit had been brought against him, could he be heard for a moment to say that the transaction was at all unbusinesslike? The whole difficulty has arisen from the fact that Sookias is dead and the plaintiff took possession of his properties under circumstances we shall state later on. If Sookias had been alive, certainly it could not have been urged by him, why there was no witness to this transaction, why was not any Attorney called in, and so forth. In order to understand the nature of this transaction one must remember the relationship between the parties. Galstan had every confidence in the integrity of Sookias as would appear from the fact that he had been making large advances of money to Sookias and when Sookias produced the title-deeds of the property before him, the plaintiff was satisfied, by looking into the last conveyance which Sookias had taken, as regards the nature of the deeds, and kept them in deposit. That being so, we do not consider that there was anything unbusinesslike in the transaction which would make the allegation of the plaintiff suspicious.

We should next deal with the other points of suspicion on which the Subordinate Judge relies. The first thing he says is that there is no documentary evidence to show that in 1914, or previously, the plaintiff ever pressed Sookias to give security for his debts to the plaintiff. The plaintiff has expalined why he asked for security. The Subordinate Judge deals with two documents, Ex. 2 and Ex. 3., Ex. 2 is a letter at the end of which the plaintiff wrote:—"Don't forget to get the title-deeds of Gopechur Godown as you promised." This letter is dated 12th May 1914. In reply to this letter, Sookias wrote Ex. 3, which is dated 14th May 1914. The last lines are these.—"Gopichur title-deeds I shall with pleasure bring them down for year inspection and satisfaction to my satisfactory bargain in that property." The Subordinate Judge considers that the plaintiff asked Sookias to bring the title deeds of Gopechur properties to him in order that the plaintiff might inspect them for the purpose of satisfying himself that Sookias had made a good bargain, and he comes to this conclusion with reference to the last few words of Sookias' letter. We must say that it is difficult to understand the meaning of what Sookias wrote. But we have no doubt in our minds that the plaintiff did not want the title-deeds of Gopechur properties for the object of satisfying himself as to whether Sookias had made a good bargain. It is in evidence that Galstaun knew about the purchase when it was made. The purchase had been made in Calcutta and the conveyance was prepared by a Firm of Attornies here. Basil says that he had seen the title-deeds of Sookias at the time the property was purchased. Whether Sookias had made a good bargain or not might be a question of some importance at or about the time of the purchase and if the plaintiff was so anxious to be satisfied about that he would have enquired into the matter at or about the time of the purchase. But a mere inspection of the title-deeds would hardly enable any person without inspection of the property to decide whether the purchase of property was a good bargain or not. This property was purchased for

9,800 rupees only in September 1913, buildings were made upon it by Sookias and the value of the property at the time of the suit is said to have been about a lakh of Rupees. Galstaun says that when he saw that buildings had been made on it by Sookias with monies which he had advanced, he thought of taking that property as security for his debts by deposit of title-deeds. It seems to us that that is a probable explanation of plaintiff's asking Sookias to bring the title-deeds and it was not for the purpose of being satisfied as to the bargain Sookias had made.

Then, we have to deal with two other letters, Ex. 53 and Ex. 54. The Subordinate Judge has, in our opinion, made a mistake with regard to the inference he draws from Ex. 53. That is a letter written by Sookias to the plaintiff, dated 8th January 1916, and the relevant passage runs thus :—Regarding the pro-note my best endeavours are to reduce my old standing debts to you. Therefore, I am reluctant to sign a fresh note until I go down to Calcutta by the end of this month and adjust our account. Then I shall be ready to give you anything that you may ask for. " The Subordinate Judge seems to have thought that this letter was in answer to a letter by Galstaun asking Sookias to execute a fresh promissory-note in his favour and from that he infers that there was a previous promissory-note. If that was so, he says, then the story of a mortgage by deposit of title-deeds would be false. We are unable to follow this reasoning of the Subordinate Judge. It is well known that a debtor may execute a promissory-note in favour of his creditor and at the same time deposit his title deeds by way of security for payment of the debt. In fact the oldest cases with regard to equitable mortgages in our books before the Transfer of Property Act show the fact of deposit of title-deeds being endorsed on the promissory-note. In this case the deposit was made to secure the past and future debts. The amount of the debt was not ascertained and it is only natural that the creditor would ask for some acknowledgment from the debtor by way of a promissory-note in order to fix the amount of his liability.

Much has been made by the learned Subordinate Judge about a press copy-book of letters of the plaintiff. This press copy-book was filed by the plaintiff on the 31st March 1920 and it purported to be a copy-book of letter from 18th May 1915 to the 24th February 1916. After the close of the case of both parties the plaintiff's pleader took back this copy-book on the 26th June 1921. The book, therefore, remained in Court for about a year and three months. The defendant, from time to time, applied to the Court for inspection of the document and they obtained such orders. It may be presumed that they did inspect this book. But they did not choose to use any portion of this book as evidence on their behalf, nor did the plaintiff use it. After the book had been taken away from Court the Subordinate Judge desired to have it for the purpose of looking into the letter of the 4th January 1916 which was mentioned in Sookias letter of the 8th January 1916 (Ex. 53). It is unnecessary to state in detail about the various orders relating to this matter. On the 12th July the plaintiff's pleader informed the Court that he was unable to produce the press copy-book as it had been sent to England where Mr. Galstaun then was for the purpose of some litigation there. The Subordinate Judge draws an inference against the plaintiff for non-production of this document. It should be borne in mind that the defendant did not ask for it, presumably because the defendant knew that there was nothing in the book to support his case. It was not until the Judge was anxious to have it and the plaintiff was unable to produce it that he presented a petition in Court that he had not inspected the book thoroughly. In this Court, before us, the plaintiff offered to produce it if the defendant wanted it. But the defendant's Vakil declined to accept the offer, and, moreover, he said that he did not ask the Court to look into that book. The obvious inference is that that letter has no bearing on the present question at all. The only inference the Subordinate Judge appears to make is that there was a promissory-note prior to that date executed by Sookias in favour of the plaintiff. But the most remarkable thing in this trial is that questions which appear to be material to the Subordinate Judge were never put to the plaintiff when he was in the box and everything is left to conjecture as regards the probable meaning of letters and the transaction of the parties. The proper thing would have been to ask the

plaintiff when he was in the box as to the matters dealt with by the lower Court.

The same observation would apply to the next two letters with which we are going to deal, that is the letter Ex. 54 which was written by Sookias to the plaintiff in answer to the plaintiff's letter, Ex E. E., which is dated 23rd March 1916. In the letter of the plaintiff he asked for a cheque and said, failing which, Sookias must arrange to work elsewhere as he could not go on paying these large sums getting no return. The relevant portion of the letter in answer by Sookias, dated 25th March 1916 is this: "As I am anxious to see all accounts cleared up-to-date with your goodself on arrival will go though it thoroughly. Any balance left I shall mortgage everything that I possess and refund you with grateful thanks. My aim and object has always been to pay off my dues to you and whatever I have made it has been paid to you, and I have kept no secret from you. I shall see that you will not lose a single pie out of my dues to you." The Subordinate Judge says: "This letter indicates to my mind that there was no mortgage to the plaintiff previous to this letter," and he proceeds thus: "In this letter J B. Sookias promised to mortgage everything that he then possessed in order to secure what might be due by him to the plaintiff." It seems to us that this is a misreading of the letter, because Sookias said, "I shall mortgage everything that I possess and refund you with grateful thanks." He did not speak of securing the debt of the plaintiff by mortgage, but refunding him, that is, paying off his debt by mortgage, and, therefore, the letter does not contradict the fact that the debt had already been secured by a mortgage. The plaintiff was demanding money and not security, and the answer is that Sookias would pay the money by mortgage. It does not mean, therefore, that the mortgage should be effected in favour of the plaintiff, and it may mean that Sookias promised to pay off plaintiff by procuring money by mortgage to some other person. It appears to us that the argument based on these letters is altogether fanciful and not convincing.

It, therefore, seems to us that there is no ground based on the circumstances of the case on which it can be said that the plaintiff's case is inconsistent with the facts proved by him and on the facts disclosed by the evidence the plaintiff's story of the deposit of title-deeds and the subsequent letter of hypothecation is false.

Then, with regard to some observations of the learned Judge as regards the truthfulness or otherwise of the plaintiff we do not think it necessary to make any remarks at any length, for example, the Subordinate Judge says that the plaintiff had made a false statement in his affidavit sworn on the 25th April 1917 and this refers to the misstatement of the rate of interest at which he advanced money to Sookias. This is a statement which the plaintiff had made against his own interest, because the rate of interest was given in the affidavit as 9 per cent. per annum, whereas, it was really ten per cent. per annum with compound interest. It was reprehensible carelessness on the part of the plaintiff to make such a statement. To say that he had no scrupulous regard for truth on account of these statements seems to us to be going too far.

There is one other matter dealt with by the Subordinate Judge which we need only mention. That is with regard to the account-books of Sookias. The account-books of Sookias, according to Galstaun, had never been sent to him. A letter has been produced by the defendant purporting to have been written by Galstaun on the 22nd August 1917 asking C. B. Sookias, the brother of J. B. Sookias, his debtor, to send the cash. book-ledger and journals showing the debts of J. B. Sookias. C. B. Sookias had given a list of the debts of his brother to Galstaun for insertion in the application for Probate and the Probate Deputy Collector wished to see the accounts. In pursuance of that letter it has been proved that the documents had been sent to Calcutta, and it also appeared from the account-books of the plaintiff that those were sent to the Collectorate, presumably for the purpose of satisfying the Probate Deputy Collector about the correctness of the entries made in the application for probate. Similarly, with regard to the entries of the debts of T. B. Sookias and Basil in Ex. A, the affidavit of Galstaun. These accounts of the debts, as will appear from the letter Ex. E, were given by C. B. Sookias to Galstaun, and if there was any misstatement Galstaun could not be held responsible for telling a false story. But with

regard to Basil's debt it is quite clear that the shares of the Lansdowne Jute Mills were pledged with him by C. B. Sookias, and Basil considered them, when he was giving evidence, as belonging to C. B. Sookias. But they have been taken as belonging to J. B. Sookias in describing the assets of J. B. Sookias and the debt was shown as the debt of J. B. Sookias by pledge of these shares. Therefore, it cannot be said that Galstaun had no regard for truth when making that affidavit.

Then, one other fact must be stated with regard to this point. The debt of Galstaun was, roughly speaking, about a lakh. The debt of other creditors who had not been paid would not exceed Rs. 20,000. If there was no mortgage in favour of Galstaun he could obtain a decree for money against the representatives of Sookias, and if he had asked for rateable distribution of the sale-proceeds he would get 5|6ths of the sale-proceeds and the other creditors would get only 1|6th. In the present case the property had been sold for Rs. 30,000 and the amount which the other creditors would get, if Galstaun had asked for rateable distribution after obtaining a mere money decree with regard to his debt, would not exceed 5,000 Rupees. The advantage which the plaintiff would get by this mortgage in his favour is that the other creditors would be deprived of Rs. 5,000 only. It has been admitted that the plaintiff is a very wealthy man. He has landed properties giving an income of about Rs. 30,000 a month and he makes 15 to 20 thousand Rupees a month by his business. Apparently, he has some position in the mercantile circle. The learned Judge says that it is difficult for him to discover a motive for this forgery, to call it by its true name, of Ex. 5. It is possible that a man of the plaintiff's position may be guilty of the offence of forgery or of using a forged document as genuine. But there must be some relation between the advantage he expects and the risk he runs by that forgery. Here it is a question of money only, because it cannot be said that Galstaun is anxious to get the property; and to say that a man of his position stoops so low as to countenance forgery, if not actually doing it, for the gain of such a paltry amount would require some strong evidence to support it.

It is urged on behalf of the respondent that this fact of the mortgage was not given out by Galstaun immediately after the death of Sookias when some petty creditors of Sookias saw him or wrote to him about their debts. This is explained very well by the fact that, before the death of Sookias, he wrote a note that Galstaun should be guardian of his minor son. After the death of Sookias, Galstaun actually took possession of all the properties of his debtor and it appears that he carried on the business of J. B. Sookias, through his brother C. B. Sookias for sometime. When he was written to by these small creditors the answer he gave was that he would take Letters of Administration after the reopening of the Court after the long vacation in 1914 and then look to the assets of the estate. There was no occasion for him then to state anything to the other creditors about his mortgage, and the fact that he did not tell them about this mortgage at the time does not go against the fact that there was such a mortgage.

Then, it has been urged that the pleader purporting to have been authorized by the plaintiff in that behalf made a statement in a petition Ex. 12, dated 1st May 1919, that an equitable mortgage had been made on the basis of a letter of hypothecation on the 30th June 1914, and the argument is that then it was intended by the plaintiff that there should be a letter of the 30th June by which the mortgage by deposit of title-deeds was effected. We do not think that such a conclusion is warranted. It might be either a mistake of Basil who had instructed the pleader to file the petition or the mistake of the pleader. In any case, the document of the 30th June 1914 does not create a mortgage by deposit of securities. On these grounds we are of opinion that it should be held that there was a mortgage by deposit of title-deeds on the 22nd May 1914 and that the letter dated 30th June 1914 purported to be signed by J. B. Sookias was actually signed by him and which letter shows the terms of the loan.

The learned Subordinate Judge has found that defendant No. 3 had purchased with notice of the mortgage. This point has not been contested before us. But, in any case, it seems to us that he, being a purchaser at a sale in execution of a decree, has purchased the property subject to all the equities of the judgment-debtor and he cannot take up the

position of a *bona fide* purchaser for value without notice.

As we have already said, no question has been raised as regards the amount which has been found due by the Subordinate Judge to the plaintiff, there will, therefore, be the usual mortgage-decree in favour of the plaintiff for the principal amount of Rs. 79,043-8 as-10 pies with interest at ten per cent. per annum with six-monthly rests from the date of suit to three months from this date, with costs calculated on that amount in the lower Court and in this Court. The defendants will bear their own costs throughout. The interest and costs of the plaintiff will be added to the mortgage-money. The period of redemption is fixed this day three months. From after that date interest will run on the whole amount found due at the rate of six per cent. per annum.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1453 OF 1922.

February, 26, 1924.

Present:—Mr. Justice Daniels.

PARBHU DAYAL—DEFENDANT—APPELLANT
versus
MURLI DHAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XLI, r. 22—Appeal, withdrawal of, effect of—Cross-objections, after withdrawal, whether competent—Limitation Act (IX of 1908) s. 5.—Appeal, delay in filing—Review, time spent in, whether can be deducted.

The dismissal of an appeal on withdrawal has the effect of a decision on the merits. It leaves the finding of the trial Court final against the appellant and the rule of *res judicata* applies. [p. 678, col. 2.]

Rule 22 of O. XLI of the Civil Procedure Code allows a respondent to take a cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. [p. 678, col. 2.]

Ramji Das v. *Ajudhia Prasad*, 25 A. 628, followed.

The expression "cross-objections" in r 22 of O. XLI of the Civil Procedure Code implies that the objections are taken in answer to a pending appeal. Cross objections cannot be filed where the appeal has been withdrawn.

Time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under section 5 of the Limitation Act, from the period of limitation provided for an appeal. The mere fact that the applicant for review made a mistake of law in applying for review does not preclude him from obtaining the benefit of the section. [p. 679, col. 1.]

Brij Indarsingh v. *Kanshi Ram*, 42 Ind. Cas. 43; 45 C. 94; 88 M. L. J. 486; 22 M. L. T. 882; 6 L. W. 592; 126 P. W. R 1907; 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; 44 I. A 218, relied on.

Second appeal from the decree of the Additional Subordinate Judge, Bareilly, dated the 13th October 1922.

Mr. *Bajpai*, for the Appellant.

Mr. *Agarwala*, for the Respondent.

JUDGMENT.

Daniels, J.—This is an appeal by the defendant arising out of a suit for specific performance of a contract. As the appeal raises a question of limitation both as to the plaintiff's suit and as to the plaintiff's appeal to the Court below and involves a question of *res judicata* as to the defendant's cross-objections in the Court below it will be necessary to set out the material facts and dates in some detail. The contract, of which specific performance is sought, was made on 1st April 1915. By it the defendant-appellant Parbhu Dayal agreed to sell to his nephew the plaintiff Murli Dhar one-fourth of a house whenever the plaintiff should pay him the sum of Rs. 200. Shortly after this, the defendant mortgaged the house to a third party and I am informed that the mortgagee has filed a suit on his mortgage and has obtained a decree. On 4th November 1921 the plaintiff filed the present suit for specific performance alleging that, on 21st September, he had tendered the sum of Rs. 200 to the defendant and asked him to carry out the contract and transfer the house to him and that the defendant had refused. The learned Munsif passed a decree in favour of the plaintiff on 18th March 1922 subject to his paying to the defendant a sum of Rs. 300 and one-fourth of the decree obtained by the mortgagee. The sum of Rs. 300 included the original Rs. 200 stipulated in the contract and a further

sum of Rs. 100 on account of one-fourth share of the improvements to the house made by the defendant since the date of the contract. The plaintiff, on 29th March 1922, filed an application for review objecting to this condition. His application was dismissed on 6th May 1922.

In the meanwhile, on 24th April 1922, the defendant had appealed to the District Judge. On 15th May 1922 he applied to the Court below to withdraw the appeal and the appeal was dismissed on his application. On the next day, that is, one day after the appeal had been dismissed, the plaintiff filed cross-objections under O. XLI, r. 22. The Court below dismissed those objections on the ground that there was no appeal pending before it and, therefore, no cross-objection under O. XLI, r. 22 could be preferred or entertained, and that the plaintiff's remedy was to file an appeal. On the same date, namely, the 18th May 1922 the plaintiff filed the appeal against the judgment in which the present second appeal has been brought. The defendant thereupon filed cross-objections raising the same points which he had raised in his appeal of 24th April. The Court below has dismissed those objections as barred by the rule of *res judicata*. It has allowed the plaintiff's appeal by deleting the condition requiring the plaintiff to pay one-fourth of the decree obtained by the mortgagee. The defendant has preferred a second appeal to this Court and has urged in support of it the following grounds:—

1. That the plaintiff's appeal to the Court below was time barred.

2. That as the plaintiff's cross-objections to the defendant's appeal had previously been dismissed it was not competent to the plaintiff to file a separate appeal on the same points.

3. That the Court below was wrong in dismissing the defendant's cross-objections on the ground of *res judicata*.

4. That the plaintiff's suit was barred by limitation under Article 113.

5. That the plaintiff by his own laches had disentitled himself to equitable relief by way of specific performance.

6. That instead of relegating the defendant to a separate suit for contribution in case the mortgage amount should be realised from him, the equities should be adjusted now by requiring the plaintiff to pay one-fourth of the mortgage-money. In other words, the decree of the trial Court should be restored.

I take the third plea first. This plea is wholly untenable. The dismissal of an appeal on withdrawal has the effect of a decision on the merits. It leaves the finding of the trial Court final against the appellant and the rule of *res judicata* applies. The language of O. XLI, r. 22 is to the same effect. The rule allows a respondent to take any cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. The point was expressly decided against the appellant in *Ramji Das* v. *Ajudhia Prasad* (1) and there is nothing in the alteration in the wording of the rule under the new Code which renders this decision inapplicable. The result is that the appellant cannot now raise any point which was decided against him by the trial Court. His fourth and fifth pleas are, therefore, not maintainable and it is unnecessary to go into them.

It remains to consider his objection to the appeal filed by the plaintiff in the Court below. His first contention is that that appeal was time barred. This depends on whether the plaintiff can be allowed the benefit of the time occupied in prosecuting his application for review. It is pointed out that neither the first nor the second para. of section 14 of the Limitation Act applies to appeals and that in other cases, *e.g.*, in section 12 where it was intended that the provision should apply to appeals, the word "appeal" has been separately mentioned. In dealing with this question it is, however, necessary to consider not merely section 14 but also section 5. The Privy Council, in *Brij Indar Singh* v. *Kanshi Ram* (2), have laid down that time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under section 5. It is also now settled that the fact of the plaintiff having made a mistake of law does not necessarily preclude him form obtain-

(1) 25 A. 623.

(2) 42 Ind. Cas. 48 ; 45 C. 94 ; 88 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); 44 I.A. 218.

ing the benefit of the section. In this case there is a finding of the Court below that the plaintiff was prosecuting his application with due diligence and it appears to me that I should accept that finding.

The second objection is that the dismissal of the plaintiff's cross-objections to the defendant's appeal precluded him from appealing on his own account. If those objections had been dismissed on the merits this plea would have been unanswerable. The record shows quite clearly that they were not dismissed on the merits. Indeed, they appear to have been dismissed on an office report without even hearing the parties. They were dismissed on the view that it was not competent to a party to file cross-objections after the appeal of the other side had been dismissed. Even if the view of the Court below was incorrect I must look to the ground on which the objections actually were decided and not to what, in the view of the appellant, the Court ought to have done. In my opinion, however, the view taken by the Court in dismissing them was correct. The very word "cross-objections" used in O. 41, rule (and introduced, I may note, for the first time in the present Code) implies that the objections are taken in answer to a pending appeal. Clause (4) of the rule has been referred to by the appellant but that clause is really against him. It lays down that where, after the respondent has filed a memorandum of objection under the rule, the appeal is subsequently withdrawn or dismissed for default such withdrawal or dismissal shall not prevent the objections being heard and decided. The rule clearly implies that the objections have been filed prior to the appeal being dismissed or withdrawn. I know of no reported decision on the point, but I am informed that there is an unreported decision of Mr. Justice Banerji in which the same view has been taken.

On the sixth plea I do not consider that I should be justfied in interfering with the decree of the Court below. It is not yet certain that the mortgagee will realise any portion of his security from the share of the house which is in dispute in this case.

The result is that the appeal fails and on all points and it is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 1 OF 1922.

February 22, 1924.

Present :—Mr. Justice Newbould, Mr. Justice Ghose and Mr. Justice Page.

SURESH CHANDRA MUKERJI—
PLAINTIFF - APPELLANT
versus
SHITIKANTA BANERJEE, AND OTHERS—
DEFENDANTS —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 142—Dispossession and discontinuance of possession—Burden of proof—Constructive possession of owner.

Where a plaintiff sues for possession on an allegation of dispossession, he must prove possession within twelve years before suit. In order to prove such possession he may rely upon the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession, but if he relies upon this presumption he must prove that the land was incapable of actual possession within twelve years before suit. For instance, constructive possession may be shown by the fact that the land being under water was incapable of actual possession, or that, although it was capable of being possessed, no one had actually taken possession during the period in question. He cannot, however, by proving possession at any period anterior to twelve years before suit, shift the *onus* on to the defendant to prove his possession.

Case-law discussed.

Per *Page, J.*—A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues until he is dispossessed ; and upon the cessation of the dispossession before the lapse of the statutory period, constructive it remains.

While the doctrine of constructive possession is equally applicable to cases where the plaintiff seeks to obtain possession of land in the possession of another and to cases where the plaintiff claims to recover possession of lands of which he alleges that he has been dispossessed, a plaintiff who frames his siut to recover possession of lands of which he has been dispossessed must needs prove that he has been in possession and that he has been dispossessed within twelve years prior to commencing proceedings to recover possession of the land.

Appeal against the decree of Justice Sir George Woodroffe, dated the 28th July 1922.

Dr. *Sarat Chundra Basak* (with him Bubus *Pramatha Nath Mitter* and *Hemendra Nath Chatterjee*), for the Appellant.

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Dr. *Jadunath Kanjilal* (with him Babus *Punchanon Ghose* and *Apurbacharan Mukherjee*), for the Respondents.

The facts of the case will appear from the following judgments delivered in the Second Appeal : —

Woodroffe, J.—This is a suit for declaration of the plaintiff's title to and for recovery of possession of certain lands covering, it is said, 10,000 bighas in area described in the schedule to the plaint. The facts are fully set forth both in the judgment of the learned Subordinate Judge and of my learned brother. I need not, therefore, repeat them except so far as is necessary for explaining the conclusions at which I have arrived.

Since the date of the plaint, claim to certain lands has been abandoned. The tract on the east within stations m, n, x, v, 8, 7, 36, 35m in the Commissioner's map was given up in the trial Court. In this Court so much of the disputed land as lies north of the Settlement line of 1904 (which corresponds to the southern banks of the river at the time of Revenue Survey in 1856) was given up. Out of the lands comprised within the Revenue Survey and the boundary lines of Kabirajpore the plaintiff's title has been found in respect of 15 *chaks* and the residuary portion of *Mouza* Kabirajpore. The *chaks* are numbered 5, 7, 15, 17, 61, 64, 69, 70, 73, 99, 100, 101, 102, 103 and 104. The residue does not bear any number. These 15 *chaks* and the residue lie scattered all over the *Mouza*.

The learned Subordinate Judge has given the plaintiff a decree for so much of the 15 *chaks* and the residue as lies, speaking roughly, south of the southern line of the map of 1903 (thick brown line in the Commissioner's map) which is near to the southernmost line of the Partition Map of 1899. The plaintiff's title to so much of the 15 *chaks* and the residue as lies north of the above-mentioned line has been held by the learned Subordinate Judge to have been extinguished by the adverse possession of the defendants. The present appeal related to so much of the disputed land as lies north of the above-mentioned line of 1903, and is covered by the 15 *chaks* and the residue of *Mouza* Kabirajpore. The appellant asks that *khas* possession be given to the plaintiff of so much of the whole of the disputed land as is covered by these 15 *chaks* and the residuary portion of *Mouza* Kabirajpore.

The decision of the suit depends upon the questions of limitation and adverse possession. It is conceded that the plaintiff's suit is governed by Article 142 of the Limitation Act as also that, under that Article, it is necessary for the plaintiff to show possession and dispossession within 12 years before the suit. As to the sort of possession and the mode of showing it I deal later. It is also conceded that, whilst the burden of proving his case, namely, possession and dispossession within 12 years lies upon the plaintiff, the burden of proving adverse possession lies upon the defendants. The defendants are not, however, called upon to prove anything unless and until the plaintiff has established his possession and dispossession within 12 years. If the plaintiff does that, then the onus is upon the defendants to prove their adverse possession for 12 years. It is very important, in my opinion, to keep this distinction well in sight in order to avoid the confusion which is liable to result in cases of this kind in which a very large number of decisions have been cited. The point is, however, in my opinion clear, namely, that the plaintiff must, first of all, establish possession and dispossession within 12 years of the suit. It has been contended on the plaintiff's behalf that as his title to the land has been found as also that he had possession of the land before diluvion, his constructive possession must be deemed to have continued until the defendants show that such possession has come to an end. The argument has been carried to the length of the statement that in a case of this kind it is only necessary for the plaintiff to establish his title and to allege that he is out of possession in order to obtain relief, it being upon the defendants to allege and prove when such dispossession took place. This, however, in my opinion, is a wrong view of the law. It will be, however, more convenient to deal with this matter after I have set forth the case which the plaintiff made in the plaint. This is the case upon which his claim must be judged.

According to the plaint, diluvion took place in the year 1890. In 1902 there was a re-formation. At the time of the temporary Settlement by the Collectorate of Nadia in the year

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1904 of Char Balliadanga the then Collector of Nadia declared the lands to be reformation *in situ* of *Mouza* Kabirajpore to which the plaintiff had title and the Collector released them in favour of the plaintiff as *talukdar* of *Mouza* Kabirajpore The plaintiff alleges that at that time the land was in the form of an extensive sand-bank and unfit for cultivation and possession. It was only after the rainy season of October 1906 that the land became, according to the plaintiff's case fit for cultivation. At that time, it is alleged that the defendants proposed to take settlement of the land from the plaintiff. But owing to their, that is, the formers' delay the plaintiff with a view of settling the land with others attempted in March 1913, to have it surveyed by an *Amin* but the defendants, alleging that the lands were comprised within the Settlement *mahal* belonging to them and denying the title of the plaintiff prevented the plaintiff from making the Survey. This allegation is denied. The plaint then alleges that the defendants, not having a legal title, the plaintiff has brought this suit. He dates his cause of action as having gradually arisen from the date when a portion of the land first became fit for cultivation, that is, from the 18th October 1906. Obviously this is incorrect, as "becoming fit for cultivation" is not a cause of action. But it appears from the evidence of the witnesses for the plaintiff and is admitted in argument that the plaintiff was dispossessed in the year 1906 when the land become culturable; for the evidence of his witnesses is that the defendants have been in adverse possession since the year 1906. The defendants claim to have been in possession long before that.

Now the position is this, the evidence of the plaintiff's own witness establishes, as I have said, the adverse possession of the defendants for a period of ten years, a period of two years short of the period of limitation under Article 142. A question then arises as regards the two years prior to 1906, that is, a period of 12 years before this suit. On the face of the plaint, the plaintiff is not barred and if it were established as he alleges that the lands only became capable of possession and were possessed from the year 1906 then the plaintiff's suit would be in time because during the two years prior to 1906 the lands would have been, according to the plaintiff's case, incapable of possession, having reformed only in 1902 and in the case of land incapable of possession it would have to be held that the plaintiff who has title has constructive possession during such period. But it has shown to a certainty in this case, and it has not been contested before us, that the story which has been put forward by the plaintiff is not a true one and the Judge has described it as absurd. For it has been abundantly shown that it is not true that the land for the first time re-formed in the year 1902 as alleged in the plaint. As a matter of fact, (to go no earlier) the land re-formed in 1880. In that year a Settlement was made; as also in 1890 another Settlement was made. There was a further re-formation and further Settlement more than 12 years before the suit. That being so, the question then arises whether or not the plaintiff's allegation having been disproved on this head he must not show that he had possession of the land during the period of 1904 to 1906. For the appellant it is contended that the plaintiff has not to show this, that we must assume, in the absence of any evidence and on the strength of his title, that during such period he had constructive possession unless and until the defendants prove their adverse possession during such time. In my opinion, however, this contention is not sound. The plaintiff sued for possession on the allegation of dispossession. He is bound to prove possession within 12 years before the suit. This possession may be either actual or constructive. His witnesses say that he was not in actual possession from the time the land became submerged as it became incapable of such possession and that he has not had actual possession since the land re-formed and become culturable. The plaintiff must, therefore, prove that the land was incapable of actual possession within 12 years before the suit, that is, during the two years preceding 1906 since which date, admittedly, there has been adverse possession. In other words, he must show that this constructive possession continued on account of diluvion and on account of the land being incapable of possession within 12 years of the suit. He must show that the land became incapble of user by submergence or otherwise and remained in such a state of incapacity for use until within the period of limitation.

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Now the question is whether the plaintiff has shown this : It is, in the first place, to be observed that there has been admitted adverse possession for 10 years before the suit and having regard to the fact that some of the disputed land re-formed so far back as the year 1880, some 26 years before the institution of the suit, it is in my opinion *prima facie* probable that in the two years prior to 1906 the land was capable of possession as it admittedly was during the ten subsequent years. As stated in the judgment, the plaintiff does not claim to have exercised an act of ownership over any part of the re-formed land and his witnesses show that possession had been for ten years prior to the suit with the defendants. Of course, if the allegation in the plaint be established there would obviously be a distinction between the period of ten years before the suit and the period before that because the answer to the question why we should not hold that the defendants admitted possession of ten years did not extend two years further would, upon the plaint, have been that it could not be extended further because the land was incapable of possession having only been re-formed in 1902. But as that case is shown to be untrue that reason can no longer be given. The plaintiff now seeks to establish, (if the onus be upon him) that the land was unoccupied and incapable of user during the years preceding 1906 and, therefore, his constructive possession continued. He seeks to do this not by his own evidence, of which he has none, for that period but by the evidence given on behalf of the defendants. Some inconsistent arguments have been addressed to us upon this part of the case. Thus, the evidence of the defendants has been attacked as untrue and untrustworthy. If that be the fact then the plaintiff who seeks to use that evidence can gain nothing thereby. Again, it has been sought to show that the lands of which user has been spoken of by the defendants' witnesses have not been sufficiently identified with the lands in dispute. It may be, it has been suggested that the undisputed portions of the *Char* Balliadanga were the subject of some at least of the user of which the witnesses spoke. But if this be so then the evidence is irrelevant, because it is only on the assumption that the defendant's evidence relates to the disputed lands in suit that it can be of any use to the plaintiff. All that the plaintiff can consistently do as regards this matter is in my opinion to admit the general trustworthiness of the defendant's evidence as also that such evidence refers to the disputed land, but he may at the same time contend that the acts of user which are spoken to are not of such a character as to constitute adverse possession by reason of inadequacy in continuity, extent and so forth. I will discuss, shortly, the defendant's evidence when dealing with the question of adverse possession. I am now dealing with the question only whether the plaintiff has established his case the onus of which lies upon him, namely, possession and dispossession within 12 years of the suit. It is sufficient to say here that in my opinion it is not possible to say that the defendant's evidence establishes in the plaintiff's favour the fact that the lands in dispute were either not used or were incapable of user and that, therefore, the plaintiff had constructive possession within 12 years prior to the suit.

The next question is this : assuming that the plaintiff has established his case, then the onus is on the defendants to show that they had adverse possession during the period of 1904 to 1906. We must consider whether they have, as the learned Judge has held, discharged that onus.

Before entering into this question it is necessary to advert to an objection by the respondents, namely, the position of the *chaks* which the plaintiff claims has not been in some cases delineated and in others the *chaks* have not been numbered. In reply to this objection we were asked by the plaintiff to direct the Commissioner in this case to appear and to re-lay and number all the *chaks* of Kabirajpore upon the map of the disputed lands prepared and submitted by him. The learned Vakil for the respondents objected to this on the ground that the appellant should not be allowed to amend his case in appeal The view, however, which we took with regard to this matter was that the appellant's case should not fail on such ground if it were possible for the Commissioner to do what the plaintiff asked without calling any further evidence ; in, other words, if it was a question of numbering and (if necessary) plotting the *chaks* from the maps already in evidence in the case and

without taking further evidence. We accordingly directed the Commissioner to appear and on his appearance and our making the order in terms of the plaintiff's petition the learned Vakil for the respondent (without prejudice to his contention above-mentioned) asked us also to direct the Commissioner to plot on his map the Government Settlement *Chittas* of 1880, 1890 and the *dags* of the Partition Commissioner. This prayer we also acceded to.

The Commissioner's report finds that the *chaks* and residue claimed in the appeal fall within the disputed area. His report, however, raises a question whether only six *chaks* and not fifteen form part of the appellant's *patni*. These statements in the report upon this point are objected to on the ground that they raise a new case, the title to these *chaks* having been found by the first Court to be with the plaintiff and the only question, therefore, which, it is said, was left open on our order was the identification of the *chaks* and their numbering. It is to be observed that the statements to which exceptions are taken are not statements by the Commissioner himself but are taken from the *thak* statement which was already on the record before the direction was given by the Court to the Commissioner. It is denied, on the other hand, that it is a new case. Dr. Jadunath Kanjilal for defendant No. 1 as also the learned Vakil who support the same interest state that they argued that the appellant could not claim all the 15 *chaks* because the plaintiff's estate only comprised six *chaks*. Accepting this statement of the learned Vakil it is not, in my view of the case as regards limitation, necessary to determine this question because I think that the appeal fails on other grounds than that of title. Re-laying of the Government *chittas* of 1880 and 1890 and the partition plots of 1899 show that whatever be the title the lands are covered in part by these *chittas*. The report identifies the plaintiff's lands and the lands covered by the *chittas*.

Upon the question whether the defendants have proved adverse possession it is to be remembered, in the first place, that adverse possession for ten years prior to the suit is admitted. No doubt if (as the plaintiff alleges in the plaint) the land only appeared and became culturable ten years before the suit there is an answer to the objection as regards limitation. But when we find that that story is untrue and that in fact the land commenced to re-appear at, to go to no earlier date, 1880 that is, 26 years before the suit, it seem *prima facie* likely that the adverse possession which is admitted for ten years existed for the additional two years prior to 1906. On the one hand, there is nothing to prevent such an inference, seeing that the lands did not re-form and become first culturable about 1906, and, on the other hand, we have the fact of the reformation of the land in 1880, 1890 and subsequent years. It is not to be supposed that the land was allowed to remain for so many years without any possession having been taken.

We must distinguish, doubtless, between the question of possession and the nature of possession. It my be that in any particular case acts of possession may be shown which are not adequate to establish adverse possession by reason of continuity, limited extent, or other reason. That some possession was exercised over the land indispute I have no doubt. We have it noted upon the Government map made in the proceedings of 1903 that the defendants were then in possession. If that statement is correct and the possession amounted to adverse possession then the suit is barred. We also have the fact that Settlements have been made with the defendants from the year 1880 in respect of which revenue has been paid by them. It is to be noted that the defendants, thus, are not in the position of mere trespassers but they are persons who entered into possession under colour of title. As regards this it has been said that where a man enters upon a land claiming title his entry into possession refers to such title. Where he enters without title the seisin is confined to possession by metes and bounds, it being a well known rule that mere trespassers and squatters must, in order to establish advers possession, show actual and not merely a constructive possession. So where there is, as here, an entry into possession of a tract of land under a deed of settlement containing specific boundaries the possession may be referred to the boundaries given in such title-deed. I do not say that this is anything more than a rule of evidence. As such, it must be applied with reference to the facts of each particular case. Thus, as I have said during the course of argument, if

under a deed giving title to a tract of 100 square miles, actual possession is taken only of a very small portion of it and nothing further is done it may be that such possession would be insufficient to constitute adverse posseseion of the whole tract to which there was a colour of title. I think, however, that as a rule of evidence in judging whether adverse possession has been established or not we may take into account the fact that the party is not a mere trespasser but is acting under a colour of title. But, however this be, my conclusion would be the same, namely, that the appellant has not shown that the decree should be reversed. In this case the defendants held under a Settlement from the Government. In addition to the fact that the defendant's possession was noted in a map of the Settlement Proceedings of 1903 we have the fact that the land was partitioned between the defendants in 1899 under a decree of the High Court and boundary pillars were set up denoting the parties' respective possession. It seems to me, under the circumstances of this case, unlikely that persons would for years pay Government revenue without making any user of the land.

As to the actual user, the learned Judge says that the defendants have examined certain witnesses whom he names to prove possession of the *Char* lands. He says: "I think this part of the defendant's evidence is not at all satisfactory. Such evidence can be manufactured by a powerful man like the defendant without much difficulty. But there is no doubt that this evidence, coupled with the documentary evidence referred to above, unmistakeably show that the defendants adversely possessed by far the greater portions of the disputed *Char* since 1903." It has been argued that the learned Judge has discredited the oral evidence. But I do not read his judgment in this way. Evidently what the learned Judge meant to say was, that without the documentary evidence the oral evidence to which he refers would not have been enough, as it might have been got up. For if it had been in his opinion unreliable in the sense of untrue he could not have said "coupled with the documentary evidence." By so coupling it the Judge in effect says that he does accept it when associated with the documentary evidence in the case. I may observe here that there is no presumption that evidence is manufactured even when given by "a powerful landlord." It must be shown by cross-examination of witnesses or other evidence in the case that there are reasons for disbelieving the evidence on this or on any other ground. It is to be observed in this connection that the defendant's witnesses are corroborated by the plaintiff's own witnesses so far as the period of ten years is concerned extending up to the year 1906. I see no sufficient reason to doubt the evidence given that the defendants had possession for more than two years before that date. One of the defendants has given his own evidence which is more than the plaintiff has done, who, on the other hand, set up an untrue case and has not appeared to support it.

It is to be observed also in this connection that amongst the witnesses whom the learned Judge mentions the name of the *Amin* witness, Rajani Nath Dey, D. W. No. 7, is not included. *Prima facie* he is a disinterested witness, although the contrary has been suggested on the ground that when he went to test the measurement he put up in the defendant's house. He says that in 1890 Shiba Das Babu, the father of defendant Shiti Kantha Bannerjee, was in possession of the *Char* which he then saw for the first time. He saw it again in 1903. In 1903 he found the major portion of the *Char* under cultivation. About 2 to 2½ *rashis* wide lands above the water was sandy. Above that all lands were culturable. There were some trees and Shiti Kantha grew Kalai on the culturable portion of the *Char*. It has been suggested that the cross-examination establishes that this gentleman refers to the undisputed area. But I am unable to read his evidence in this way. Because he refers in cross-examination to certain plots Nos. 11 of *Touji* No. 2460 and 26 and 29 of *Touji* No. 824 it does not follow that he meant thereby to limit the general statement which he made in his examination in chief. Otherwise, for what reason was he called?

As regards the documentary evidence to which the learned Judge has referred, it consists of partition proceedings of 1899, a note of possession on the map of 1903, rent-receipts and *chittas* as regards four of which at least the Commissioner compared them with the locality. The first mentioned proceedings are

of course not binding as a judgment not having been given in proceedings to which the appellant was a party. But they are evidence to show the origin of the defendants' possession and relevanti n connection with the obtaining of possession and demarcation of lands by metes and bounds under those proceedings. In my opinion the note on the Settlement map of 1903 is of great importance.

The learned Judge comes to the conclusion that the tract of lands which are shown as unculturable in the Partition Map of 1899 were in the actual occupation of the defendants in that year and also in 1903. That being so, he comes to the conclusion that the defendants have succeeded in establishing their adverse title to all the re-formed lands of Kabirajpore which fall within the Settlement Map of 1903 and the Partition map of 1899.

Doubtless, in a case of admitted title one is disposed to regard with strictness evidence of adverse possession and to call for satisfactory proof before deciding against the title. In the present case there was entry under colour of title from the Government and on a fair reading of the evidence, which in my opinion sufficiently establishes both the fact and nature of the possession necessary, I agree with the Subordinate Judge that it does dispose of the plaintiff's case. In my opinion there is no sufficient ground for disturbing the judgment under appeal and the appeal should be dismissed with costs.

A cross-objection has been made with respect to costs. The lower Court has directed that each of the parties should bear and pay their own costs on account of the Commissioner, and as regards other costs, half costs have been disallowed. It has been contended in the cross-objection that these orders are incorrect and that they should be reversed having regard to the small area of the land which has been granted to the plaintiff. No doubt the plaintiff has claimed a great deal more than what was given by the Court. But he did succeed in part and I am unable to hold that the question of costs in this case raises such a matter of principle as would justify this Court in interfering in appeal.

We have already given our order as regards costs of the Commissioner in this Court. But to avoid any further question I may record our order that the cost of the Commissioner in this Court is to be borne by the parties in equal shares. This cost has already been paid to the Commissioner according to the shares stated.

As there is a difference of opinion and there is no majority varying or reversing the decree appealed from, the appeal is dismissed with costs.

Cuming, J.:—The suit out of which this appeal arises is a suit for declaration of title and recovery of possession. The plaintiff's case was that he took a *patni* Settlement of a certain lot Madhusudhanpore and that within the lot was a certain *Mouza* called Kabirajpore, and that by virtue of this *patni* title and also by adverse possession he had acquired a good title and was in possession of the property in suit. In his plaint he does not state when he took the *patni* Settlement of which his adverse possession began. His Vakil stated that he took the *patni* Settlement in 1857 shortly after the Revenue Survey. The superior landlord is the Maharajah of Burdwan. The northern boundary of the *Mouza* Kabirajpore was the river Bhagirathi. In the year 1880 the river Bhagirathi began to wash away the *Char*, north of Kabirajpore, and from the year 1890 it began to wash away the main lands of village Kabirajpore and a *Char* appeared on the north side of the river adjoining *Char* Baliadanga which is a *Char* on the Nadia or north side of the river.

From the year 1902 the land of Kabirajpore began to re-form on the Nadia side of the river Bhagirathi which is one of the many names for the river Ganges. It may be noted here that at the time of the Revenue Survey the river Bhagirathi formed the boundary at this place between the Districts of Burdwan and Nadia.

The Bhagirathi continued to move towards the south and the land of the *Mouza* Kabirajpore began to be re-formed *in situ* from 1902 and the said land began to be fit for cultivation at the end of the rainy season of 1313 (1906).

In 1904 the Collector of Nadia made a temporary settlement of the *Char* called Baliadanga in the District of Nadia with defendants 1 and 2 which *Char* is recorded as Settlement

Mahal Nos. 824 and 2460. At the time of the temporary Settlement in 1904 a map was prepared and the Collector found that some 665 odd *bighas* of land which had been measured as forming part of *Char* Baliadanga were really a reformation *in situ* of village Kabirajpore and so he excluded them from the Settlement. These lands were then unfit for cultivations. The Bhagirathi then moved further south and a further tract of land of village Kabirajpore re-formed, in extent some 334 *bighas* odd.

The plaintiff in 1913 sent his *Amin* to measure the lands. The defendants 1 and 2 resisted him and would not allow the plaintiff to measure the land. Hence, the suit for declaration of title and recovery of possession on the ground that these lands are re-formation in *in situ* the land of village Kabirajpore which is included within his *Patni Taluk* lot 10 Madhusudanpur. The defendants denied the title of the plaintiff. They contended that the plaintiff did not hold a 16-annas share in lot Madhusudanpore, that he had only a fractional interest in *Mahal* Kabirajpore. They denied that the lands in suit were a re-formation *in situ* of the land of *Mouza* Kapirajpore. They contended that they were accretions to *Char* Baliadanga recorded as belonging to *Touji Mahal* 824 and 2460 of the Nadia Collectorate, which had been settled with them. Further, that the land in dispute had become fit for cultivation more than 12 years before the date of the suit and the defendants had themselves passessed the lands for more than 12 years before the date of the suit and so the plaintiff had lost his title, if any, by adverse possession.

They traversed all the allegations of fact in the plaint. Briefly, then, their case was that the plaintiff had no title and that the defendant had acquired a title by adverse possession. The trial Court found that the land in suit was a re-formation in suit of the land of *Mouza* Kabirajpore. The trial Court then dealt with the plaintiff's two titles to the land in dispute, namely, his claim to so much of the land of Kabirajpore as falls within lot Madhusudanpore under Estate No. 10 and also his title by adverse possession to the other land of the *Mouza*. He found that the plaintiff was sole owner of lot Madhusudanpore. Further, that plaintiff had title to *Mouza* Kabirajpore to the extent of 15 *chaks* and the residuary portion before the lands were diluviated. He found that the plaintiff had not established his title by adverse possession to the rest of the village. He found, however, that defendant had acquired a title by adverse possession to all the re-formed lands which fall between the boundary line of the *Char* as shown in the Partition Map of 1899 and the Settlement Map of 1903 and that the plaintiff was only entitled to so much of the 15 *chaks* and the residuary parts of *Mouza* Kabirajpore which are bounded on the south by the River Ganges and on the north by the lines 24-24, 24-15 (western part of the southern boundary line of the *Char* in Ex. D) and the southern boundary line of the Settlement Map of 1903 up to the point where it runs towards the east and also of the disputed land which are bounded by the river, the lines Nos. 33, 35 to 36, 36 to 7 and the eastern boundary lines of the Settlement Map of 1903 up to the point Q and he was further entitled to mesne profits for these lands.

The plaintiff has appealed with regard to the land to which his title has been declared but of which it has been found that he has lost title by adverse possession. There was also an appeal regarding the land to which the title was found not to have been established but this part of the appeal has not been pressed. The case which he wishes to establish is as follows: It has been found that he had title to these lands and that these lands were washed away. So long as the lands remained under water and when they again appeared as a re-formation his title subsisted and as the lands were not fit for possession or use when they appeared again he must be considered to be in constructive possession. The defendants have not shown that they have continuous possession for more than 12 years before the date of suit. The lands are inundated from time to time and even if the defendant had any possession, as soon as the lands were inundated again the title and possession went back to the true owner for the defendants as tort-feasors can not be held to be in constructive possession during the period that the land in suit went under water, for the doctrine of constructive possession does not apply to a tort-feasor. Further, that to establish their title by adverse possession the defendants must prove their actual possession of every

parcel of land to which they allege they have acquired a title by adverse possession. The doctrine of constructive possession is not available to a tort-feasor and it cannot be held that if he is proved to be in actual possession of a certain portion that he is in constructive possession of the rest of the land having regard to the nature of the land: *Nawab Bahadur of Murshidabad* v. *Gopinath Mandal* (1).

The first question which requires decision is, what Article of the Limitation Act applies.

Now, the plaintiff sues for recovery of possession on establishment of his title. Clearly, therefore, Art. 142 applies and the plaintiff must sue within 12 years of the date of dispossession. This point had been discussed at length in the case of *Rakhal Chundra Ghose* v. *Durga Das Samata* (2), in which all the authorities on the question have been collected and fully discussed, and I entirely agree with the decision arrived at. The plaintiff in his case dates the commencement of his dispossession from the year 1904, October, when he says the land became fit for cultivation and further states that when his men went in 1913 to measure the land they were resisted and turned out.

It is contended that the plaintiff must show that he is in possession within 12 years of the date of suit. This contention no doubt is correct. The plaintiff-appellant answers that argument by contending that he has been all along in constructive possession. That the land was sand and incapable of actual possession and that, therefore, it is sufficient for him to show that he has title and that then the defendant must show that he has had adverse possession for more than the statutory period. He argued that as the property was not capable of actual possession the presumption is that legal possession continued with him the rightful owner and it is sufficient for him to prove that the property remained in this state to within 12 years of the suit: [*Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (3)].

Further, that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances, that that state naturally would and probably did continue till within 12 years of suit it may properly be presumed that it did so continue and that the plaintiff's possession continued also until the contray is shown: [*Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4)].

Now, a careful consideration of these cases (2) (3) (4) referred to shows that there is no deviation from the rule that in an action in ejectment the onus is on the plaintiff to show that he was in possession and was dispossessed within the statutory period. This principle the learned Judges re-affirm. What they do, however, consider, and that is of importance in this case is, what is necessary, looking at the particular circumstances of the case, for the plaintiff to prove in order to establish his possession within 12 years of the suit.

In the present case it has been proved that before division the title and possession of the 15 *Chaks* and residuary land was with the plaintiff and the finding has not been challenged by the respondent in appeal. An attempt was made, after the argument had been concluded and the case has been sent to the Commissioner to relay certain plots, to argue that the plaintiff had not established his title to some 9 of these *Chaks*. The case was already concluded and it clearly was not open to the respondent to raise this point at that stage. The material on which he relied was really on the record before the case was sent by us to the Commissioner for he wished to base his argument on Ex. H H. We have now to see what was the condition of the land and the manner of possession. If the plaintiff can show he has title, that the land was washed away and after re-formation was unfit for possession and continued so up to or near a time within 12 years of the date of suit the plaintiffs would be entitled to the benfit of the presumption that they had constructive possession as rightful owner at the time of dispossession in 1906. If the plaintiffs are entitled to this presumption then the onus

(1) 6 Ind. Cas. 892; 13 C. L. J. 625.
(2) 67 Ind. Cas. 673; 26 C. W. N. 724; (1922) A. I. R. (C) 557.
(3) 7 C. L. J. 414; 12 C. W. N. 273; 3 M. L. T. 212.
(4) 9 C. 744 (F.B.); 12 C. L. R. 257; 4 Ind. Dec. (N.S.) 1145.

will be on the defendants to show the plaintiffs lost their title by adverse possession. The period with which we are mainly concerned so far as adverse possession is concerned is the period two or three years immediately before 1906. Admittedly, the land is a *Char* a re-formation *in situ* of the village Kabirajpore. The plaintiff's case was that it was not washed away till 1880. The evidence in the case shows that it was in or before 1880 that the land began to re-form and continued the process up to the present time. To this extent obviously the plaintiff's case is not in accordance with the facts found. How far his case is affected by this will be discussed later on. When the process of diluvion began it is not possible to say but it was apparently some time after 1857 when the plaintiff purchased.

What has then been the condition of the land after re-formation ?

To deal first with the defendants' evidence.

In considering all the evidence one fact must be borne in mind that these disputed lands form an accretion to another *Char*, *Char* Baliadanga which admittedly belongs to the defendants. The importance of this is obvious when we see in what a vague way the witnesses have deposed because it is not easy as a rule to say whether any particular statement refers to the *Char* as a whole or to the land in dispute.

Taking, first of all, the evidence of defendant No. 1.

He says that from 1301 to 1305 (1894-98) they possessed the *Char* partly in *Khas* and partly through tenants. He also sold Babla trees growing on the *Char* and fishermen used to catch fish and spawn.

To what extent Kalai was grown he does not state. He does not produce any of his papers to show that he received any money from any tenant or from any one for the sale of his Kalai or in case when the Kalai was grown by himself his expense of growing it.

The fact that fishermen used to catch spawn and fish on the *Char* would show it was liable to inundation. He then goes on to refer to the partition proceedings in 1899 and says 200 *bighas* were unculturable and the rest culturable. This apparently refers to the land in dispute as he says it was the southern portion of the *Char*. The mere statement by an interested party that the lands were culturable is perhaps of little value. The only real test is whether they were cultivated. The witness, however, gives us no indication how much of the *Char* was cultivated. Further on he states that sand is now being deposited in culturable lands and that some 400 or 500 *bighas* have recently been covered with sand and the lands are again being washed away. Carefully examined, this witness's evidence would show that the land or portions of it were liable to submergence and had actually been submerged from time to time, otherwise sand would not be deposited on it or fish caught on it. Accepted at its highest, it would prove that Kalai had been grown on the land but it gives no indication how much land was sown with Kalai and the failure to produce any papers in support of these statements makes the bare statement of little or no value. His next witness is Gobinda Biswas. This witness is the Dewan of defendant No. 2 who has been disputing with defendant No. 1 for a long time for the possession of *Char* Baliadanga. He visited the *Char* in 1899. He states that the *Char* was followed from 1899-1901 and that in these years there were no tenants there. He states that the southern portion of the *Char* was sandy. His evidence proved little or nothing as to the state of the *Char* except to show that in 1899 some 275 *bighas* were sandy. His evidence is rather vaguely recorded. It is difficult to say whether he refers to the whole *Char* Baliadanga of which the disputed land fromed a part or the disputed land only. He, however, speaks to deposit of silt which would show the *Char* was inundated from time to time.

The next witness relied on is Rajani Kanta Das (page 169) and the statement on which reliance is placed is his statement "I saw Baliadanga *Char* even after 1903. In 1903 I found the major portion of the *Char* under cultivation." He, however, here refers to the whole *Char* Baliadanga of which admittedly the northern portion belongs to the defendants and so possibly the major portion under cultivation refers to the northern portion. He states there were here and there Babla trees. It is not possible to

say from his statement that he was referring to the disputed land as being under cultivation and this same remark applies to all his evidence. His statements would apply to the undisputed as well as to the disputed portion of the *Char*.

The next witness to whose evidence our attention has been drawn is Kali Prasanna Chukerbutty (page 172). This witness took an *ijara* lease of the *Char* in 1902-1903 and he cannot say whether any part of the land was tenanted then. He simply grew Kalai but has no papers to support his statement. Further, that at the time of the partition of the *Char* Baliadanga (1899) it was partly culturable and partly full of sand. He again is speaking of the whole *Char* and not only of the disputed portion. So it is not possible to say from his evidence whether any portion of the culturable land was in the disputed land or not. He says north of the sand were Babla trees and north of the Babla trees cultivation but where the cultivation began is not clear and that is the important point in this case. Whether any act he refers to took place on the disputed or undisputed portion of the *Char* it is impossible to say. Lastly, we have Alef Sheik (p. 182). His evidence helps very little for it is impossible to say whether he refers to the disputed or undisputed part of *Char* Baliadanga. His evidence whold show that a part of the *Char* was sandy and silt was deposited from time to time which would show that the lands were liable to inundation and were inundated from time to time. The evidence of these witnesses would seem to show that the land was sandy and liable to inundations and was inundated from time to time, a condition often found in re-formed *Char* lands.

The plaintiff's own evidence would go to show that the land did not become culturable till some 10 or 12 years before the date they were deposing, *viz.*, 6 or 8 years before the date of suit. This evidence really only deals with the condition of the land after 1902 where it is alleged by him the land re-appeared and does not deal with the period between 1880 and 1902. It is his case before 1902 the land was under water although this is not a fact he may well have been greviously mistaken not realising, as apparently no one else did, that the land accreting to *Char* Baliadanga were really re-formation *in situ* of Kabirajpore. His evidence as to the time of re-formation in view of the documentary evidence on this point is obviously incorrect. The defendant has further relied on certain documentary evidence. First, of the two Settlements of 1880 and 1890. In these two Settlements one for ten years and one for fourteen the disputed land was settled with the defendant as part of *Char* Baliadanga which admittedly belongs to the defendants. The disputed land which increased at each Settlement was treated as an accretion to *Char* Baliadanga which is in the Nadia District and it was not known till the Settlement of 1904 that the disputed lands were really a re-formation of village Kabirajpore which belongs to the District of Burdwan. The mere fact that defendants took Settlement of these accretions does not prove that they were then fit for cultivation and capable of being effectively possessed. The *Zemindar* would naturally take Settlement of an accretion to his land at a low rate of rent in the hope that it would improve in value and to prevent any rival *Zemindar* taking it. Such Settlements are often in the nature of a speculation.

In the Settlement Map of 1903 when it was discovered that the disputed lands were a re-formation *insitu* of Kabirajpore a note is made that they are in possession of the defendants. But there is nothing to show what the nature of that possession was. Possibly this entry was made because the former Settlement had been with the defendant. It had been contended by the defendants-respondents that the appellant must have known of these Settlements with the defendants. There is no reason why he should. The Settlement was made by the Collector of Naida. The appellant's land is in the District of Burdwan and they are now on the opposite side of the river. The operation of measuring them need attract no attention. Neither would Settlement be offered to the appellant as the Collector of Nadia did not know till 1903 that these lands belonged to Kabirajpore in the District of Burdwan. He treated them as being accretion to *Char* Baliadanga in the District of Nadia.

The documentary evidence proved nothing about the state of the lands. No doubt the land has been in existence some 40 years but *Char* land may in some cases never become fit

for cultivation or possession. It certainly cannot be presumed that it must have. The conclusion to which I have come is that the land in suit after re-formation remained incapable of possession in the ordinary way by cultivation until 1906 when defendants began to cultivate it and that in this case we may fairly presume that constructive possession remained with the true owner up till 1906. *Char* lands are cases to which the doctrine laid down in *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal*, (3) *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4) *Raj Kumar Roy* v. *Gobind Chunder Roy* (5) is applicable. These lands appear often after many years when the whole configuration of the country due to the shifting of a big river is changed the lands appearing sometimes, as in the present case, in a different district and only a careful Survey showed to what district they belonged. In such circumstance, every presumption should be made in favour of the true owner. The case may be viewed as from another standpoint. The plaintiff having shown by the evidence on the record that neither party had exercised any act of possession a presumption can be raised in his favour as to the question of possession of the land prior to his dispossession by the defendant-*Rakhal Chundra Ghose* v. *Durga Das Samanta* (2).

The respondents have contended that the case now set up by the appellant in appeal differs from the case he made out in his plaint and the case found on the facts. He argues that in the plaint the plaintiff-appellant's case was that the lands began to be diluviated in 1880 and the process continued in 1890 that they began to re-form from 1902 and began to be fit for cultivation in 1906. Further, the appellant's case in his plaint was that he was dispossessed in 1913 when an *Amin* went to measure the land, whilst his own evidence would show that he was dispossessed in 1906 and onwards.

Now, undoubtedly, the documentary evidence has shown clearly that the lands had begun to re-form in 1880 and obviously, therefore, the plaintiff's case is here incorrect. But it cannot be said that plaintiff has changed in any way the relief he asked for. The relief asked for is the same and it is still his case that the cause of action arose in 1906. He does not seem to date his cause of action from 1913 when the *Amin* was prevented from going on the land, but his plaint states (para. 10) that the cause of action has gradually arisen from the date when a portion of the land became fit for cultivation in 1906.

Then we must bear in mind the peculiar circumstances of the case. It is a case of land re-forming after diluviation in a big river which has largely shifted its course. A mere inspection of the land would tell no one whether they were a re-formation *in situ* of any particular land. The District Authorities untill 1904 treated them as belonging to *Char* Baliadanga in Nadia District and it was after the Collector of Nadia had released the lands in 1904 that the appellant realised they were a re-formation *in situ* of his village Kabirajpore. In the particular circumstances of the case I do not think the plaintiff should be non-suited because he was inaccurate in giving the date when the land re-formed. The whole evidence is before the Court, and so it cannot be said that either party has been taken by surprise.

Further, the respondent has contended the case now argued by the appellant that there was an interruption of the adverse possession of the respondent by inundation, is a new case which was never raised in the lower Court. I do not think there is any substance in this objection.

The respondent raised the defence of adverse possession and the appellant is obviously entitled to show that one of the elements necessary for adverse possession, *viz.*, continuity is absent and this he can show by arguing that the evidence shows the land was under water from time to time.

It is then necessary to deal with the question of adverse possession and to consider whether the respondent has made out a title by adverse possession. It will be seen that the evidence dealing with this point is practically the same as the evidence which has been dealt with in considering what was the state of the land up to 1906 and the finding I have already come to really disposes of this point. I, however, propose to deal with it separately. The plaintiff's evidence admits that the defendants began taking possession of their land in

(5) 19 C. 660 (P. C.) ; 19 I. A. 140 ; 6 Sar. P. C. J. 140 ; 9 Ind. Dec. (N. S.) 883 (P. C.).

1906. The suit was instituted in 1916 and there would thus remain at least two years during which the respondent-defendant must prove that he held the lands in adverse possession.

Now the respondent to succeed must prove actual continuous possession of the lands to which he alleges he has acquired a right by adverse possession for the statutory period. No doubt, acts of possession over a part of immoveable property may in certain cases be evidence of *de facto* possession of the whole. This rule, however, operates with full force in favour only of the true owner and should be applied with caution, if at all, in favour of the wrong-doer : *Mohini Mohan Roy* v. *Promoda Nath Roy* (6) The possession of the wrong-doer should be held to be confined to what he is in actual possession of : See also *Mirza Shamser Bahadur* v. *Munshi Kunj Behari Lal*, (3) and *Secretary of State for India* v. *Krishnamoni Gupta* (7).

The same question has been discussed in the case of *Baroda Prosad Roy* v. *Annoda Mohan Ray*, (8). Mookerjee, J., in delivering the judgment of the Court, points out that to establish adverse possession it is not sufficient to show that some adverse acts of possession have been done but the possession must be adequate in continuity, in publicity and in extent of area to establish that it is possession adverse to the true owner and, further, that the doctrine of constructive possession applies only in favour of the rightful owner and cannot as a rule be extended in favour of a wrong-doer whose possession must be confined to the land of which he is in actual occupation. The learned Judge gives, as an instance, that where the party relies on possession through their tenants evidence must be given to show the tenants were in actual possession and such possession covered the whole of the disputed land. Further, it must be proved that with regard to any particular portion that it has been continuously in the possession of the party claiming adverse possession visible, exclusive and hostile for the statutory period.

(6) 24 C. 256 ; 1 C. W. N. 304 ; 12 Ind. Dec. (N. S.) 837.
(7) 29 C. 518 ; (P. C.) ; 29 I. A. 104 ; 6 C. W. N. 617 ; 4 Bom. L. R. 537 ; 6 Sar. P. C. J. 260.
(8) 6 Ind. Cas. 359 ; 13 C. L. J. 80.

It is pointed out that, as soon as the land became unfit or incapable of use or occupation, the title of the true owner revived. The respondent has argued that he was not a wrong-doer but entered under a *bona fide* claim of title and so his position is different from a mere trespasser and that he is in the position of a true owner. I am not aware that what is obviously a dangerous doctrine has ever been accepted by this Court.

Examined in the light of these principles, the defendants have clearly failed to make out any title by adverse possession.

In considering the probability or improbability of the defendant's case we must remember that up to 1899 the two defendants were fighting each other for the possession of the *Char* Baliadanga and this fact might render it highly problematical whether either of them ever had effective possession of the land in dispute. The evidence they rely on is documentary and oral. With regard to the oral evidence the learned Subordinate Judge says it is unsatisfactory and can easily be manufactured but coupling it with the documentary evidence he held that the defendants adversely possessed the greater portion of the disputed *Char* since 1903. The documentary evidence is mainly the evidence of Settlement by the Collector and it is not easy to see how this substantiates the oral evidence which is directed to prove actual possession. To deal with the documentary evidence first.

The respondents rely for this on the three Settlements of 1880, 1890, 1904 and the partition proceedings of 1899.

To take first the two Settlements of 1880 and 1890.

They prove that so much of the land as was re-formed at the time of the Settlement was together with a tract of land which admittedly belongs to the defendants settled with the defendants. But this does not prove that the defendants actually occupied or used the land or that it was capable of user. It may well have suited the defendants to take Settlement of these *Char* lands in the hope they would some day become capable of use. But this does not by itself show that the land was actually used and occupied. Then we have the partition proceedings of 1899. These proceedings show that these lands were partitioned together with other lands which

admittedly belong to the defendants. It has been argued that the defendants would not fight over lands of which they had not possession and were not in occupation. Here, again, it is to be remembered that the partition suit also included the rest of *Char* Baliadanga which admittedly belongs to them. That, again, does not prove that the lands were used or occupied. The Settlement Map of 1903 has on it the remark that these lands are in the possession of the defendants but that,again, does not show what the nature of the possession was. Lastly, there are certain *chittas* which cover a small portion of the disputed land. They are for the year 1306 and there are also the counterfoils which it is alleged show receipt of rent from tenants. Their genuineness is very doubtful. They contain the names of some 18 tenants only one of whom is examined, Pachouri, and he says his receipts have been burnt. Of the others it is a remarkable fact that during the space of some 16 years there has been no change in any of the tenants. Exactly the same tenants were holding the holdings in 1322 as in 1306. Some of these tenants must be available. The Commissioner re-laid *chittas* of four of the plots and then using them as a starting point re-laid the others on the plan not on the ground. This evidence obviously would not show actual occupation of these plots nor that tenants were ever actually settled there in the absence of the tenants themselves. It would show that when the Commissioner visited the spot in 1916 that certain plots were pointed out on the *chitta* plots and four were identified by him.

Next, we have the oral evidence which has already been dealt with in considering the question of the condition of the land and which it is unnecessary to recapitulate in detail. In shows, even if believed, though I may say I share the learned Subordinate Judge's doubt as to its genuineness, that at some time or other some *Kali* was grown and some Babla trees cut. It is obviously evidence which is not sufficient to prove adverse possession and could be manufactured without difficulty. It does not appear how much was *Kali* grown, whether on one *righa* or on the whole of the disputed land, whether the was *Kalai* grown always in the same place or on different plots or whether it was grown for the statutory period.

The defendants are *Zemindars* who presumably keep accounts. Their account-books would have shown the money expended in cultivating *Kalai* and the money realised from the sale of it and also the money realised from the sale of Babla trees. There is no documentary evidence to support the story that *Kalai* was grown or Babla trees cut from the disputed land.

The area in dispute is some 1000 *bighas* Obviously, if there had been any real attempt to cultivate any appreciable portion of the land there must have been a considerable expenditure and receipt.

Defendant No. 1, Sib Kanta Banerjee, in his examination gives no suggestion how much land was cultivated or for what period,whether it was the same portion or different portions.

Kali Prasanna Chuckerbutty took a lease of *Char* Baliadanga from defendant No. 2, the 12-annas proprietor, from April 10th, 1902 to April 14th, 1904. He states that during this period, which ends at a date within the statutory period, he cannot say if there were any tenants on the land. Obviously, if there had been he must have known it as he was the *ijaradar* and so clearly the statement is equivalent to an admission that during the period there were no tenant on the land. Therefore, from 1902 to a period within 1904 there were no tenants in the 12-annas share. His possession consisted of growing *Kalai*, where he grew *Kalai* is not proved whether on the disputed or undisputed portion of *Char* Baliadanga. He produced no papers to support the bare statement that he grew *Kalai*. It has been argued that he paid Rs. 500 as a yearly rent for the 12-annas share of the *Char*. But though he paid rent it does not necessarily follow that he occupied or used any portion of the *Char* still less that he actually occupied the disputed portion of the *Char*. After him Sib Kanta Bannerjee, defendant 1 ; the 4-annas share-holder took a lease of the 12-annas share. This, however, was from April 14th, 1904 which is within the statutory period the suit being instituted on 25th February 1906. Further, the witness does not produce the rent receipt which he alleges he got for the payment of the rent. Then the evidence of Rajani Kanta Dey, witness No. 7 for the defendant, shows that he measured the land in 1903 on which there

were tenants. He states which were the tenanted plots and admitted none of the plots he has described as tenanted fall within the disputed area. Then his evidence goes to show that in 1903 there were no tenants in the disputed area. Further, he states that in 1903 there was nothing on the lands in Sib Kanta Babu,the4-annas *Zemindar's khas* possession. His evidence would show that in 1903 there were no tenants on the disputed portion of the Baliadanga *Char*.

Boloram Ghose, witness No. 3 for defendant, proves that in 1900 he went to the *Char* and that there were then some 25 or 30 *bighas* of land sown with Kalai. Whether these 25 or 30 *bighas* were in the disputed land or not does not appear. Even if they were, the growing of Kalai on some 25 or 30 *bighas* out of an area of about 1000 *bighas* could not obviously amount to adverse possession of the 1000 *bighas*. His evidence, at the highest, would show the cultivation of some 25 or 30 *bighas*.

Then there is the evidence of Dole Gobinda Biswas, the Dewan of defendant No. 2. He apparently last went to the *Char* in 1899 and has not been there since. Then he knows nothing about the period from 1899 up to 1906.

He, however, states that the disputed *Char* remained uncultivated from 1899 to 1901 and that between these years it was not let out to tenants.

Defendants 1 and 2 were fighting and it is perhaps improbable that either could really effectively possess the land.

Taking all the facts and circumstances of the case into consideration,and even accepting for the sake of argument the oral evidence of the defendants' witnesses, the evidence is not sufficient to establish a title by adverse possession. The defendants cannot avail themselves of the doctrine of possession of a part being constructive possession of the whole. They are tort-feasors and must prove actual continuous possession of the land for which they seek to establish a title by adverse possession: [*Nawab Bhadur of Marshidabad* v. *Gopinath Mandal* (1)].

In the present case we have an area of some 1000 *bighas* of *Char* land which adjoins the defendants' lands and the only evidence of possession is that some Kalai has been grown from time to time and some Babla trees cut. Even if this were proved, which I do not think it has, it would amount at the most to isolated acts of trespass. Neither need the true owner necessarily know that such acts were being done when we take into consideration the extent, nature and situation of the property. The taking of Settlement from Government cannot be considered as an act of possession. The deputing of an *Amin* to demarcate the land in the partition suit and the planting of one or two pillars would be an isolated act of trespass.

There is in the present case no possession adequate in continuity, publicity and extent of area to destroy the title of the true owner.

Rejecting, however, as I do the defendants' evidence of actual possession, their case entirely fails for if the oral evidence is disbelieved there is no evidence at all to support a story of adverse possession.

The defendants have failed to make out any title by adverse possession.

The respondents have argued that the appellants have failed to identify the land they claim because the numbers of the *chak* have been omitted from the Commissioner's map. What, however, has happened then ? The plaintiff-appellant has established his title to some 15 *chaks* of which the numbers are given, *viz.*, 5, 7, 15, 17, 61, 64, 69, 70, 73, 99, 100, 101, 102, 103, 104 and the residuary lands. There are other *chaks* to which he had not established his title. The numbers of these *chaks* are also known.

Under the orders of this Court the same Commissioner who had made the local investigation re-plotted on his map all the *chaks* putting the correct *chak* number in each *chak*. It now appears that these 15 *chaks* of which the numbers have been given above actually fall within the disputed land.

No difficulty would be experienced in granting to the appellant-plaintiff a decree capable of execution. He is clearly entitled, on the findings I have come to, to so much of the disputed land as falls within the 15 *chaks* and the residue portion of village Kabirajpore which falls within Estate No. 10.

This residue will be found by deducting the *chaks* of which the title had been found not to be with the appellant.

A cross-objection has been filed by the respondent regarding the costs in the lower Court.

In view of the finding to which I have come the cross-objection must fail as I would hold the appellants are entitled to proportionate costs of the suit throughout I would decree the appeal so far as the disputed land to which the plaintiff-appelant has proved his title. *viz.*, the 15 *chaks* and the residuary portion of Kabirajpur with proportionate costs throughout.

JUDGMENT.

Newbould, J.—The plaintiff brought the suit out of which this appeal arises for declaration of his title and also recovery of possession of about 1000 *bighas* of land. He succeeded in obtaining a decree for a part only of the land claimed and appealed to this Court. His appeal was heard by a Divisional Bench of this Court consisting of Woodroffe and Cuming, JJ. There was a difference of opinion, Woodroffe, J., holding that the appeal should be dismissed while Cuming, J., was in favour of allowing the appeal in part. They held that as there was a difference of opinion and there was no majority varying or reversing the decree appealed from the appeal should be dismissed. Against this decision the plaintiff has preferred an appeal under section 15 of the Letters Patent. A preliminary objection has been taken that no appeal lies. This objection we overruled at the commencement of the hearing of the appeal. Though we accept the contention of the learned Vakil for the respondents that the decision of the Judicial Committee in *Bhaidas Shiv Das* v. *Bai Gulab* (9) shows that the procedure laid down in section 98 of the Civil Procedure Code was wrongly applied in the present case, that is immaterial. Had the provisions of clause 36 of the Letters Patent been followed the result would have been the same since the opinion of Woodroffe, J., who is the senior Judge, would prevail. Under clause 15 of the Letters Patent this appeal is clearly competent.

The present suit is due to events primarily caused by the movements of the river Ganges at a part where-under the name of Bhagirathi, it flowed between the Nadia district on its north and the Burdwan district on its south. At the time of the Revenue Survey by Government of 1855 there were *Chars* on both sides of the river. On the north side was *Char* Baliadanga which was temporarily settled with the defendant's predecessors in two estates bearing *Touzi* Nos. 824 and 2460 of the Nadia Collectorate. On the South side was a *Chur* adjoining *Mouza* Kavirajpur which is a part of the Estate bearing Touzi No. 10 of the Burdwan Collectorate and in this village the plaintiff has *putni* right to certain plots. The river moved gradually in a southerly direction causing accretions to *Char* Baliadanga and diluviating first the *Char* adjoining Kavirajpur and subsequently also part of the Kavirazpur *Mouza*. This alluvion and diluvion continued until the accretions to *Char* Baliadanga became re-formations *in situ* of Kavirajpur land. While this was going on Government made three Surveys and Settlements of the land which accreted to *Char* Baliadanga in the years 1880, 1890 and 1903. Even in 1880, some land of Kavirajpur was settled with the defendants as proprietors of estate Nos. 824 and 2460, and in 1890 still more land of that *Mouza* was settled with the defendants. During the Survey and Settlement of 1903 the mistake was discovered and the land found to be re-formation *in situ* of *Mouza* Kavirajpur was excluded from the Settlement. The temporarily settled estates Nos. 824 and 2460 were originally undivided four-annas and twelve-annas shares of *Char* Baliadanga. In 1893 a partition suit was brought which after protracted litigation ended in a division of the land after Survey by a Commissioner in 1899. The plaintiff instituted the suit, out of which the appeal arises, on the 25th February 1916. He originally claimed approximately 1000 *bighas* of land. In the trial Court he gave up his claim to a large tract on the east and at the hearing of the first appeal to this Court he no longer claimed the land which had been settled with defendants after the 1903 Survey. He originally

(9) 60 Ind. Cas. 822 ; 45 B. 718 ; 40 M. L. J. 519 ; 25 C. W. N. 605 ; 33 C. L. J. 488 : 19 A. L. J. 409 ; 28 Bom. L. R. 623 ; 8 U. P. L. R. (P.C.) 22 ; 14 L. W. 7; (1921) M. W. N. 408 ; 29 M. L. T. 350 ; 30 M. L. T. 149 ; 48 I. A. 181 (P.C.)

based his title both on his *putni* right and adverse possession. The finding that he has no title other than his *putni* right has not been disputed. He is content to rely on the finding of the trial Court that he has established his *putni* title to 15 specific *Chaks* and the *abasista Chak* or unnumbered residue. The learned Subordinate Judge gave the plaintiff a decree for the land within these *Chaks* that was south of the lines of the south boundary of the *Char* shown in the Settlement Map of 1903 and the Partition Map of 1899. He held that the plaintiff's title to land north of this line had been barred by limitation.

The case made in the plaint was that diluvion took place in 1890 and re-formation in 1902. It was further alleged that the land first began to be fit for cultivation in October 1906 and the defendant No. 1 then proposed to take a Settlement from the plaintiff. As there was undue delay, the plaintiff in 1913 attempted to have the lands surveyed and was prevented by defendant No. 1. This case has admittedly failed. The correctness of the various maps as showing the re-formations is not questioned and the map of 1880 shows that re formation *in situ* had commenced before that year. The plaintiff's case now is that he was in possession of the *Chaks* to which he has proved title until they were diluviated to and his possession must be presumed have continued and that he is entitled to succeed unless the defendants can prove that they have destroyed his title by adverse possession. This contention raises the issue as to the party on whom the burden of proof lies in the present case. On this issue I find myself in entire agreement with the finding of Woodroffe, J. The reasoning in his judgment appears to me clear and logical and in accordance with the principle laid down in previous decisions of this Court and the Judicial Committee of the Privy Council. He points out that the plaintiff sued for possession on the allegation of dispossession. Article 142 of the first Schedule of the Indian Limitation Act, 1908, is, therefore, applicable and he is bound to prove possession within twelve years before suit. Admittedly, he has not had any actual possession since the lands became submerged and it is also admitted that the defendants have been in possession since 1906, ten years before the institution of the suit. In order to prove possession within twelve years the plaintiff may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But in a case like the present where Article 142 applies the plaintiff, if he relies on this presumption, must prove that the land was incapable of actual possession within twelve years before suit. For the appellant, it was strongly contested before us that it lay on the defendants to prove their adverse possession for twelve years before the suit. It was urged that the presumption of possession in favour of the real owner would continue until it is shown that the presumption does not apply by reason of the defendant having been in adverse possession. It was also urged that the presumption would continue as long as the land continued incapable of ordinary possession, and it is for the defendants to show when this change took place. These contentions ignore the difficulty in the appellant's way arising from the fact that he has so framed his suit that the intitial burden lies on him to prove dispossession within twelve years. Relying, as he does, on a presumption to discharge this burden he must prove the facts necessary to establish this presumption, that is to say, not only that he was the legal owner but also that the land was incapable of possession in the ordinary way. Of the cases cited, the Full Bench decision of this Court in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1), is the most favourable to the appellants. The rule laid down at page 752, if read apart from the context, seems to support his contentions. It is as follows:—"The true rule appears to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown." But the rule is qualified by the preceding remarks on p. 751 which require the plaintiff to show such acts of ownership as are natural under the existing condition of the land before he can claim the benefit of the presumption that

his possession continued. It is not necessary to discuss all the decisions that have been cited on behalf of the appellant. Several of them, as, for instance, *Basanta Kumar Roy* v. *Secretary of State for India* (10), can be distinguished on the broad ground that they were cases where Article 144 and not Article 142 was applicable. The head-note of the Indian Report wrongly states that the High Court decided that case on limitation alone holding that the suit was barred by Article 142. The English report of the same case quotes the High Court judgment, which clearly states that the case "must be governed by Article 144." Other cases that were cited follow the decision in *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, (4) and give no greater support to the appellant's contention than that Full Bench decision. I would, therefore, hold that in the present case it lay on the plaintiff to prove that the lands were incapable of user within twelve years prior to the suit.

For the appellant it was further urged as an alternative plea that if it was necessary for him to prove that the land was incapable of user, he has proved this at any rate as regards the land south of the Survey line of 1890. In order to prove this he relies on the defendant's evidence, oral and documentary. The case made out by the plaintiff's witnesses was entirely abandoned at the hearing of the appeal and their evidence was not even read to us. The first piece of evidence on which reliance is placed is that of Gurudas Biswas, defence witness No. 2. He was the *Gomasta* of the second defendant in respect of the *Char* lands from 1306-1308 B. S. In cross-examination he stated, "I found the sandy tract of the *Char* in the same condition during the period of my service. There was no alteration in its area during that period." It is contended that this proves that no extra land became culturable after the Survey of 1890. But if his examination-in-chief be also read, it is clear that what he meant was that during this period, as the river receded there remained a fringe about 1½ or 2 *rashis* wide of unculturable sandy land and that though the nature and area of this fringe remained unchanged, its position altered as the *Char* extended towards the south. The only other oral evidence to which reference is made in this connection is that of defence witness No. 7, Rajani Kanta Dey. He was a Collectorate *Amin* and took part in the Settlement Surveys of 1890 and 1903. His evidence-in-chief is strongly in favour of the defendants since he says that he saw the *Char* after 1903 and found the major portion of the *Char* under cultivation. It is contended that this evidence refers to the land which was settled with the defendants in 1904 and not to the land now in dispute But this cannot be, since he was speaking of the land down to the water's edge and the map of the 1903 Survey shows the water edge far south of the land settled with the defendants as part of their estates Nos. 824 and 2460. A similar argument to that based on the evidence of defence witness No. 2 is based on this witness's statement: "About 50 to 60 *bigha* lands must have accreted to the *Char* between 1890 and 1903. In 1903, I found the area of the sandy portion of the *Char* to be 60 to 80 *bighas*." But this does not mean that the only accretion during these years was sandy land. Our attention has also been drawn to a statement in the Settlement Report of the 8th March 1904 Ext. P.: "The estate consists of a low tract of *Char* land liable to annual inundation." It is urged that as these remarks refer to the land settled with the defendants, the disputed land to the south would be still more liable to inundation. But the expression "liable to annual inundation" does not mean that the land was actually inundated every year. The same paragraph of the report shows that though *aus* paddy could not be grown in normal years, *Kalai* and *Musuri* were extensively grown and this supports the defendant's case that the land was capable of possession. Another argument is based on the map and report of the Commissioner who executed the partition decree in 1899. It is contended that as the south line of the Commissioner's Map and of the Settlement map of 1903 are almost identical, there could have been little alteration in the *Char* during the interval between the two Surveys. It appears from the Commissioner's report that in 1899 there was practi-

(10) 40 Ind. Cas. 887 ; 44 C. 858 ; 44 I. A. 104 ; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642 ; 15 A. L. J. 398 ; 25 C. L. J. 487 ; 19 Bom. L. R. 480 ; (1917) M. W. N. 482 ; 6 L. W. 117 ; 22 M. L. T. 310 (P. C.).

cally no culturable land south of the land settled in 1890. But the Commissioner's Map does not show the true position of the river in 1899. At the wish of the parties to the partition suit, the defendants in this suit, he included land which was still part of the bed of the river in his map and divided it between them. It follows, therefore, that there was considerable accretion of culturable land, to the south of the *Char* between 1890 and 1903. The defendants' evidence does not show that that any land north of the line, which has been given as the south boundary in the decree, was unfit for cultivation within twelve years of the institution of the suit.

These findings are sufficient for the disposal of the appeal, but even if I had held that the burden of proof lay on the defendants to prove twelve years' adverse possession, I should decide in their favour. That the defendants did exercise acts of possession on the land as it re-formed and became capable of possession, there can be no doubt. Further, these acts of possession were all done in the assertion of the claim of the defendants to the land by virtue of theSettlements made by Government. This case is distinguishable from *Basanta Kumar Roy's case* (10) cited above, since there are "circumstances to link together various portions of ground so as to make the possession of a part as it emerged amount constructively to possession of the whole".

We all agree that the appeal fails and it is accordingly dismissed with costs.

B. B. Ghose, J.—It is unnecessary for me to recapitulate the facts of this case as they have been sufficiently stated in the judgment of my learned brother Newbould which I had the advantage of reading. I agree that there is no substance in the preliminary objection taken on behalf of the respondents that the appeal is not maintainable.

The only question argued on behalf of the appellant is one of limitation. The allegation in the plaint is that the plaintiff was in possession of the land in suit before diluvion, which commenced to re-form in 1902 and that he has been dispossessed by the defendants in 1906. That appears to be the proper meaning of the plaint and this was sought to be established by the evidence led by the plaintiff. The story, however, that the land began to re-form in 1902 is untrue, as it is beyond dispute that it re-formed long prior to that date ; and this has not been contested by the appellant. The suit then being for possession on the allegation of dispossession falls within Article 142 of the Limitation Act as has been held by both the learned Judges of this Court who heard the appeal in the first instance. This is also not seriously disputed by the appellant The burden of proof in such a case is without doubt on the plaintiff to show that he had been dispossessed within 12 years of the date of suit. The plaintiff-appellant admits that he has been dispossessed for about tenyears, the suit having been brought in 1916. The difference between the admitted possession of the respondents and the period of limitation is within the narrow limit of about two years, during which the appellant must establish his possession in order to succeed in the suit. In the case of *Maharajah Koowar Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* (11) Turner, L. J., in delivering the judgment of the Privy Council, said.—" The appellant is seeking to disturb the possession admitted to have existed for about eleven years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him..... on a dispossession within twelve years next before the commencement of the suit .....No proof of anterior title such as would be involved in the decision of the boundary question in his favour can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." The law is the same under the present Limitation Act where the dispossession from which limitation is declared to run should have taken place within twelve years of the suit. The nature and quality of the possession of the respondents in this case during the period after the admitted dispossession of the appellant need not require any discussion. The appellant may establish his possession within the disputed period of two years, by showing that his possession was either actual or constructive. There is no evidence of actual possession or the exercise of any act of

(11) 8 M. I. A. 199 at p. 220 ; 5 Suth P. C. J. 420 ; 1 Saw P. C. J. 744; 1 W. R. P. C. 51; 19 E. R. 506.

possession, however trivial, by the appellant during that period, for the title being in him such acts might have preserved his title. Constructive possession may also be shown by the fact that the land being under water was incapable of possession, or although it was capable of being possessed no one had actually taken possession during the period in question. The appellant cannot, by proving possession at any period anterior to twelve years before suit, shift the onus on the respondents to prove their possession.

Much stress was laid by the appellant on the observations of Wilson, J., who delivered the judgment of the majority of the Full Bench, in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4), and it was contended that as the land in this case did probably continue to have been in such a condition as not to be fit for the usual modes of enjoyment within twelve years before suit, it should be presumed that his possession continued until the contrary is shown. It is urged that it is incumbent on the respondents to show that they had dispossessed the appellant during the two intervening years. The meaning of the observations relied on will be clear when read with the preceding remarks in the judgment of that case. What the learned Judge laid down was that so long as the state of the land remained unchanged, the possession of the rightful owner should be presumed to continue unless he is shown to have been dispossessed. Dealing with the case of diluvion by a river-Wilson, J., says (at page 751): "In such a case, if the plaintiff shows his possession down to the time of diluvion, his possession is presumed to continue as long as the lands continue to be submerged." It has been established in this case that the condition of the land had changed a considerable number of years prior to the period in dispute, and there is no reason why the ordinary rule that the plaintiff should prove his possession within the period of limitation should be departed from. The appellant has not succeeded in proving that the land was incapable of possession on account of its remaining submerged, or that no one else was in possession during the disputed period although the land had emerged from the water.

It is next submitted that the Settlement Report of 1904 shows that the land was liable to annual inundation and plaintiff's possession should be held to have constructively revived during such inundation and the suit is, therefore, not barred. The appellant strongly relies on the case of *Basanta Kumar Roy* v. *Secretary of State for India* (10) as bearing a close resemblance to this case. There are, however, distinctions between that case and the present one in important particulars. Their Lordships of the Judicial Committee observe, in following the case of *Secretary of State for India* v. *Krishnamoni Gupta*, (7), "No rational distinction can be drawn between that case and the present one, where the re-flooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged, the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner." *Basanta Kumar Roy* v. *Secretary of State for India* (10). In that case the plaintiff did not come to Court on the allegation that he had been dispossessed. It was held that the suit was one to which Article 144 of the Limitation Act was applicable and it was, therefore, for the defendant to show that plaintiff's title had been extinguished by reason of the adverse possession of the defendant. In the present case it is for the plaintiff to establish a subsisting title There is no evidence that the land was inundated during the two years in question and that there was a cessation of the dispossession by the defendants by reason of the submergence of the land. The principle on which the cases of *Krishnamoni Gupta* (7) and *Basanta Roy* (10) was decided was that the possession of the defendant was in fact determined by the submergence of the land, when it became derelict and, as was observed in the former case, on the dispossession of the defendant (Government) by the vis major of the floods the constructive possession of the land was (if anywhere) in the true owners [See *Secretary of State for India* v. *Krishnamoni Gupta* (7).] In the present case there is no suggestion that the inundation had the effect of dispossessing the defendants or rendering the land derelict, and in my judgment that principle does not, therefore, apply in the present case. The case of

Kuthali Moothavar v. *Peringati Kunharankutty* (12) was also a case falling within Article 144 of Limitaion Act and, moreover, the plaintiff there had proved the exercise of various acts of possession during the currency of his title and is, therefore, different from the present case.

It is next urged that the respondents only cultivated small areas during the period of their possession and their possession of a part did not amount to possession of the whole. But assuming the fact to be so, in this case there is the connecting link of claim of title and close connection and inter dependence between the part and the whole, as the respondents were in possession by virtue of Settlements obtained from Government of the entire land, which was surveyed at intervals and depicted in maps, and on the whole of which revenue was assessed. Then, again, the respondents partitioned the entire land among themselves in 1899 when it was again surveyed and masonry pillars erected in order to demarcate the portion of each co-sharer. The circumstances contemplated as operating in favour of a wrong-doer in the case of *Mohini Mohan Roy* v. *Promoda Nath Roy*, (6) which has been approved by the Privy Council in *Basanta Roy's case* (10) are established in this case. This argument of the appellant also fails.

Lastly, it is urged that plaintiff should, at any rate, be given a decree for that portion of the land which lies south of the Settlement boundary line of 1890, as it was found by the Partition Commissioner in 1899 to be sandy and almost in the bed of the river and could not, therefore, be the subject of effective possession by the defendants. It does not, however, appear that the portion was in the same condition in 1904. Rajani Kanta De, *Amin* of the Collectorate, who is an independent witness, says: "In 1903 I found the major portion of the *Char* under cultivation. About 2 to 2½ *rashis* wide lands from the water edge was sandy. Above that all lands were culturable." The sandy portion in 1903 would appear to be the portion for which the appellant was given a decree by the trial Court. In any case, the respondents having erected pillars on this portion during the partition proceedings and included it within the rest of the land, the possession of this portion cannot be distinguished from the rest. Thus, all the contentions of the appellant fail.

In this view, it is unnecessary to discuss the question as to what would have been the effect of the possession by the respondents if the case fell within Article 144 of the Limitation Act. It is sufficient to say that, under the circumstances of the present case, the possession of the respondents cannot be held to be surreptitious or occasional acts of trespass and that it had not the qualities of adequacy, continuity and exclusiveness. I agree that the appeal should be dismissed with costs.

Page, J.—I agree that this appeal should be dismissed. In my opinion, it is not incumbent upon the Court in this appeal to consider upon whom lies the burden of proving the dispossession of the appellant because "as their Lordships find the evidence sufficient to establish a clear conclusion of fact it cannot matter now by which party it was given:" [*per* Lord Summer in *Basanta Kumar Roy* v. *Secretary of State for India* (10)]. The only inference which, in my judgment, can reasonably be drawn from the facts proved at the trial, and set out in the judgment of my brother Newbould, is that the appellant was dispossessed of the lands in dispute more than twelve years prior to the institution of the present proceedings. If that be so, this appeal must fail, because it was undoubtedly incumbent upon the appellant, having regard to the form of his claim, and the provisions of Article. 142 of Schedule I of the Limitation Act, 1908, to establish the fact that he was dispossessed within 12 years prior to the date upon which he launched this suit.

I desire, however, to state that I am unable to concur in the view which has found favour with Woodroffe and Newbould, JJ., as to where the burden of proof lies in circumstances such as those obtaining in this case. While they accept the appellant's contention that, inasmuch as both the title to and the possession of the lands in dispute were vested in the appellant before the river Bhagirathi changed its course and the lands became submerged, the said lands are deemed

(12) 66 Ind. Cas. 451; 48 I. A. 395; 44 M. 883; 14 L.W. 721; (1921) M.W.N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 26 C. W. N. 666; 24 Bom. L. R. 669; (1922) A. I. R. (P.C.) 181; (P.C.).

to have remained in the constructive possession of the appellant so long as they continued to be inundated, the learned Judges are of opinion, that "it lay upon the plaintiff to prove that the lands were incapable of user within 12 years prior to the suit" (*per* Newbould, J.) and that the plaintiff "must show that his constructive possession continued on account of diluvion, and on account of the land being incapable of possession within 12 years of the suit" (*per* Woodroffe, J.). With great respect, I am unable to agree that the burden which lay upon the appellant was of this nature. In my opinion, the true rule was laid down by the Judicial Committee of the Privy Council as follows: "The Limitation Act of 1877 does not define the term 'dispossession,' but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively, it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment when the land is not capable of use and enjoyment.' (*per* Cotton, L. J.) in *Leigh* v. *Jack* (13). It seems to follow that there can be no continuance of adverse possession where the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession and revives as it ceases." Mr. Justice Wilson intended, I think, to lay down the same rule when he observed: "The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did continue till within twelve years before suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in section 114 of the Evidence Act:" *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4)

(13) (1879) 5 Ex. D. 264 at p. 274; 49 L. J. Ex. 220; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488.

The rule of constructive possession does not create a new title to or interest in the lands; it merely operates to maitain the continuance of an existing right or interest. Further acts of possession after the waters have subsided are not required to prove possession by the true owner for in law such possession is deemed to have been throughtout continuous and unbroken. The occasion and the necessity for further acts of possession by the true owner arises when, and only when, his right to possess the lands is challenged. So long as his possession is neither threatened nor disturbed what need is there of further witness?

I find myself in agreemement with the following observations of Melville, J., on the subject. "The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within 12 years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land": *Pandurang Govind Now Bal Krishna Hari* (14). Now, while the doctrine of constructive possession, in my opinion, is equally applicable to cases where the plaintiff seeks to obtain possession of land in the possession of another, and to cases where the plaintiff claims to recover possession of lands of which he alleges that he has been dispossessed, a plaintiff who frames his suit to recover possession of lands of which he has been dispossessed must needs prove that he has been in possession, and that he has been dispossessed within 12 years

(14) 6 Bom. H. C. R. A. C. J. 125 at p. 128.

prior to commencing proceedings to recover possession of the land. He must, further, prove, unless it is admitted, the time when, and the mode in which such dispossession was effected. Having regard to the evidence adduced at the hearing so far am I from being satisfied that the plaintiff in this case has proved that he has been dispossessed of the lands in dispute within 12 years prior to the institution of the suit, in my judgment, the true conclusion to be drawn from the evidence is that the respondents have been in possession of the lands in a manner adverse to the plaintiff's title for more than 12 years before the present peoceedings were commenced, In my opinion no question of law is involved in this appeal, which depends solely upon the determination of an issue of fact. For these reasons, it appears to me to be a matter of indifference whether Article 142 or Article 144 of the Limitation Act is applicable in the circumstances of this case, or upon whom the burden of proof lies, for in any event the appeal fails and should be dismissed.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 98 OF 1924.

March 11, 1924.

Present :—Justice Sir Jwala Prasad, Kt., and Mr. Justice Kulwant Sahay.

DAHO KUER AND OTHERS—PETITIONERS

versus

TURAL DEI AND OTHERS—OPPOSITE PARTIES.

Probate and Administration Act (V of 1881), ss. 3, 51—Bengal N. W. P. and Assam Civil Courts Act (XII of 1887), s. 8—Additional District Judge, jurisdiction of, extent of—Probate cases transferred to Additional Judge—Jurisdiction to revoke probate granted by District Judge.

By virtue of the provisions contained in section 8 of the Bengal N.-W. P. and Assam Civil Courts Act, an Additional District Judge exercises with respect to the cases transferred to him by the District Judge the same powers as the District Judge. Where, therefore, cases under the Probate and Administration Act have been transferred to an Additional District Judge by the District Judge, the Additional District Judge becomes the Judge of the principal Civil Court of Original Jurisdiction within the meaning of section 3 of the Act and has jurisdiction to revoke a probate granted by the District Judge.

Case law discussed.

Revision from the order of the Additional District Judge, Patna, dated the 22nd February 1924.

Messrs. Rai *Gurusaran Prasad* and *Anand Prasad*, for the Petitioners.

Messrs. *Gangadhar Das* and *S. N. Roy*, for the Opposite Parties.

JUDGMENT.—The petitioners in this case appealed to the District Judge for revocation of a Probate granted some time ago by that Court.

The District Judge, by his order of the 5th February 1924, transferred the case to the Additional District Judge for disposal under the following order :—

> " Under section 8 (2) of the Bengal N.W.P. and Assam Civil Courts Act, the functions of the District Judge under the Probate and Administration Act and Indian Succession Act relating to grant and revocation of probate have been assigned to the Additional District Judge. Let this suit accordingly be sent to the Additional District Judge for disposal."

The petitioners objected to the trial of the case by the Additional District Judge upon the ground that the order passed by the District Judge transferring the case to the Additional District Judge was *ultra vires* and that the Additional District Judge had no jurisdiction to try the case. This application was refused by the Additional District Judge, and consequently the petitioners moved this Court in revision.

The question before us is, whether the Additional District Judge has power to deal with the application for revocation of the Probate in question. Under section 51 of the Probate and Administration Act (V of 1881) jurisdiction is conferred on the District Judge as regards the granting and revoking of Probates and Letters of Administration in all cases within his District. Section 3 of the Act defines " District Judge " to mean

" the Judge of a Principal Civil Court of Original Jurisdiction." The Bengal, Agra and Assam Civil Courts Act (XII of 1887) deals with the constitution of Civil Courts in Chapter II. As regards Additional Judges, provision is made in section 8, clauses (1) and (2) of the Act, which says :—

> " When the business pending before any District Judge requires the aid of Additional Judges for its speedy disposal, Local Government may, upon the recommendation of the High Court appoint such Additional Judges as may be requisite."
>
> " Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

It is clear from the aforesaid provision that the Additional District Judge exercises with respect to the cases transferred to him by the District Judge the same powers as the District Judge. Now, a class of cases or a particular case may be transferred to the Additional District Judge for the reason that he is to relieve the District Judge of the burden on account of accumulation of cases. When the Additional District Judge takes seizin of a case upon a transfer made to him he becomes the "Principal Civil Court of Original Jurisdiction." Therefore, the Additional District Judge exercises the same powers and in fact occupies the position of a District Judge in the sense that it is defined in the Probate and Administration Act referred to above. When the function of a District Judge under the Probate and Administration Act is transferred to an Additional District Judge he has the same jurisdiction as the District Judge with respect to the grant and revocation of Probates and Letters of Administration. This is not seriously disputed, and in face of the statutory provisions and the authorities on the subject it cannot be seriously disputed.

Mr. Rai Gurusaran Prasad, however, contends that, although the Additional District Judge had jurisdiction in the matter of grants and revocation of Probates and Letters of Administration, he had no jurisdiction as regards the revocation of Probates granted by the District Judge. The foundation of this argument is that the District Judge who grants Probates and Letters of Administration should alone have power to revoke the same. There is no authority to support this proposition. The authorities cited go only to show that Probates and Letters of Administration should not be allowed to be disputed in any other forum but in the Court which granted it. Now, the Probate in the present case was granted by the District Judge, and the District Judge had power to revoke it. It is not the *personnel* of the District Judge, but the presiding officer of the Court of the District Judge who will have power to revoke it. By virtue of the transfer made by the District Judge to the Additional District Judge in the present case under section 8 of the Bengal, Agra and Assam Civil Courts Act, the Additional Judge becomes the District Judge for the purpose of exercising functions under the Probate and Letters of Administration Act. Therefore, the contention of Mr. Rai Gurusaran Prasad must fail.

The following cases :—

Lal Behari Basak v. *Akhil Chandra Santra*, (1) (2) *Jogesh Chundra Sanyal* v. *Rasik Lal Saha*, (2) and *Makhan Lal* v. *Sri Lal*, (3) show that in other statutes, such as, the Bengal Tenancy Act, the Land Acquisition Act and the Insolvency Act, the Additional District Judge exercises the powers of a District Judge in respect of cases transferred to him although the provisions in the particular Act state that the particular function should be exercised by the District Judge. It appears to us that the question raised by Mr. Rai Gurusaran Prasad can be answered by a reference to the reasons given in the order of reference in the Full Bench Case of *Rup Kishore Lal* v. *Neman Bibi* (4). Those reasons were accepted by the Full Bench, the judgment of which was delivered by Sir Lawrence Jenkins, C. J. The cases referred to by Mr. Rai Gurusaran Prasad,

(1) 72 Ind. Cas. 794; 27 C. W. N. 315; (1923) A. I. R. (C.) 469.
(2) 50 Ind. Cas. 690.
(3) 14 Ind. Cas. 162 ; 34 A. 332 ; 9 A. L. J. 371.
(4) 29 Ind. Cas. 935 ; 42 C. 842; 19 C. W. N. 791 ; 21 C. L. J. 487.

HIRDERAM v. RAMCHARAN

Mayho v. *Williams* (5), *Komollochun Dutt* v. *Nilruttun Mundle* (6), and *the goods of Mohendra Narain Roy* (7), only show, as has already been said, that the Court which grants a Probate should have power to revoke it. The order in the present case passed by the District Judge and quoted above shows that the functions of the District Judge with respect to the Probate and Administration Act were generally transferred to the Additional District Judge, and as a part of that arrangement the present case was also sent to the Additional District Judge for disposal. The order purports to have been passed under section 2 of the Act and is a valid order.

We, therefore, dismiss this application with costs: hearing fee two gold mohurs.

Z. K. *Application dismissed.*

(5) 2 N. W. P. 268.
(6) 4 C. 360; 4 C. L. R. 175; 2 Shom. L. R. 126; 2 Ind. Dec. (N. S) 228.
(7) 5 C. W. N. 377.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 210 of 1923.

January 14, 1924.

Present:—Mr. Baker, J. C.

HIRDERAM AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

RAMCHARAN AND ANOTHER—DEFENDANTS —RESPONDENTS.

Court-Fees Act (*VII of* 1870) *S* 17—*Distinct claims —Suit to recover possession from one defendant or refund of consideration from other defendant—Court-fees, separate; whether payable.*

Plaintiff sued defendant No. 2 for possession of certain land on the ground that the land had been surrenderd to him by defendant No. 1 and in the alternative claimed to recover from the defendant No. 1 the amount of consideration for the surrender paid to the latter as on a failure of consideration:

***Held*, that the suit embraced two distinct claims within the meaning of section 17 of the Court-Fees Act and separate Court-fees must be paid on each part of the claim**

Case-law discussed.

Appeal from the decree of the District Judge, Hoshangabad, dated the 22nd February 1923, in Civil Appeal No. 10 of 1923.

Mr. *M. R. Dixit*, for the Appellants.

Messers *S B. Gokhale* and *M. B. Niyogi*, for the Respondents.

JUDGMENT.—A preliminary point in this case is that an objection is taken on behalf of the respondents that proper Court-fees have not been paid on the memorandum of appeal in the lower Appellate Court. The plaintiffs, who are the *Malguzars* of the village, sued the defendant Ramchand, alleging that he had executed a registered deed of surrender to them in respect of the land in dispute for a consideration of Rs. 300, and when they went to take possession of the land they found it was in possession of defendant No. 2 Kishendas and defendant No. 1 had no right to effect a surrender, as had already been decided by the Revenue Court, a fact which the defendant No. 1 had concealed Hence they being unable to get possession brought a suit for possession of the land, or in an alternative for the return of the consideration with interest. The suit was valued at Rs. 300 and Rs. 30 interest, and Court-fee was paid on that amount only.

It is argued in second appeal that the memorandum of appeal is improperly stamped because there are two causes of action; one for possession against defendant No 2 and the other for refund against defendant No. 1. Reference is made to the case of *Neelakandhan Nambudripad* v. *Tirunilai Ananthakrishna Ayyar* (1) and *Dharamchand* v. *Gorelal*, (2) of this Court, decided on 28th January 1918).

On the allegation in the plaint the defendant No. 1 had nothing to do with the land and the fact that he had executed a surrender of it to the plaintiffs would not entitle the plaintiffs to dispossess defendant No. 2. It was stated in *Kashinath Narayan* v. *Govinda*, (3) that

(1) 30 M 61; 16 M. L. J. 462; 1 M. L. T. 426.
(2) 47 Ind. Cas 886.
(3) 15 B. 82; 8 Ind. Dec. (N. S.) 56.

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where the plaintiff sues, in the alternative, for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. Section 17 of the Court-Fees Act (VII of 1870) does not apply to such a case. That section is applicable only to a case of cumulative relief sought by the plaintiff. In the present case there is only one cause of action, namely, the surrender executed by defendant No. 1; no suit lies against defendant No. 2 for the surrender executed by defendant.

In *Neelakandhan Nambudripad* v. *Tirumalai Ananthakrishna Ayyar* (1), relied on by the learned pleader for the respondents it is said at page 64: "The phrase 'two or more distinct subjects' in section 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, section 17 would not govern the case. That may also be so where the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds. It is, however, different in the present case. The claim for redemption is based upon the alleged right of the plaintiff as mortgagor, while the alternative relief is based on a contract for a further mortgage which is distinct from the earlier mortgage right, though both are evidenced by the same instrument.

In *Dharamchand* v. *Gorelal* (2), an unreported case of this Court, referred to above, reference is made to the Madras case (above cited), and it was held: "The present seems to be a case of alternative reliefs being claimed with reference to causes of action of which the plaintiff's loss of the house bought from the defendant Gorelal forms part. The foundations of the claims are not, however, precisely the same. As pointed out by the trial Judge, the relief against Duli Chand was based on the plaintiff's right as vendee to stand in Gorelal's shoes, whereas refund of the purchase-money was asked for on the ground that the sale had failed owing to a defect in Gorelal's title." Although in the present case the plaintiffs rely on the surrender, they ask for possession of the land which is admittedly in possession of defendant No. 2, and it may, therefore be fairly, argued that the suit embraces two distinct subject-matters, namely, the possession of the land from defendant No. 2 on the basis of the surrender, and, secondly, refund of the amount paid on the surrender on the ground of failure of consideration, a relief against defendant No. 1 alone. The fact that if defendant No. 2 is the owner he could not be affected by a surrender executed by defendant No. 1, makes no difference as the plaintiffs claim possession.

The point is not without difficulty, but on the whole I am of opinion that the case falls under the ruling in *Hashmat-un-Nissa Begam* v. *Muhammad Abdul Karim* (4), where the plaintiff sued for specific performance of an alleged agreement to sell to him certain immoveable property, and, secondly, in the alternative, for the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other. It was held there that these were distinct claims; the claim for specific performance being a claim in respect of the proprietary interest in the land, whereas under the claim for pre-emption the plaintiff could only obtain such interest as the mortgagees of the defendant possessed, and their claim in the shoes of the mortgagees. So also, in the present case, the claim for possession of the land is a claim in respect of the proprietary interest in the land, whereas the claim in respect of the refund of the money is a suit based on failure of consideration.

In the circumstances, I think the memorandum of appeal and also the plaint in the first Court were insufficiently stamped and separate Court-fees must by paid on each part of the claim.

Fifteen day's time given for payment of deficient Court-fees.

Z. K.

(4) 29 A. 155; A. W. N. (1907) 4; 4 A. L. J. 127.

NARAYAN *v.* RAMKRISHNAJI

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 38 of 1923.

February 1, 1924.

Present :—Mr. Baker, J. C.

NARAYAN—APPELLANT

versus

RAMKRISHNAJI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale in Execution, when only can be set aside.

A sale held in execution of a decree can only be set aside under r. 89 of O. XXI of the Civil Procedure Code when the whole amount specified in sub-r. (1) has been deposited by the applicant within the time stated.

Chandi Charan Mandal v. *Banke Bihari Lal, Mandal*, 26 C. 449 ; 3 C. W. N. 288 ; 18 Ind Dec. (N. S.) Rep. relied on.

Appeal against the decree of the Additional District Judge, Nagpur, in Execution Case No. 7 of 1921, dated the 25th October, 1923.

Mr. *S. C. Dutt Chowdry*, for the Applicant.

ORDER:—In this case the judgment-debtor deposited the amount less than the proper amount under O. XXI, r. 89, C. P. Code. The balance of 7-12-0 was deposited after the 30 days. O. XXI, r. 89 must be strictly construed. No sale will be set aside under this rule unless the whole amount specified in sub-rule (1) is deposited by the applicant within 30 days from the date of sale. *Chandi Charan Mandal* v. *Banke Bihari Lal Mandal* (1). The appeal is accordingly dismissed under O. XLI, r. 7, Civil Procedure Code.

Appeal dismissed.

(1) 26 C. 449 ; 3 C.W.N. 288 ; 18 Ind. Dec. (N.S.) 890.

JAY NARAIN PANDEY *v.* KISHUN DUTT MISRA

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 111 OF 1920.

February 27, 1924.

Present : —Mr. Justice Das and Mr. Justice Ross.

JAY NARAIN PANDEY AND OTHERS—APPELLANTS

versus

KISHUN DUTT MISRA AND ANOTHER—RESPONDENTS.

Hindu Law—Joint family—Partition—Transactions between members—Presumption—Possession, suit for—Document executed by third person—Cancellation, whether necessary - Transfer of Property Act (IV of 1882), s. 6 (e)—Assignment of right to recover mesne profits, validity of.

Separate transactions by members of a joint family do not by themselves establish separation, but mutual transactions between two members of a family furnish very strong evidence of the fact that there was a separation between the parties. [p. 709, col. 1.]

A person who is entitled to possession of property is not bound to set aside a document which may have been executed by somebody else in order to defeat his title [p. 703, col. 2.]

An assignment of the right to recover mesne profits which has already accrued is an assignment of a mere right to sue within the meaning of section 6 (*e*) of the Transfer of Property Act and is invalid. [p. 710, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Chapra, dated the 10th March, 1919.

Messrs. *Ram Prasad* and *Janak Kishor*, for the Appellants.

Messrs. *Akbari* and *S. N. Bose*, for the Respondents.

JUDGMENT.

Das, J.—There is no substance in First Appeal No. 111 of 1920 presented on behalf of the defendants Nos. 1 to 7 and I must dismiss that appeal with costs.

In this appeal three questions have been argued before us ; first, whether Kishun Dutt is the son of Jasoda Kuer ; second, whether Kamala Kant Pande, through whom the plaintiffs claim, separated from his brothers before his death which took place sometime in June, 1860, and, thirdly, whether Kamala Kant left

a son who died shortly after him. The first question raises a point whether Kishun Dutt has the right to sue. The case of the plaintiffs is that Kamala Kant was separate from his brothers Nand Kumar and Raj Kumar, defendants Nos. 1 to 7 represent the interest of Nand Kumar and Raj Kumar, and their case is, that Kamala Kant was joint with his brothers. Kamala Kant died leaving a widow Badamo Kuer and five daughters including Umeda Kuer (plaintiff No. 1) and Jasoda Kuer. Badamo Kuer died in 1906 and Jasoda Kuer died in 1907. Umeda Kuer was the only surviving daughter of Kamala Kant at the date of the institution of the suit. She is now dead and Kishun Dutt claims to be the son of Jasoda and the only heir of Kamala Kant The defendants resist the claim and their case is that Kishun Dutt is the son, not of Jasoda, but of Jasoda's husband's brother. In my opinion, the case of the defendants on this point is manifestly false. Jasoda was married to one Brijbhukhan. Brijbhukhan had three brothers-Tirjugi Narain, Gangasebak and Ramsebak. Gangasebak and Ramsebak have been examined on behalf of the plaintiffs, and there is no reason to disbelieve their testimony supported as it is by ample documentary evidence. Exhibit 4 is a deed of assignment, dated the 6th of October 1898. That deed was executed by Brijbhukhan in respect of certain debts due to him in favour of his wife Jasoda Kuer. There is satisfactory evidence that Kishun Dutt sued to recover these debts. Exhibits 34-A, 34-B, and 34-C prove satisfactorily that proceedings were taken by Kishun Dutt and in all these proceedings Kishun Dutt was described as the son of Brijbhukhan. There are two other documents, Exhibits 32-B and 41. These documents are in respect of rent which Brijbhukhan owed to one Surajbuksh Singh. Kishun Dutt executed an instalment-bond in respect of the money due, and there were suits upon the bond in which Kishun Dutt was described as the son of Brijbhukhan.

The argument on behalf of the defendants is that Tirjugi Narain, Gangasebak and Ramsebak had their eyes on this property all along, and that they entered into a conspiracy to defeat the claim of the defendants; and with that view they began to create evidence in their favour at a very early period. I am unable to accept this argument. I hold that Kishun Dutt is the son of Jasoda and is entitled to maintain the action.

The third point raised on behalf of the defendants is a short one and may be disposed of at once. It is necessary to remember in this connection that Kishun Dutt claims as the daughter's son of Kamala Kant, and it is obvious that his claim must fail if it is proved that Kamala Kant had a son who survived him. The case of the defendants on this point is equally false and only shows to what lengths they were prepared to go in order to defeat the claim of the plaintiffs. The learned Subordinate Judge has referred to the documentary evidence on this point and in my opinion that evidence completely destroys the case of the defendants. The first document to which I shall refer is Ex. 22. That is a deed of relinquishment executed on the 12th of February 1871 by Badamo Kuer in favour of Raj Kumar and Nand Kumar. In that document Badamo Kuer states as follows : "Now Kamala Kant Pande died "*lawald*" on the 5th Asarh, 1275 Fasli. Raj Kumar Pandey and Nand Kumar Pandey, brothers of Kamla Kant Pandey, are entitled to his estate in equal moiety. I, the executant, have no other right to the estate of my husband which was his ancestral *Milkiat* property, except that of maintenance. The marriage and *Gowna* ceremonies of my two unmarried daughters will be performed under the management of Raj Kumar Pandey and Nand Kumar Pandey and both these heirs will themselves perform the marriage and *Gowna* ceremonies of both the daughters." In my opinion this document establishes that Kamala Kant did not leave a son. The argument before us is that dying "*lawald*" does not mean dying without male issue, but that it means dying without issue. That may be so. But in order to understand in what sense the executant understood the expression "*lawald*" we must read the whole document. Now Badamo Kuer herself says that her husband left at least two unmarried daughters. She could not, by the expression "*lawald*" have meant that her husband died without leaving any issue. It is obvious that, reading that expression in connection with the context, it means that her husband died without leaving any male heir. This is undoubtedly the sense in which Badamo

Kuer understood the expression. Exhibit 26 which is the *Ekrarnama* executed by Nand Kumar and Raj Kumar in favour of Badamo Kuer, is to the same effect. Rajkumar and Nandkumar, who were the predecessors-in-title of defendants Nos. 1 to 7 say as follows:—"Our youngest brother Kamala Kant Pande died leaving behind him his widow *Musammat* Badamo Pandain and three unmarried daughters. We have performed the marriage and *Gowna* ceremonies of one of the three daughters meeting the expenses in cash and kind, etc., in connection therewith, out of our own funds, and have been maintaining and supporting the said *Musammat* and the two daughters." The argument is that, as a matter of fact, Kamala Kant left four daughters; but, in my opinion, that argument cannot have any effect on the point before us, namely, whether Kamala Kant left a son. There is no suggestion in the *Ekrarnama* by Nand Kumar and Raj Kumar that he left a son. Exhibit 19 also supports the case of the plaintiffs on this point. In my opinion the defendants have failed to establish that Kamala Kant was survived by a son.

The only substantial question in this case is, whether Kamala Kant was joint with his brothers at the time of his death. The learned Vakil for the defendants has referred to evidence showing that Lachmi Narain was joint with Kamala Kant and his brothers. Kamala Kant, Raj Kumar and Nand Kumar were the sons of Uma Dutt. Lachmi Narain was the brother of Uma Dutt. After the death of Lachmi Narain a question arose as to whether the family was joint. In the litigation which ensued it was determined in 1864 that the family was joint. In my opinion the history of that litigation throws no light on the present dispute between the parties which is, whether in 1868 the family was joint. Kamala Kant died on the 25th of June 1868 and Badamo Kuer was recorded in the mutation register in respect of some of the properties as the owner of the shares held by Kamala Kant. This was followed by the deed of relinquishment executed on the 12th of February 1871; and it is argued on behalf of the defendants, that the statement of Badamo Kuer on this point is entitled to very great weight, as she must have known whether her husband was or was not joint with his brothers. I am unable to take that view. It is certainly remarkable that this lady says that the brothers of Kamala Kant were entitled to the estate in equal moities. Now, obviously, if the family was joint, Rajkumar and Nand Kumar were not entitled to any specific shares in the joint family property. Nor do I find any unqualified admission in this document to the effect that the family was joint at the time of the death of Kamala Kant. In one place the lady says that Nand Kumar and Raj Kumar were the heirs of her husband. It is quite true, that, in another place, she says that she was only entitled to maintenance and nothing more. But if the family was joint, Raj Kumar and Nand Kumar could not have been described as the heirs of Kamala Kant Pandey. I am unable to give so much importance to the statement made in Ex. 22 as the learned Vakil appearing on behalf of the appellants would like me to give.

The deed of relinquishment was executed, as I have said, on the 12th of February 1871. On the 23rd of February 1872 Jasoda Kuer instituted a suit to have her right declared in the property which belonged to her father. The primary Court as well as the first Court of Appeal gave Jasoda Kuer a decree for possession on the hypothesis that her father was separate from her uncle. But the High Court pointed out that Badamo Kuer having relinquished her interest Jasoda was not entitled to maintain a suit for possession during the life time of the widow. The judgment of the High Court is a short one and may be set out in full. It runs as follows: "The decree in this case is not drawn in the proper from. The decree according to the modern practice ought to be that the widow was entitled, as the heiress of her husband, to an interest for her life in her husband's property and that the interest under the *Bazenamah* has passed to the defendant. On that ground the suit for present possession will be dismissed. Each party to pay their own costs of this appeal." This judgment, in my opinion, establishes that the family was separate and that Badamo Kuer, but for the deed of relinquishment, was entitled to succeed to the estate of her husband. Badamo died in 1906 and the present suit was instituted on the 16th of March 1916 As I entirely agree with the view which which has been

taken by the learned Subordinate Judge on this point, I do not think that it is necessary to refer to all the evidence in the case. In order to succeed, the plaintiffs must establish that the parties altered and intended to alter their title to the property, and that there was a definite and unambiguous indication by the members of the family to separate and to enjoy their respective shares in severalty. In my opinion the evidence shows that the parties did intend to alter their title to the property. The learned Subordinate Judge has referred to a mass of evidence and although I have considered all that evidence, I will refer only to two documents. The first is the judgment of the High Court (Ex. 30), to which I have already referred, which establishes that the parties were separate. The other document is Ex. 23A. This is a bond executed by Nand Kumar in favour of Raj Kumar in order to raise money for the expenses of the marriage ceremony of his own daughter. This document was executed on the 25th of April 1865. I quite agree that separate transactions by members of a joint family do not by themselves establish separation, but mutual transactions between two members of a family stand on an entirely different footing if the family were joint, as is contended by the defendants, it would be impossible for one brother to borrow money from another brother, for the fund would be a common fund. In my opinion Ex. 23A. furnishes a very strong, if not conclusive, evidence of the fact that there was a separation between the parties. This document, taken with all the evidence in the case, shows that the parties intended to alter their title to the property. I hold that Kamala Kant was separate from his brothers and that the plaintiffs are entitled to succeed in this action.

First Appeal No. 111 of 1920 must be dismissed with costs.

First Appeal No. 125 of 1920 is by the plaintiffs. There are two points in this appeal; first, whether the learned Subordinate Judge was right in disallowing the plaintiffs' claim for mesne profits in regard to the period prior to the deed of gift dated the 21st of February 1916; and, secondly, whether the learned Judge was right in deciding a portion of issue No. 12 against the plaintiffs. Now, it appears that some of the properties in dispute are in possession of persons who are not members of the joint family. They are defendants Nos. 8 to 12, defendant No. 13 and defendants Nos. 14 to 16. Some of them claim under mortgages executed in their favour by the predecessors-in-title of defendants Nos. 1 to 7 and some claim under sale-deeds executed by them. The learned Subordinate Judge says as follows: "I do not think that the properties which have passed to third persons can be recovered by plaintiffs. They are apparently innocent purchasers for value from ostensible owners. Besides, both Umeda Kuer and Kishun Dutt Missir had the right to sue for setting aside the sale-deeds within three years of the date of execution of such deeds. This none of them did. The prayer for setting aside the sale-deeds becomes time-barred and plaintiffs cannot recover possession of properties covered by the sale-deeds unless they clear the ground by first getting the sale-deeds set aside which they cannot do." I am unable to agree with this view. These deeds of sale were executed by the predecessors-in-title of defendants Nos. 1 to 7. There is no privity between them and the plaintiffs and I know of no authority which lays down that a person who is entitled to possession of property has, as a preliminary to that, to set aside a document which may have been executed by somebody else in order to defeat his title. Nor do I think it can be considered that defendants Nos. 8 to 16 are *bona fide* purchasers. They have taken the title from a person who had no right whatever to convey that title. In my opinion the plaintiffs are entitled to recover possession of the properties claimed in the suit.

There is a question as to whether defendant No. 13 was actually in possession of three of the properties alleged by the plaintiffs to be in her possession in the plaint. These properties are *mauza Sohng*, *mauza Babhouli* and *mauza* Sarkauli. It was the plaintiffs' case that the defendant No 13 is in possession of these properties by virtue of a conveyance executed in his favour by the predecessors-in-title of the principal defendants. Defendant No. 13, however, filed a written statement stating that she was not in possession of those properties. Thereupon the plaintiffs filed a petition after the judgment was pronounced, but before the decree was drawn up, bringing the facts to the notice of the Court, and asking

the Court to pass a proper direction in regard to those properties. The Court, however, has not passed any order upon this petition except to say, ' Petition as required by order No. 162 stating separation shares of the defendants filed. Let the decree be prepared now." The decree as drawn up, however, did not give effect to the petition of Kishun Dutt, dated the 27th of March, 1919. The question is now important only in regard to the claim for mesne profits. Defendants Nos. 1 to 7 maintain that they are not in possession of any of these *mauzas* and that defendant No. 13 is in fact in possession of these *mauzas*. The question as between defendant No. 13 and defendants Nos. 1 to 7 has not been tried by the Court below; and we direct that this question should be tried at the time of the ascertainment of mesne profits.

The next question is, whether the learned Subordinate Judge's decision on the question of mesne profits is right. In order to understand this point it is necessary to remember the following facts. At the time when the suit was instituted Kishun Dutt had no interest whatever in the properties. Umeda Kuer was the only surviving daughter of Kamala Kant and she was entitled to maintain the action. On the 21st of February 1916 Umeda made a gift of 12-annas interest in the properties in dispute to Kishun Dutt. The question is, whether at the same time she made a gift of the mesne profits which had already accrued due to her, and, whether, if she purported to do so, it conferred any right upon Kishun Dutt to sue for mesne profits which had accrued due to Umeda Kuer on the 21st of February, 1916. The suit was instituted on the 16th of March, 1916: Umeda Kuer died on the 25th of August, 1918. Thereupon Kishun Dutt became entitled to the remaining 4-annas interest in the properties as heir. The direction of the learned Subordinate Judge on the question of mesne profits is as follows: "So long as *Musammat* Umeda Kuer was alive she and not Kishun Dut Missir was entitled to recover mesne profits; Kishun Dutt Missir is, therefore, entitled to recover mesne profits in his own right from the date of Umeda Kuer's death. The question is, if the deed of gift, dated the 21st February 1916 conferred on him the right to recover mesne profits to the extent of 12-annas share. As under the deed he was entitled to immediate possession to the extent of 12-annas share, he is entitled to recover mesne profits from the said date to the extent of such share. *Musammat* Umeda Kuer is now dead and the mesne profits which accrued due to her before the deed of gift cannot be recovered by anybody. The result, therefore, is that the plaintiffs shall recover mesne profits to the extent of 12-annas share in the properties decreed from the 21st of February 1916 till the date of Umeda Kuer's death which took place according to the plaintiff's petition on the 25th August 1918, and full mesne profits for the properties decreed from the date of Umeda Kuer's death till recovery of possession. Plaintiffs may get the same determined by a separate petition." In my opinion the decision of the learned Subordinate Judge on this point is right and must be affirmed.

The solution of the problem must, in my opinion, depend on whether, in regard to the mesne profits which had already accrued due to Umeda Kuer, the assignment of the 21st February 1916 was an assignment of an actionable claim or an assignment of a mere right to sue. In England, ordinarily, choses in action were not assignable at law, but were, speaking generally, assignable in equity. The general rule formulated by the Courts of Equity has been adopted in the Transfer of Property Act which defines " an actionable claim " and provides how such a claim can be transferred This is the general rule; but an exception was engrafted on this rule. Equity, on the ground of public policy, did not give validity to the assignment of what is in the English cases referred to as a bare right of action. Our own statute has accepted this view of Equity in section 6 (e) of the Transfer of Property Act which provides that " a mere right to sue cannot be transferred." As was pointed out in *Glegg* v. *Bromley* (1), " there is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule." Having considered the whole subject with care, the learned Judges came to the conclusion that "the question was whether the subject-matter

(1) (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825.

of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

I think we may usefully apply that principle to this case, and the question at once arises what exactly was assigned by Umeda Kuer to the plaintiffs on the 21st February, 1916. There was undoubtedly an assignment of property and with regard to that, there is no question before us. But there was also an assignment of mesne profits which had accrued due to her at the date of the assignment. The property was in her at the date of the assignment, and she says in effect to the plaintiffs, "I am transferring by the deed a share of the property which is in me but of which I am not in possession. But, in addition to the property, I am assigning to you my claim in regard to the mesne profits which have accrued due to me by right of my title to the property, which title vests in you as from the 21st February 1916". Can it be said that the subject-matter of the assignment in regard to the mesne profits was property with an incidental remedy for its recovery? Mesne profits are unliquidated damages. A claim to mesne profits is not a claim to any debt, it is not a claim to any beneficial interest in moveable property, not in the possession, either actual or constructive, of the claimant. How can it then be suggested that the subject-matter of the assignment is property falling within the definition of "actionable claim" in the Transfer of Property Act? In my opinion, the subject-matter of the assignment was "a mere right to sue", and the decision of the learned Subordinate Judge on this point must be affirmed.

The result is that F. A. No. 125 of 1920 succeeds in part. The decree passed by the learned Subordinate Judge must be varied in the manner indicated in this judgment, and the appellants must have the general costs of the appeal, but will not be entitled to a separate hearing fee.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 177, 287 OF 1922.

February 12, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerji.

TULARAM BHUTUNIA—APPELLANT

versus

PURNENDRA NARAIN RAI DEB VERMA AND OTHERS—RESPONDENTS.

Execution of decree—Auction-sale—Bidder, whether can withdraw offer—Bid, whether open for any length of time.

A bidder at an auction-sale can withdraw his bid before it is knocked down. A bidder at an auction-sale must be presumed to make his offer on the condition that it would be accepted or rejected within the period during which such sales ordinarily last, and the offer cannot be treated as open beyond a reasonable period of time.

Appeals against the orders of the Subordinate Judge, Dinajpur, dated the 18th February, 1922.

Babu *Girija Prosanna Sanyal*, (with him Babu *Indu Prokash Chatterji*,) for the Appellant.

Babu *Asuti Ranjan Ghose*, for the Respondents.

JUDGMENT.

Walmsley, J.—These two appeals arise from an order passed by the learned Subordinate Judge of Dinajpur in the following circumstances. The decree-holder-respondent obtained a decree and put it into execution. The property against which he proceeded consisted of 24 lots, and the sale began on the 16th February 1921. On the application of the judgment-debtor, the Court ordered that the sale would be continued until the 18th February 1921. On the 18th the Judge made this order: "The bid will be accepted on 30th March 1921 on return from Jalpaiguri as prayed for by the judgment-debtor in to-day's petition. Decree-holder also consented." The Judge returned from Jalpaiguri on the 30th March and made this order: "There is no reason for allowing further time to the

judgment-debtor, direct that the sale be concluded and the parties concerned be directed to deposit the sums due for price by to morrow." On the following day, his order was: "the bids may be a accepted and the sales concluded. Absent bidders be served with notices that their bids have been accepted and others be informed of the acceptance of bid". The Nazir on the same day reported that Tularam Bhutur'a (appellant in appeal No. 177) had retracted his offer in respect of 5 lots before the bid was knocked down and that Satish Chandra Das, bidder in respect of 3 lots, BaidyaNath Das and Kissori Mohan Das, bidders for 2 lots, and Basant Kumar Guha, bidder for one lot, were absent. The lastf our persons are the appellants in appeal No. 287. Thereafter, at the instance of the decree-holder, the Court proceeded to sell these lots afresh. The bids in the second sale were considerably lower and, at the instance of the decree-holder, the Court issued notices on the defaulting bidders to pay the differences. They objected and the judgment against which these appeals are preferred is the judgment disposing of their objections.

So far as Tularam is concerned, very little need be said. As I have mentioned, the Nazir reported on the 31st March 1921 that Tularam retracted his offer before the bid was knocked down. On the authorities it is clear that Tularam had the right to withdraw his bid. It is urged, however, for the respondent that his bid had actually been accepted before it was withdrawn. For that view, I can find no support. The Nazir was the officer conducting the sale and his report is quite clear that the withdrawal was made before the hammer fell. Consequently, Tularam's appeal must be allowed and the Judge's order reversed so far as he is concerned.

With regard to the others, they were absent on the 31st March. The first point in their favour is this that they were not consulted about the adjournment of the sale from the 18th February to the 30th March. It is suggested that they probably knew and did not object. But that is not enough. There is nothing on the record to show that they gave their consent. That being so, the position is that these men who bid for the various lots expecting that the auction-sale would be concluded with reasonable expedition either the very day on which the offer was made or at any rate the following day, found to their surprise six weeks later that the sale was not concluded on the day the offer was made but that it was kept open for this abnormal length of time. It appears to me that the reasonable view is that each of these bidders made his offer on the condition that it would be accepted or rejected within the period during which such sales ordinarily last, and that, in the absence of anything to show that he consented to the period being protracted to the extraordinary length of six weeks, we ought to hold that his offer was not intended by him to be open for that unusual length of time. I think, therefore, that the appeal of Satish Chandra Das and others should also be allowed on this ground.

The result is that the judgment of the lower Court is reversed and the order directing the appellants in both these appeals to pay to the decree-holder the deficits on sums by which their offers exceeded the amounts realised at the second sale is set aside with costs in both Courts the hearing fee in each of these appeals being assessed at two gold mohurs.

Mukerji, J.:—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 279-B OF 1922.

January 28, 1924.

Present:—Mr. Kinkhede, A. J. C.

MOTILAL RAMLAL—PLAINTIFF—APPELLANT

versus

RENI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint Family—Alienation by father—Antecedent debt—Necessity—Mortgage—Damdupat *rule of, applicability of—Interest* pendente lite, *whether can be allowed- Civil Procedure Code* (*Act V of* 1908), *s.* 34, *applicability of.*

MOTILAL RAMLAL *v.* RENI

A Hindu father who is manager of the joint family is competent to mortgage the family property for payment of antecedent debts or raise money for legal necessity on the security of the larger interest including the shares of his sons. [p. 714, col. 2.]

Where the rule of *Damdupat* recognised in Hindu Law is in force, it applies to simple money debts as also to mortgage-debts. The consequence of this is that in case of a mortgage as soon as the maximum limit of interest is reached the contractual obligation comes to an end, and this may take place before the date of suit. In such a case the rule of *Damdupat* intervenes and precludes the Court from allowing the uniform contractual rate of interest down to the date fixed for redemption. The matter ceases to be any longer within the realm of contract and passes into the domain of judgment as soon as the suit is instituted, and it is here that the discretion which s. 34 of the Civil Procedure Code vests in Courts to decree interest *pendente lite* comes into play. [p. 716, cols. 1 and 2.]

Case-law discussed.

Appeal against the decision of the District Judge, East Berar, Amraoti, in Civil Appeal No. 197 of 1921, daded the 28th March 1922.

Mr. *M. R. Dixit*, for the Appellant.

Mr. *M. B. Marathe*, for the Respondents.

JUDGMENT.—One Daulat was the husband of the present respondent No. 1 and father of the respondents Nos. 2 and 3. He is said to have given himself up to drinking and thus led a life of extravagence. On 23rd April 1915 he executed a *vyavasthapatra* (Exh. 2 D-1) in the name of his wife Reni and mother Tulsabai. After the execution of this *vyavasthapatra* he, in consideration of Rs. 1,200, mortgaged the property in suit with plaintiff as per Exh. P-1 dated 1st June 1916 and Reni also joined him in the execution of this mortgage-deed. Subsequently, on 2nd February 1918 Daulat along with his wife Reni and mother Tulsabai acting for himself and as guardain of his minor sons defendants Nos. 2 and 3 executed a sale-deed Exh. 5 D-5 in respect of the property in suit in favour of Kesheorao, the father of defendant No. 4 and husband of defendant No. 5, for a consideration of Rs. 3,000. Daulat died on 9th December 1918. The mortgagee instituted the suit to enforce the mortgage on 30th October 1919 against defendants Nos. 1, 2, 3, 4 and 5 to recover Rs. 2,400 on its basis subject to the rule of *Damdupat*. The mortgage is dated 1st June 1916 and provides for payment of interest at Rs. 1-8-0 with a stipulation for payment of 2 rupees compound interest on the amount, and provides for the foreclosure of the mortgaged property. The mortgage-debt is said to have been advanced for payment of antecedent debts of Daulat and for agricultural and household expenses.

The defendant No. 1 did not make appearance while defendants Nos. 2 and 3 contested the claim and similarly did also the defendants Nos. 4 and 5. The defence of defendants Nos. 2 and 3 was a denial of the mortgage and of its consideration and attestation, and of its being binding as against them, on the ground that it was not for legal necessity or for their benefit. They also pleaded that their father Daulat being addicted to drinking and other vices, the consideration, if any, received by him, must have been spent in these vices. They also relied upon the registered *vyavasthapatra* dated 23rd April 1915 (Exh. 2 D-1) executed by their father evidently for their benefit in the name of their mother defendant No. 1 and grand-mother Tulsabai ; their contention raised on its basis was that Daulat had ceased to be interested in the property from before the date of the mortgage Exhibit P-1. The defence of defendants Nos. 4 and 5, so far as it is relevant to this appeal, was almost similar to that of defendants Nos. 2 and 3. The necessary issues were framed. The first Court found that by reason of *vyavasthapatra* (Exh. 2 D-1) Daulat had ceased to be interested in the property and, therefore, the mortgage by him was incompetent. As regards the question of legal necessity that Court found that the consideration of the mortgage was not proved to be for legal necessity, and, consequently, it held that in the interest of the defendants Nos. 2 and 3 could not be validly mortgaged for the same. On the point of Daulat being addicted to drinking and other vices, the Court accepted the story of the defendants and concluded that it was not proved that the mortgage-debt was incurred for any legal necessity and held that it was possible that he might have borrowed money for his immoral purposes. On these findings the Court refused to pass a decree against the mortgaged property held by defendants Nos.4 and 5 under the sale-deed, dated 2nd February 1918 (Exh. 5 D-5) although that deed clearly recited that the payment of the mortgage-debt formed part of its consideration.

The Court, however, passed a money-decree against defendant No. 1 for a sum of Rs. 3,316-12-0 which it found was due at the date of suit although plaintiff claimed Rs. 2,400, as due to him at that date. The defendant No. 1 was by the judgment ordered to pay proportionate costs of the suit. But in drawing up the decree the plaintiff's pleader's fee was calculated on Rs. 3,316-12-0 instead of on Rs. 2,400 claimed as due at the date of the suit; this amount together with the other full costs of the suit making an aggregate of Rs. 334-12-9 is shown in the decree as costs of the suit payable by defendant No. 1 to plaintiff. The *Moharrir* who drew up the decree calculated defendants' costs in two sets, but here it must be said to his credit that he did not commit the further mistake of calculating pleader's fee on Rs. 3,316. He carefully calculated it on Rs. 2,400 only. The Judge, Mr. Jawahirlal, signed the decree without any scrutiny, so did also the pleaders who initialled the same.

The matter came up in appeal at the instance of the plaintiff before Mr. Staples, District Judge, Amraoti. The value of the relief in appeal was put down at Rs. 3,316-12-0. Of course, it was not the plaintiff's interest to point out that the first Court granted him a decree far an amount far in excess of what was claimed by him at the date of the suit. The District Judge who simply confirmed the findings and dismissed the appeal also did not care to notice the excessive amount of claim and of pleader's fee awarded in the first Court; he also allowed two sets of costs to the two sets of respondents although their defence was common. The pleader's fee was, however, calculated in his Court on Rs. 3,316 for both parties. It was I think the duty of the District Judge to draw the attention of the lower Court to the mistakes apparent on the face of the record, and to warn the *Muharrir* who was responsible for the drawing up of the decree of the District Judge's Court is equally to blame for not having drawn the attention of the District Judge to the mistakes in the lower Court's decree. The District Judge might then, at least have called upon the plaintiff's pleader to correct the valuation in the memorandum of appeal and put down the claim in appeal at Rs. 2,400 and thus the same mistakes would have been avoided in the decree of the Appellate Court. Although there are grounds Nos. 6 and 9 in the memo of appeal the attention of the Court does not appear to have been directed to them. The District Judge's judgment, at least, does not show that they were present to his mind when he disposed of the appeal. He concludes his judgment by the usual order that the costs of the appeal will be borne by the appellant, and the costs of the lower Court will be borne as ordered by that Court. The case has come up before me in such unsatisfactory state and I am bound to say that I am not at all pleased with either the manner of its trial by Mr. Jawahirlal, or the mode of its disposal by him in the first Court, and by Mr. Staples at the stage of appeal.

I will now deal with the main appeal. It is contended that the lower Courts have committed a horrible mistake in looking upon the *vyavasthapatta* as having put an end to Daulat's interest in the property covered by it with effect from its date whereas, as a matter of fact, it does not purport to do anything of that kind. The document seems to have been misread by both the Courts. There is not a single word of a present demise of any interest in the land in favour of the executees, or of the sons who were the beneficiaries thereunder. It simply hands over or transfers the right of management, but does not in any way transfer Daulat's ownership *in presento*. It says that Reni and Tulsabai were to manage the property till their death, and that after their death, the property will go to his heirs the sons. He delegates to them only the function of management of the property including the one of payment of assessment. It is contended by the plaintiff-respondent that mere proof of execution of the deed is not sufficient. There must be evidence to prove that it was acted upon and given effect to. My attention has been drawn to the evidence both oral and documentary which shows that the field continued, in spite of the deed, in the actual possession, management and enjoyment of Daulat. It was he who paid the assessment and leased out the land to lessees. See Ex. P-4 and P-5 which show the field in the name of Daulat as the person who held actual possession and paid the assessment. The Exhibit P-2 is an extract from

the Record of Rights. It does not show any transfer of ownership from Daulat in 1915-16-17 in pursuance of the *vyavasthapatra*, but records the mortgage incumbrance dated 1st June 1916 (Ex. P-1) and the sale as per Ex. 5 D-5 This clearly shows that the Revenue or Settlement authorities were never informed of the existence of this *vyavasthapatra*. So far as I can see, the document was a waste-paper and was not given effect to, because we find Daulat, in spite of it, had created the mortgage over the property within 14 months of its execution and he went on letting out the land and paying assessment, and enjoyed its income, and, further, sold the same to Kashirao for a consideration of Rs. 3,000 on 2nd February 1918. Of course, the mortgagee, as also the vendee, knew about the existence of the *vyavasthapatra* and, therefore, like careful business men, the mortgagee got the obligee Reni to execute the mortgage Ex. P-1, and the purchaser got Reni and Tulsabai also to join in the execution of the sale-deed along with Daulat, who in his turn signed it for himself as also as guardian of his minor sons defendants 2 and 3. The *vyavasthapatra* restricts the right of the two ladies to transfer the property either by sale or mortgage, and yet the ladies have sold the property to Kesheorao for satisfaction of the mortgage-debt. All these circumstances coupled with the oral evidence, clearly establish the appellant's contention that it was not Daulat's intention to give effect to this *vyavasthapatra* to any extent, much less to divest himself, by means of it, of his own ownership over the property covered by it. I am not, under such circumstances, prepared to accept the erroneous construction put upon that deed by both the lower Courts, without carefully scrutinizing the terms and conditions thereof. This would show that, in spite of the execution of the said document, he retained his ownership over the property and was competent to alienate the property for payment of antecedent debts or for cash debts incurred by him, if any, for legal necessity.

The property is put down in the mortgage-deed itself as being ancestral, so the interest which Daulat had in it was not that of a sole owner, but only, of a joint co-parcener, and the extent of his individual interest did not exceed 1|3rd. But as a father and manager of the joint family he was competent to mortgage the family property for payment of antecedent debts, or raise money for legal necessity, on the security of the larger interest including the shares of his two minor sons. This takes us to the next point which deals with the question how far the alienation binds the minor sons' interests. So far as the alienation of his own 1|3rd share is concerned, the question is not at all difficult or material. The question of the consideration of the mortgage-debt being required to pay off antecedent debts, or for other legal purposes binding on the minor sons depends upon proof of the existence of debts and of the fact of their satisfaction out of the consideration, as also upon the existence or otherwise of circumstances amounting to legal necessity for the borrowing of cash.

The mortgage-deed recites that Rs. 200 were borrowed to pay off one Rama or Ramji. But who he was and where he lived is not satisfactorily proved. Consequently, the item of Rs. 200 cannot be strictly held proved to have been utilized towards liquidation of the antecedent debts of the father. The evidence of one Anyaj, P.W. 3, has been rightly discarded, unsupported or uncorroborated as it is by any documentary evidence. The lower Courts have discarded the evidence of P.W. 7 as insufficient or unsatisfactory. I am not, however, prepared to agree with them in the appreciation of this piece of evidence. P. W. 7's evidence is corroborated by entries in Exh. P-3 which prove the existence of the antecedent debts to the extent of Rs. 327. There is no valid reason for holding the repayment of Rs. 327 out of the consideration of the mortgage-deed as not proved. There is absolutely no reliable evidence to show how the rest of the consideration was utilized and the conclusion of the first Court that it has not been proved to have been taken by Daulat for legal necessity seems correct. That Daulat was a confirmed drunkard is amply proved by the evidence on record on both sides, and it is likely he may have spent the same or major portion thereof to meet his expenses in connection with his immoral pursuits. The Patwari's report shows that he died of hard drinking. The document Exh. 2 D-1 is drawn up on the very basis of his being a drunkard and as such incompetent to look after and

protect his minor sons' interests adequately. I am, therefore, not prepared to hold that the balance of Rs. 873 out of Rs. 1,200 was borrowed for legal necessity or for purposes binding on his minor sons. The alienation is not, therefore, binding on the minor defendants Nos. 2 and 3's 2|3rd share so far as Rs. 873 is concerned. Their shares could be legally alienated by him for payment of Rs. 327 only. So far as Daulat's 1|3rd share is concerned, it would of course be bound in whose-so-ever's hands it may go to the full extent of the mortgage-debt and I hold accordingly. The defendants Nos. 4 and 5 who have taken the sale with full knowledge of the mortgage cannot avoid the liability of Daulat's interest in the property in their hands, for the debt in suit, to the extent indicated above.

The next question is about the interest to be awarded. The plaintiff claimed Rs. 2,400 made up of Rs. 1,200 principal+Rs. 1,200 for interest up to the date of the suit subject to the rule of the *Damdupat*. His calculations as given in the plaint show that the amount due to him up to 29th September 1919 came to Rs. 2,403-9-0 but that as the rule of *Damdupat* stopped the running of interest as soon as it reached its maximum the mortgagees' right to demand interest after that date under the terms of the contract ceased and the matter, therefore, passed from the domain of contract to the domain of judgment. Here in this case this contingency having happened sometime before the date of the suit, the Court's power to award interest under the statutory provisions contained in section 209 of the old Code, which correspond to section 34 of the new Code, came into operation with effect from the date of the suit. I am fortified in this view by the ruling of the Bombay High Court as also by an unreported decision of Sir Henry Stanyon. In *Amboo Bai* v. *Ragho*, F. A. No. 64|07 decided on 19th March 1908, Sir Henry Stanyon, Additional Judicial Commissioner, has put it very tersely in the following words which have my entire approval :—

> "The very fact that it is within the discretion of the Court to award interest or not, and to fix the rate of interest, makes it manifest that it is a statutory power which does not relate back to the contract nor comprise the enforcement of any part of the contract between the parties. The law recognizes that in claims for money there may be considerable delay between the institution of the suit and the realization of his money for which delay the plaintiff may not be responsible. If the money is carrying interest by contract the till date of payment then probably no interest under section 209 (new section 34) will be allotted but merely interest under the contract. But if the money carried no interest *ab initio* or for any reason had ceased to carry interest from and after the date of suit or some earlier date, then the Court may in a proper case apply section 209 (new section 34) aforesaid.
>
> (1) If A lent money to B payable without interest in one year ; (2) if A lent Rs. 500 on which prospective interest to date fixed for payment was calculated and added and no further interest stipulated for ; (3) if A lent B money repayable with interest at Rs. 24% p. a. in 5 years in a case governed by the rule of *damdupat*, so that all the recoverable interest under the contract had accrued due before date of suit, in all these cases, section 209 (new section 34) of the Civil Procedure Code, could be brought into operation to compensate A for the delay involved by B's failure to pay and the resulting necessity of a suit."

Reliance is placed on behalf of the respondents on the case of *Nandalal Roy* v. *Dhirendra Nath Chakravarti* (1), and it is urged that in view of that ruling no interest *pendente lite* should be allowed. Looking to the sound reasoning in *Amboo Bai* v. *Ragho*, F. A. 64|07, which followed *Dhondshet* v. *Rauji* (2), which also was a case of foreclosure, as also looking to the fact that, in *Narain* v. *Nathmal* (3), the actual decree passed allowed interest from the date of suit to the date fixed for redemption by the second Appellate Court, (although the head-note does not clearly show it), I think I should not follow the Calcutta decision in preference to the local rulings above referred to. It appears that the question which the Calcutta High Court had to decide was whether the rule of *Damdupat* operates as a bar to the

(1) 21 Ind. Cas. 974 ; 4 O. C. 710.
(2) 22 B. 86 ; 11 Ind. Dec. (N.S.) 689.
(3) 65 Ind. Cas. 975 ; 17 N. L. R. 209.

Court's power to award interest after the date fixed for redemption until realization. While the question I have to decide is whether interest from date of suit to the due date fixed for redemption is allowable or not. Instead of the Culcutta ruling militating against the view taken by our High Court it really proceeds upon and recognizes the very principles which are taken as the basis for the local decisions, and I may even say that the Calcutta ruling in fact supports the view taken by our High Court. If Courts can award interest after the date of the decree, I do not see why after the application of the rule of *damdupat* at the date of suit, and the consequent stoppage of interest under the terms of the contract, the Court's power should not be exercisable in respect of the period which intervenes between the institution and the date fixed for redemption. It might be argued that the general principles which make section 34 of the Civil Procedure Code applicable to all claims for money do not justify the view that that section was meant to be applied to mortgage decrees or to decrees for sale in enforcement of a mortgage or charge. There is a very simple answer to this. The scheme of the Transfer of Property Act, as also of the provisions of O. XXXIV, which have now incorporated the corresponding provisions of the Transfer of Property Act into the Civil Procedure Code, shows that the underlying idea is that in all mortgage-suits interest is calculated at the constract rate specified in the mortgage, up to the date to be fixed for redemption consequently there is no room or necessity ordinarily for applying the provisions of section 34 of the Civil Procedure Code to such suits. But where the rule of *damdupat* recognized under Hindu Law is in force it applies to simple money-debts as also to the mortgage-debts. The consequence of this is that as soon as the maximum limit of interest is reached the contractual obligation comes to an end, and this very often takes place before the date of suit. The rule intervenes and precludes the Court from allowing the uniform contractual rate of interest down to the date fixed for redemption in the mortgage suit. The matter of allowing interest from the date of suit until the date fixed for redemption in such cases thus ceases to be any longer within the realm of contract and passes into the domain of judgment as soon as the suit is instituted. And here the discretion which section 34 of the Civil Procedure Code vests in Courts to decree interest *pendente lite* comes into play. That the matter of allowing interest is entirely a discretionary matter with Courts, is clearly established in *Hiralal Ichhalal Majumdar* v. *Narsilal Chaturbhuj Das*, (4) which was affirmed by the PrivyCouncil in appeal in *Hiralal Ichhalal Majumdar* v. *Desai Narsilal Chaturbhuj* (5). Examinig the facts of this case in the light of these principles, it will be seen that in the plaint in this suit plaintiff himself has struck off a portion of his claim on the ground that it is not claimable by him as being in excess of that allowable under the rule of *damduppat*. The plaintiff, however, had charged interest at two rates; first up to the date of the first default he has charged interest at Rs. 1-8-0 per cent. per mensem from the date of the bond on Rs. 1,200 and then after that date, he has charged interest at Rs. 2 per cent. per mensum compound until the date of suit, and thus arrived at a sum in excess of Rs. 2,400 as payable up to the date of suit. He thus wants to take advantage of both the stripulations one for an enhancement of the rate of interest, and another for compounding the same with yearly rests. This he cannot legally do. In my opinion he should get interest at Rs. 1-8 per cent. per mensem compound with the first rest at the due date of the first *kist*, and subsequent annual rests thereafter up to a day when the maximum limit of Rs. 2,400 would be reached. If on making calculations on these lines Rs. 2,400 become payable to plaintiff before the date of suit, then interest will cease to run from that date up to the date of the suit, but if at the date of suit the amount is less than Rs. 2,400 further interest will be added to that amount from the date of suit up to such date as will make it Rs. 2,400 at the above rate. Similarly, interest on Rs. 327 from the date of bond at the rate of Rs. 1-8-0 per cent. per mensem compound with yearly rests as before, will be calculated, and if the interest so calulated amounts to Rs. 327 before the date of the suit, further interest will be stopped with effect from that date until the

(4) 2 Ind. Cas. 463 ; 11 Bom. L. R. 318.

(5) 18 Ind. Cas. 909 ; 37 B. 326 at pp. 338, 339; 17 C. W. N. 578 ; 18 M. L. T. 416 ; (1913) M. W. N. 428 ; 11 A. L. J. 488 ; 17 C. L. J. 474 ; 15 Bom. L. R. 461 25 M. L. J. 101 ; 40 I. A. 69 (P.C.).

date of suit. If it does not come to Rs. 327 further interest will be added until the maximum is reached as in the case of Rs. 2,400 stated above. The disposal of this suit has been delayed by reason of the defence based on the effect of *vyavasthapatra* which ultimately failed. I, therefore, consider that this a very fit case for the exercise of my discretion under section 34 of the Civil Procedure Code, to award interest during the pendency of the suit and down to the date which I am going to fix as the date for redemption. The first Court had given a provisional finding in para. 7 of the judgment that if a mortgage-decree were to be passed the rate of interest to be awarded will be Re. 1 per cent. per mensem from date of suit until six months after the date of the decree. I have not heard anything against the propriety of awarding interest *pendente lite* at the rate specified in the first Court's judgment. I, therefore, direct that an account be made on the lines laid down above, and calculations of interest be made up to 31st of July, 1924 the date which I propose to fix as the date for redemption. Two prices for redemption thus fixed will be payable for the redemption respectively of the entire property of the 2/3rds share thereof as the case may be. The consequential directions will be embodied in the final judgment which I will pass on the 31st of this month. The parties will, in the meantime, examine the accounts which the office will make as stated above and point out inaccuracies, if any, in the same, on the 31st, when I will confirm the account and declare the amounts due and payable.

As regards costs, I direct that as defendants Nos. 2 and 3's Counsel's fees in this Court have been paid by plaintiff, the same shall be shown in the appellant's schedule of costs of this Court. They shall have no other costs in this Court. Similarly, respondent Renu will have no costs in this as also in the two lower Courts. Defendants Nos. 4 and 5 shall bear their own costs in three Courts. As regards the costs of defendants Nos. 2 and 3 in the two lower Courts I direct that only half their proportionate costs calculated on Rs. 1,849-8-0 (Rs. 2,400-570-8), in each of the two Courts, will be paid to them by plaintiff.

Z. K.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1271 of 1919.

December 8, 1923.

Present.—Mr. Justice Harrison, and Mr. Justice Zafar Ali.

LALCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANOHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow or daughter, powers of alienation of—Alienation by daughter—Reversioner, after born, whether can challenge—Custom v. Personal law—Succession—Banias of Mauza Devi Nayar, Tahsil Kharar, Ambala District.

The limitations imposed upon the estate of a Hindu widow or daughter are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she cannot alienate the *corpus* of the property except for legal necessity. If she does alienate it without legal necessity, then, if there be no reversioners in existence at the time, the alienation can be challenged by subsequently born reversioners. [p. 719, col. 2.]

Semble :—The *banias* of *mauza* Devi Nagar, Tahsil Kharar, Ambala District, are governed by Hindu Law in matters of succession.

Appeal from the decree of the Senior Subordinate Judge, 1st class, Ambala, dated the 31st March, 1919, dismissing the plaintiffs' suit.

Pandit *Sheo Narain*, *R. B.*, and Bakhshi *Tek Chand*, and Lala *Fakir Chand*, for the Appellants.

Dr. *G. C. Narang*, and Messrs. *R. C. Soni* and *Balwant Rai*, for Pandit *Nanak Chand*, for the Respondents.

JUDGMENT.—The three plaintiffs in this case are the sons of one of the two daughters of one Ballu Mall who was a *bania* by caste and owned, besides other property, ½ share in the village Devi Nagar, District Ambala. On his death, which occured in 1857, his widow, *Musammat* Dhan Kaur succeeded to his share in the estate and later on obtained separate possession thereof by partition in spite of the opposition of the other two co-sharers Mutsaddi Mal and Shibbu Mal who claimed to be

near collaterals of Ballu Mal and asserted that the widow was entitled only to maintenance. The litigation on this point ended in 1876, and in 1881 the widow gifted in equal shares the whole of her property to her two daughters by Ballu Mal. Mutsaddi Mal and the sons of Shibbu Mal again sued to obtain a declaration that the gift was invalid and inoperative as against them; but this was refused on the ground that they had failed to establish that they were agnates or near agnates of Ballu Mal. The final judgment of the Chief Court in the said case is dated the 14th November 1889 and in 1894 one of the donees, *i.e.*, *Musammat* Sobhi, gifted her share of the property to her husband Bishambar. Later on, in 1898, her sister *Musammat* Naraini followed suit and gifted her share to her husband Basant Rai(father of the plaintiffs). Before these gifts to their husbands the two sisters had made certain alienations and a sale was effected by Bishambar after the gift to him. The sisters died in 1911 and 1912, respectively. *Musammat* Sobhi, who died first, had only one child a daughter, named, *Musammat* Tulsan, who died in her lifetime leaving a daughter *Musammat* Manohri who figures as defendant No. 1 in this case and has succeeded to the property left by *Musammat* Sobhi or her husband Bishambar.

The plaintiffs' who are the sons of the other sister (*Musammat* Naraini), sued for possession of all the immoveable property left by Ballu Mal including that alienated by the two sisters and Bishambar, stating that the widow, *Musammat* Dhan Kaur, and after her death, her daughters succeeded to a limited estate and not as absolute owners; that they as male heirs of Ballu Mal were entitled to succeed to the whole of his estate after the death of his last surviving daughter and that the alienations were inoperative as against them because there was no legal necessity for any of them.

A number of pleas were raised in defence and it was stated that the widow succeeded as full owner and that her daughters became absolute owners by virtue of the gift made in their favour but it was nowhere stated that in matters of inheritance the family followed the general custom of agriculturists and was not governed by Hindu Law. On the other hand, the principal defendant, *i.e.*, *Musammat* Manohri stated in paragraph 2 of her written statement that "the parties were bound by the Hindu Law." As no custom was directly or indirectly pleaded no issue could be struck about custom though, on the pleas of the parties, the nature of the rights to which the widow and the daughters succeeded formed the subject of two of the issues framed. The suit was instituted on the 29th November, 1916, evidence on a number of important issues was closed on the 10th June, 1918, final arguments were heard on the 12th July, 1918, and the 22nd July was fixed for judgment, but instead of delivering judgment on that date the Court below recorded an order to the effect that the plaintiffs relied upon Hindu Law but that the defendants did not specifically state what they relied upon; that according to the *wajib-ul-arz* (of the village Devi Nagar) widows succeed as full owners and that, therefore, the plaintiffs should be given an opportunity to rebut the presumption raised by the *wajib-ul-arz* with regard to the widow's title as absolute owner. After this order the parties in the course of about nine months examined a few more witnesses—almost all on questions of necessity improvements, etc. No evidence whatsoever was adduced about the alleged custom, and the plaintiffs did not even produce a copy of the *wajib-ul-arz* which had been relied upon by the Court. On the basis of a translation of a passage in the *wajib-ul-arz* relied on and quoted in a judgment in another case the lower Court decided that the widow *Musammat* Dhan Kaur was the absolute owner and that the family of Ballu Mal was governed by the custom stated in the *wajib ul-arz* and not by Hindu Law, and dismissed the plaintiffs suit.

It is conteneed on behalf of the plaintiffs appellants that the *wajib-ul-arz* wasnot produced in evidence at all and could not be referred to, and that even if a quotation of it in the judgment of some other case to which the plaintiffs were not parties could be treated as evidence, it was in the absence of all other evidence quite insufficient to establish the alleged custom. Counsel for the defendants-respondents states that the defendants filed an application in the Court below to call for the record No. 14 which contained a copy of paragraph 8 of the *wajib-ul-arz* which recited

the custom in question and that the record was accordingly called for and was in the Court below. But it appears from the following passage which occurs in the judgment of that Court that the copy in this record was never referred to before it, and that no other copy was produced and exhibited : —

"No copy of the *wajib-ul-arz* entry on which the defendants rely has been filed by them; but I have been referred to page 8 of the printed paper-book in Civil Appeal No. 545 of 1885 (*Mutsaddi Mal* v. *Musammat Dhan Kuar*). Therein the copy of paragraph 3 of the *wajib-ul-arz* appears and the last two sentences are to this effect * * *".

But even the printed paper-book referred to above was not placed on the record and is not before us. It is, therefore, clear that the *wajib-ul-arz* was neither produced nor proved in this case. There being, therefore, no evidence in support of the plea which was not taken, we find that the parties are governed by Hindu Law.

On the point of necessity there is no evidence worth the name on the record. It is argued on behalf of the alienees that no better evidence could be produced at this distance of time. If they had produced some evidence it might have been considered sufficient on account of lapse of time but as no evidence is produced it cannot be presumed that the alienations were made for legal necessity.

Some of the alienees claimed compensation for improvements but neither the existence nor value of these alleged improvements was proved by any satisfactory evidence. The oral evidence of the witnesses examined is vague and worthless.

Lastly may be noticed the argument that as the plaintiffs were born after the alienations they could not contest the same. But this contention does not appear to have been raised in the Court below and is quite untenable. The plaintiffs are entitled to succeed as full owners to all the property left by Ballu Mal, being his male heirs according to Hindu Law. The widow and daughters who were limited heirs could not alienate any property without legal necessity even in the absence of reversioners because the property goes to the Crown by escheat in default of reversioners and the Crown is entitled to impugn such alienations. See *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah* (1) "(6) The limitations imposed upon her estate are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she canot alienate the *corpus* of the property except for a legal necessity. If she does alienate it without legal necessity, then, if there be no reversioners, the alienation may be set aside by the Crown taking the property by escheat." (Mulla's Hindu Law, III Edition, page 159).

For all these reasons we accept the appeal and reversing the judgment and decree of the Court below, decree the plaintiffs, suit with costs throughout.

Z. K. *Appeal allowed.*

(1) 8 M. I. A. 500 at p. 520 ; 2 W. R. P. C. 59 ; 1 Suth. P. C. J. 417 ; 1 Sar. P. C. J. 752 ; 19 E. R. 620, (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 183 OF 1922.

February 26, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice M. N. Mukerjee.

TARAK CHANDRA CHAKRABURTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PROSANNA KUMAR SAHA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 21 (1), 32, 35, 79, 114 (e) —Bengal Regulation (VIII of 1793), s. 48—Bengal Regulation VII of 1793, s. 15 — Return filed by Zemindar, with Collector, admissibility of—Certified copy—Presumption—Admission, value of.

A return filed by a *zemindar* in the Collector's Office under section 48 of Bengal Regulation VIII of 1793 and section 15 (8) of Bengal Regulation VII of 1793 does not fall within the purview of section 35 of the Evidence Act. [p. 721, col. 2.]

The presumptions contained in sections 79 and 114 (*e*) of the Evidence Act would, however, apply to a certified copy of such a document. [p. 722, col. 1].

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The legal effect of such a document or the weight to be attached to it would have to be determined by the application of such tests as have to be applied to all other statements. If it is sought to be used as an admission against the party making it, its probative value would be considerable. Where it is sought to be used in favor of the party who made it, it must fulfil the requirements of section 21 (1), read with section 32, of the Evidence Act, or it must be relevant otherwise than as an admission. In either case its value would be slight. [p. 722, col. 1].

Appeal against the decree of the Special Judge, Noakhali, dated the 30th August 1921, reversing the decree of the Assistant Settle-Officer of that District dated the 16th September 1919.

Babu *Ramdayal De*, for the Appellant.

Babu *Bhagirath Chandra Das*, for the Respondent.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the defendants. They are the owners of a Sikmi Taluk named Kasi Chandra Chukerburtty, and in the Record of Rights recently published the rent of the *taluk* was stated to be not liable to enhancement. The landlord, however, challenged the accuracy of this entry and made an application before the Settlement Officer for enhancement of the rent under the provisions of section 7 of the Bengal Tenancy Act. The Settlement Officer found that the landlord had failed to rebut the presumptions arising from the entry in the Record of Rights and from payment of an unvarying rent for twenty years and dismissed the application. The landlord appealed and the learned Judge reversed the decision of the first Court; he based his finding on two pieces of evidence; first, the absence of the *taluk* in a return submitted by the *Zemindar* in 1242 B. S. and, second, the name of the *taluk*, the name being that of the father of the appellants.

So far as the *Zemindar's* return is concerned, the position is rather obscure. Returns were prescribed by section 48 of Regulation VIII of 1793 and also by section 15 of Regulation VII of 1799, and it is possible that the document produced in this case was prepared in accordance with one or other of those sections, though why it should have been prepared in 1242 B. S. is not explained. Assuming, however, that the return was made under one or other of those sections, other questions arise. The first is whether the return can be received in evidence at all; the second is whether the nature of the requirements warrants any inference based on the absence of the *Sikmi* in the return; and the third is whether, in any event, the defendant can be bound by such an inference

In the absence of further information about this particular return, I feel unwilling to come to any decision as to whether it could properly be received in evidence and it is not necessary that I should do so. It is the same with the second objection. Regarding the third objection, however, I feel no doubt. Sanctity may attach to an old document but the return before us was prepared by the landlord alone without any opportunity being given to the tenants of admitting its correctness. It is possible, of course, that the defendant's *taluk* was not in existence then, so that the return could not contain an admission of accuracy by their predecessor, but that explanation cannot be accepted until it is shown that the return contains an exhaustive catalogue of the subordinate interests in the estate, and that the accuracy of the catalogue is admitted by the owners of those interests. It is not suggested that in this case the return can pass such a test. I think, therefore, that the absence of the *taluk* in the return certainly cannot bind the defendant, and that, if it is evidence at all, it is of very slight weight.

The other piece of evidence on which the learned Judge relies is also slight. He says that the *taluk* bears the name of Kasi Nath Chakraburty and he assumes that that must be the name of the first holder. That is quite possible. On the other hand, the defendant's case is that their father bought from a Dhobi, and it is quite possible that he at once proceeded to get the tenure known by a more pleasing name.

The learned Judge also explains away three comments made by the first Court. Two of them are of little importance, but the first is cogent. A *Kobala* of 1239 B. S. mentioned a *taluk* which is still existing under the same name; that *taluk*, however, was not mentioned in the return of 1242 B. S. and the Settlement Officer used this omission to show that the defendant's *taluk* might also have been omitted. The learned Judge misses the point of the argument when he disposes of it by

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saying that the land described in the *kobala* is not proved to lie within the *taluk*.

My conclusion is that the learned Judge is in error ; it is not a mere matter of appreciating evidence ; he has treated as binding on defendants what cannot be more than a slender piece of evidence. It is not necessary that there should be a remand, for all the evidence is before us, and it is clear that if the return of 1242 B. S. does not bind the defendant, the evidence adduced by the plaintiff is not nearly enough to rebut the presumption arising from the entry in the Record of Rights.

In my opinion, therefore, this appeal should be allowed, and the decision of the first Court restored with costs in this Court and the lower Appellate Court the hearing fee in this Court being assessed at two gold mohurs.

Mukerji, J.—This appeal arises out of a proceeding under section 105 of the Bengal Tenancy Act wherein the plaintiff sought to enhance the rent of the defendants' *taluq* which had been recorded as not liable to enhancement in the finally published Record of Rights.

The rent of the *taluk* had admittedly been paid at a uniform rate for upwards of 20 years immediately before the institution of the proceeding the defendants relied upon a presumption that arose in their favor under section 50, clause (2) of the Act. The Assistant Settlement Officer held that that presumption had not been rebutted and dismissed the plaintiff's case. The Special Judge, on appeal, being of a contrary opinion remanded the case for settling a fair and equitable rent.

Against this decision the present appeal has been preferred by the defendants.

The learned Special Judge has observed in his judgment that the defendants are entitled to the presumption arising under section 50, clause (2), of the Bengal Tenancy Act and that the presumption afforded by the *Khatians* was also in their favor. He, however, thought that the said presumptions were rebutted by the document (Ext. 1) which had been filed on behalf of the plaintiffs and by the fact that the defendant Kashi Chandra Chakaburtty who is said to have purchased the *taluk* from one Gobinda Dhupi and whose name the *taluk* bears did not offer himself for examination and the *kobala* by which the purchase was made was not produced.

The appellants urge that the document Ext. 1 is not admissible is evidence, that at any rate, its evidentiary value is very little as against him, that no adverse inference should have been drawn from the non-examination of Kashi Chandra Chakraburtty who was a very old man at the time of the proceedings and who is now dead, and they have put in an application praying that the Kobala which they are now in a position to file may be taken as additional evidence in the case.

These contentions are opposed on behalf of the respondent on whose behalf reliance is placed on section 35 of the Evidence Act and the term of the Regulations under which the document (Ext. 1) in question was prepared.

Now, the document Exhibit 1 is a certified copy of a list which describes itself as follows:—Paper as per details under section 48 of Regulation VIII of 1793 and section 15 clause (8) of Regulation VII of 1799 relating to 10-annas 13-*gandas* 1-*kara* 1-*krant* share of Pergana Amarabad, District Bhulua, dated the 15 Pous 1242 B. S. (29th December, 1835)." It, therefore, is a certified copy of an extract from the books of the Collectorate in which the papers filed under the provisions of the aforesaid Regulations used to be kept or copied. We have not been referred to any Statute under which the books in question are kept. It has not been shown to us that the public servant, whoever he was, who made the entry in the books purported to state a fact in the entry in the discharge of his official duty. It does not also appear that the person who made the entry did so in the performance of a duty specially enjoined by the law. The paper, therefore, in my opinion does not come under section 35 of the Evidence Act at all. The section is based upon the circumstance that in the case of official documents entries are made in the discharge of public duty by an officer who is an authorised and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity. The circumstances relating to this entry do not stand these tests. It is likely that the books were kept for the information of the Collector but

that does not make them binding as official records of the facts contained in them. The probative value of this document is to be assessed first of all by the application of the presumption contained in section 79 of the Evidence Act which would go to prove that it is a correct copy of the entry in the Register of the Collectorate, then by the application of the presumption contained in section 114, Illustration (*e*), of the Evidence Act it may be held that it is a correct copy of the list filed in the Collectorate. We may perhaps go further and assume that the list was as a matter of fact filed by the party by whom it purports to have been filed. Even then it remains a statement made by a party, and its legal effect or the weight to attach to it would have to be determined by the applications of such test as such tests as have to be applied to all other statements. If it is sought to be used as an admission against the party making it, its probative value is considerable. Where it is sought to be used in favour of the party who made it, it must fulfil the requirements of section 21, clause (1), read with section 32, of the Evidence Act, or it must be relevant otherwise than as an admission. Taking it at its best it is a list filed by a *Zemindar*, independent *talukdar* or an actual proprietor of land containing a record of engagements made by him with dependent *talukdars* who would pay revenue to Government, through him. The defendant's *taluk* does not find mention in this list. We may assume that the plaintiffs' predecessors had entered into engagements with all his dependent *talukdars*, for the defendants do not claim to have ever paid revenue direct to Government ; but still the question remains as to whether the omission of the defendant's *taluk* from that list can be taken as evidence of any value to show that the *taluk* did not exist at the date when the list was filed. In filing the list the plaintiff's predecessors were making a statement to which the defendant's predecessors were not parties ; it does not appear that the statement was made in the latter's presence ; nor does it appear that the latter were at all interested in seeing that the *taluk* was entered in the list. Under the circumstances, I am of opinion that the probative value attaching to the list must, if any at all, be of the slightest character, assuming that it is admissible in evidence as corroborative evidence of the plaintiff's denial of the existence of the *taluk* on the date the list was filed. The plaintiff did not produce the *kobala* of his purchase or his collection papers

Then as to the inference arising from the non-examination of the defendant Kashi Chandra Chhkraburtty, I do not think the learned Special Judge was justified in the view that he took that in his old age he felt delicacy to state falsehood and so his son deposed in the case, nor again does the non-production of the *kobala* carry the matter any further.

In my opinion the plaintiff has failed to rebut the presumption which arises in favour of the defendant, and it must be given effect to. I, therefore, agree in the order which my learned brother has passed and reverse the judgment of the Special Judge and restore that of the Assistant Settlement Officer with costs.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 555 OF 1922.

February 18, 1924.

Present :—Mr. Hallifax, A. J. C.

MAROTI KUNBI—
DEFENDANT—APPELLANT

versus

SITARAM—PLAINTIFF—RESPONDENT.

Possessory title—Suit to recover possession from trespasser—Plaintiff's title defective, effect of—Lambardar, *one of two, whether can maintain suit for ejectment—Plaintiff ceasing to be* Lambardar *during pendency of suit—Decree, whether can be passed.*

A person who is ousted from possession of land by another who has no title whatever to the land, is entitled to eject the latter, however defective his own title may be.

If a party has two agents fully accredited, either can bring a suit on behalf of the other without the

concurrence of the other, and if in the course of the suit his powers are taken away, there is nothing to prevent a decree being passed in favour of his principal.

On the same principle one of two *Lambardars* of a *mahal* can bring a suit for ejectment on behalf of the proprietary body of the village without the concurrence of the other *Lambardar*, and a decree can be passed in the suit even after the plaintiff *Lambardar* has been relieved of his office.

Appeal gainst the decree of the Additional District Judge, Wardha, in Civil Suit No. 57 of 1922, dated 30th August 1922.

Mr. *D. W. Kathalay*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—The plaintiff-respondent described himself in the plaint as the "Eight-anna *Lambardar*" of Bhayapur and stated that in the capacity of *Lambardar* he had taken a surrender of his holding from an occupancy tenant and gone into possession of it on the 21st of May 1920 but had been illegally ousted from possession by the defendant on the 20th of October 1920. It was casually mentioned in the plaint that the defendant is also a co-sharer in the village. The suit was filed on the 27th of October 1921, the interval being occupied with proceedings in Criminal Courts. These allegations of fact have all been found to be true.

The defendant not only admitted, but urged as the whole basis of his defence, that the plaintiff as *Lambardar* was entitled to accept surrenders and create tenancies. His case was that in pursuance of an agreement between himself and the plaintiff and the tenant, the plaintiff had accepted the surrender from the tenant and had then created a tenancy in him. It is idle to attempt to plead now that the plaintiff as one of two *Lambardars* had no right to accept a surrender or grant a lease. Even if the plea could be taken, it would destroy the whole case put forward by the defendant-appellant. The plaintiff was in peaceful possession in October 1920 when the defendant ousted him. As he had no title whatever he must be ejected on the suit of the plaintiff, however defective the title of the latter may be.

The same considerations apply to the plea that the plaintiff as one of two *Lambardars* had no right to sue alone on behalf of the proprietary body of the village, and to the further plea that he had ceased before the end of the suit to have any right at all to represent the other proprietors. The latter plea is based on the fact, mentioned for the first time in this Court, that before the decree was passed the plaintiff had been relieved of his office, as it was considered unnecessary to have two *Lambardars* for one *Mahal*.

If a party has two agents both fully accredited, either can bring a suit on behalf of the principal without the concurrence of the other. And if in the course of a suit brought by an agent his powers are taken away, there is nothing to prevent a decree being passed in favour of his principal; the decree in this suit is in favour of the proprietary body of the village and it makes no difference whose name appears on it as their Agent. In any case, as has been said already, the plaintiff was himself entitled to be restored to the possession which had been illegally disturbed. For these reasons the appeal will be dismissed, and the appellant will be ordered to pay all the costs in all three Courts.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 213 OF 1920.

March 10, 1924.

Present:—Mr. Justice Ross and Mr. Justice Dass.

BANARSI PRASAD— PLAINTIFF —APPELLANT

versus

MOHI-UD-DIN AHMED AND OTHERS— DEFENDANTS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897) ss 15, 16, 94, 95—Partition—Separate accounts of revenue, whether cease—Contract Act (IX of 1872), s. 56—Performance of contract—Impossible due to default of party, whether excuses non-performance.

Sections 94 and 95 of the Bengal Estates Partition Act imply that separate accounts of revenue kept

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before a partition can have no further existence after a partition of the estate. If any further protection is required after the partition by way of separate account, a separate account must be freshly opened. [p. 725, col. 2]

Section 56 of the Contract Act has no application to a case where the impossibility, if any, is due to the default of the contracting party himself.

Appeal from a decision of the Subordinate Judge, Patna, dated the 12th August 1920.

Messrs. *Syed Hassan Imam* and *Sunder Lal*, for the Appellant.

Messrs. *Syed Sultan Ahmad*, *Mohamed Hasan Jan*, *B. C. Sinha* and *Rai Tribuhan Nath Sahai*, for the Respondents.

JUDGMENT.

Ross, J.—In *Mauza* Anantpur Kukaria *Touzi* No. 216 Jagarnath Choudhury had a share of 9-*annas* 11-*kouris* 4-*bouris* 12-*phouris*, Birjan Chaudhury had 4-*annas* 11-*dambs* 4-*kouris* 5 *kauris* 8-*phouris*, Baijnath Chaudhury had 1-*anna* 12-*dams* 4-*kouris* 10-*bouris* making a total of 15-*annas* 4-*dams*. The remaning 16 *dams* belonged to Dodraj Mahto, Keshwar Mahto, and *Musammat* Koola Kuer, the last named having 3-*dams* share. On the 2nd October, 1900, Birjan Chundhury executed an *ijara* in respect of 1-*anna* 10-*dams* of his share in consideration of Rs. 4,000 in favour of one Radha Kishun. The plaintiff has acquired this *ijara* interest. The share of 15-*annas* 4-*dams* was sold in execution of a decree for money to one Pachkouri Lal who defaulted in payment of the Government revenue whereupon the share was brought to sale and purchased by Jung Lal, Khairuddin and Hulas Behargi, who in turn sold privately to Mukhund Lal, Janki Das and Wilayeti Begam in 1916. In the meantime, in 1914, Dodraj Mahton and Keshwar Mahton had applied for partition of their 13-*dams* share and this share became *touzi* No. 14394 while the remaining 15 *annas* 7-*dams* share become *touzi* No. 12039. The partition took place on the 2nd March 1917 and possession was delivered on the 1st June of that year. On the 7th September, 1917, Janki Das and Wilayeti. Begam sold their interest to one Leaqat Hussain. Mukund Lal and Leaqat Hussain defaulted in payment of the September *kist* of the Government revenue in 1917 and *touzi* No. 12039 was sold on the 7th January 1918 for arrears of Government revenue and purchased by one Mohi-ud-din whose co-sharers were Jung Bahadur ond Hafiz. The effect of the sale of *touzi* No. 12039 was to annul the plaintiff's encumbrance. He, therefore, brought this suit on the 22nd March 1919 to set aside the sale as fraudulent and also for a decree for Rs 4,000 against such of the defendants as might be found liable for the same. Amongst the descendants, defendants Nos. 9 to 15 are defendants, direct or collateral, of the original mortgagor. The learned Subordinate Judge dismissed the suit and the plaintiff appeals.

Three points were taken by the learned Counsel for the appellant. In the first place, it was contended that the revenue sale was brought about by fraud ; in the second place, that in *touzi* No. 216 separate accounts had been opened (1) for 9-*annas* and odd share of Jagarnath Chaudhury, (2) for the six-annas and odd share of Birjan and Baijnath Chaudhury and (3) an *Ijmali* account for the remaining share ; that the partition did not affect these separate accounts and in fact at the time of the revenue sale in 1918 separate accounts were in existence. Consequently, under section 13 of the Bengal Land Revenue Sales Act of 1859 only the separate account in default should have been sold and the encumbrance has consequently not been cancelled. And in the third place, that in any case there should be a decree against defendants Nos. 9 to 15 for Rs. 4,000.

The case of fraud was not argued very seriously. The allegation is that Mohi-ud-din was *farzidar* of Mukund and Leaqat and that these persons being aware of the encumbared nature of the property intentionally defaulted in order that the encumbrances might be got rid of by the sale for arrears of Government Revenue. The only substantial basis for this contention is a connection between Mohi-ud-din and Leaqat through Latif, the husband of Wliayeti Begam; but this in itself is obviously not sufficient.

Reference was also made to the evidence of some witnesses and in particular to the following. In the first place, the evidence of Ram Babu, plaintiff's witness No. 2, was referred to. This witness stated that he attended the sale but did not bid as Moulvi Latif told him that there was an encumbrance

on the estate and so he should not purchase it. He also says that Janki Das, Mukunda and Latif paid the money. In his cross-examination he admits that he knew that "when an entire village is sold the encumbrance does not form a burden on it and that Anantpur Kukaria was sold as an entire *Mahal* and not a share in it" and consequently his evidence is self-contradictory and inconclusive. As to the payment being made by Janki and Mukunda, his cross-examination on this point shows that his evidence was without a basis of real knowledge. In the second place, reliance was placed on the evidence of Bansi Lal, plaintiff's witness No. 3, a Municipal Commissioner and Honorary Magistrate. The evidence of this witness was directed to show that Jung Bahadur was connected with Mukund. The learned Subordinate Judge has said that the story told by this witness is absurd and I do not think it can be described in any other way. The idea of carefully fixing a meeting between Jung Bahadur and Mangal Chand in order to consider terms of settlement, only to be told when the meeting took place that Jung Bahadur had no authority to settle, is not credible. Jung Bahadur in his evidence has given a credible account of the purchase. He says that he and Hafiz and Mohi-ud-din all intended to bid but having ascertained each other's intentions, they came to terms and purchased jointly. I see no reason to doubt this The only comment that was made on the evidence of this witness is that he made a mistake about the name of Hafiz. It is possible for a Hindu to mistake a Muhammadan name and there seems to be no ground for suspicion in this. He denies expressly that he was a *farzidar* for the previous owners.

In my opinion, therefore, no case of fraud in connection with the revenue sale has been established.

The main argument is the argument relating to separate accounts. The argument is ingenious and although Mr. Hasan Imam, earnestly contended that it is to be found in the plaint and in the grounds of appeal to the Commissioner, after a careful perusal of these documents, I have been unable to discover it. Paragraph 28 of the plaint says: "That separate accounts Nos. 1 and 2 had been opened for 15-*annas* and 4-*dams* share only, and, as a matter of fact, the share which had been sold for the arrears of land revenue was 15-*annas* and 4-*dams* only." This is the principal reference in the plaint to the separate accounts and the point there taken is entirely different. In the grounds of appeal to the Commissioner it is clearly contemplated, although it is not expressly stated, in the first ground, that the separate accounts had been closed. The point is an entirely new point, and the result is that there is very little evidence to go upon.

With regard to the statement of the law that a partition does not destroy the separate accounts, there is nothing in the Statute to support it and no authority was cited for the proposition. The Statute law which was referred to was sections 15 and 16 of the Estate Partition Act. Section 15 has no application because the arrears in the present case accrued after the partition. Section 16 has no application either, for the same reason, and also because the present sale is not a sale of a share but the sale of an entire estate, section 74-A of the Land Registration Act contemplates the closing of a separate account by the Collector when the state of things no longer represents existing facts. The argument is that, even after the partition, the land revenue for which each of these proprietors was liable remained the same. That may be so, but the shares were in fact different. Thus, whereas before the partition *Musammat* Keola had 3-*dams* in the whole estate, after partition she had a larger interest in a smaller property Sections 94 and 95 of the Estates Partition Act would seem to imply that the separate accounts can have no further existence after a partition, because section 94 provides for the separate liability of the separate estate for the amount of land revenue sepecified in the notice to be issued under that section and requires the proprietor to enter into a separate engagement for the payment of such land revenue ; and section 95 enacts that from the date of the notice each separate estate shall be separately liable for the amount of land revenue assessed upon it under the Act. If any further protection is required by way of separate account, it would seem that a separate account must be freshly opened. And, as far as the facts can be discovered, that is what happened in the present case.

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All that Mr. Hasan Imam had to rely upon was Ext. 15, Register D, in respect of *Mauza* Rukhai. Now it is admitted that in *Touzi* No. 216 separate account No 1 was the account of Jaganath Chaudhry, separate account No 2 was the account of Birajan and Baijnath while the remainder was an *Ijmali* account. That remainder included the share of Keola Kuer. After the partition we find a different state of affairs. Exhibit 15 shows that separate account No 1 was the account of Keola Kuer whereas the *Ijmali* account was the account of the remaining proprietors of the 16-*annas*. Moreover, it appears that this separate account No. 1 of Keola Kuer was opened in case No. 254 of 1917-18, evidently a fresh proceeding altogether. It is true that this document Ext. 15 does not show when that separate account was opened. But there is no reason to suppose that it was opened before the sale for the arrears of the September *kist*. So far as Ext. 15 goes, the account might have been opened between the date of the default and the date of the sale and the ordinary presumption would favour this view, because, if there has been a separate account in existence, presumably the Collector would have acted according to the provisions of section 13 of the Sale Law. I find, therefore, no illegality in the sale of the entire estate for the arrears of the September *kist* of 1917.

The only other point which remains to be considered is the claim against defendants 9 to 15. This claim is based upon the terms of the *ijara*. That instrument is a mortgage. There is a loan, and a security for the loan contained in the following terms : " If I fail to make payment of the entire *Zerpeshgi* to the *Ijrradar* by the end of Jeth of 1314 Fasli, then until repayment of the entire *Zerpeshgi* this *Ijara* transaction shall continue to hold good with all the terms laid down above." The mortgage covenants as follows : " If the whole or portion of the lease-hold property be sold at auction by the Civil Court or the Collectorate on account of arrears of land revenue, road and public works cesses or of any other Government demand arising out of default on my part on the part of any of my co-sharers, or for any other reason, and if the *Ijaradar* be thrown out of possession of the lease-hold property due to any act on the part of me, the executant, then the *Ijaradar* shall be at full liberty to realize the full amount of *Zerpeshgi* together with interest at 1 per cent. per mensem out of the surplus sale proceeds of the lease-hold property or from the other *Nami* and *Benami* properties, or from the person of me, the executant to which I or my heirs and representatives shall not take any objection whatsoever." The learned Counsel for the appellant claims that under this covenant he is entitled to a decree for the principal sum of Rs. 4,000 with interest against the representatives of the mortgagor Birjan Chaudhury. Defendant No. 9 is the son and defendants Nos. 13 to 15 are the grand-sons of Birjan Chaudhury. Defendants Nos. 10 to 12 are the grand-sons of Baijnath Chaudhury. The plaint does not allege that Baijnath and Birjan were joint but, on the contrary, specifies their shares in the property and, therefore, they were presumably separate The liability would, therefore be confined to the sons and grand-sons of Birjan. Various objections to this liability were urged by the learned Vakil for these respondents. First, it was suggested that the cause of action arose in 1907 when the loan became repayable and that the suit was barred by time. But by the terms of the *Ijara* the money became repayable in Jeth 1314 and every subsequent *Jeth*, and the cause of action under a usufructuary mortgage would arise only on dispossession. Secondly, it was said that after the interest of Birjan Chaudhury had been sold by the Civil Court on a date not specified in the plaint the covenants of the *Ijara* became impossible of performance and, therefore, these respondents are protected by section 56 of the Contract Act. Section 56, however, has no application to such circumstances as these where the impossibility, if any, is due to the default of the contracting party himself. Thirdly, it was said that under section 73 of the Transfer of Property Act, the plaintiff had a charge upon the surplus sale proceeds after the sale for arrears of Government revenue. This is true and he might have followed the surplus sale proceeds of the property. But he was not bound to do so and the existence of this statutory charge is no bar to his seeking a decree against the successors of Bir Jan Chaudhury. The decree, however, must be limited to the

assets of Birjan Chaudhury in the hands of these defendants. Finally, it was said that there must be an account of the rent of Rs. 75 a year reserved in the *Ijara* and that unless it is proved by the plaintiff that this rent was regularly paid, he is not entitled to the full sum of Rs. 4,000. But this question does not arise on the pleading. Paragraph 10 of the written statement of the defendants 9 and 10 days : " The plaintiff has no right to obtain a decree for the *Ijara* money, inasmuch as he has failed to make any allegation about the payment of the rent reserved, and to produce any account for the period of *Ijara*."

There is no allegation that the rent was not paid. This question was not put in issue and no evidence was given about it and the point is not open to the respondents.

There must, therefore, be a decree against respondents Nos. 9 and 13 to 15 for a sum of Rs. 4,000 with interest at 1 per cent. per mensem from the 28th March 1918 until the date of the decree ; the amount of the decree to carry future interest at 6 per cent. per annum and to be reliable only from the assets of Birjan Chaudhury, the mortgagor, which have come to the hands of these defendants. To this extent the appeal is decreed with costs against defendants Nos. 9 and 13 to 15 and is dismissed against the other defendants, which costs to defendants Nos. 1, 2 and 3. The costs will be in proportion to success.

Das, J.—I agree.

Z. K. *Appeal decree in part.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 156 of 1922.

February 12, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerji.

DEBI PROSAD BHAKAT—APPELLANT

versus

NAGENDRA KUMAR NAG AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Execution of decree—Sale proclamation, settling of —Notice to judgment-debtor—Notice affixed to door of house, whether sufficient service—Failure to attend—Objection to valuation, whether can be urged.

Where a judgment-debtor is duly apprised of the date fixed for settling the details of the sale proclamation and he fails to attend, without explanation, he is debarred from urging successfully, in an application to set aside the sale that the value entered in the sale proclamation was inadequate.

Where a notice under O. XXI, r. 66 of the Civil Procedure Code cannot be personally served on the judgment-debtor the affixing it on the door of his house followed by the receipt by the judgment-debtor of a registered notice by post is sufficient service of the notice.

Appeal against the order of the Subordinate Judge, 1st Court, Midnapur, dated the 4th March 1921.

Babu *Baranashi Basi Mukerji*, for the Appellant.

Babu *Surendranath Guha* (with him Babu *Kshirodi Narayan Bhinyan*), *Harendranath Mukerji*, for Babu *Apurba Charan Mukerji*, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is directed against an order setting aside a sale under the provisions of O. XXI, r. 90 of the Civil Procedure Code.

The circumstances are as follows : The landlord obtained a decree for arrears of rent in respect of a *patni* against five brothers and the widow of a sixth. The decree was for a sum of rather more than Rs. 12,000 with costs in addition. On June 22nd, 1921 the decree-holder applied for execution of the decree by the sale of the *patni* tenure and the Court ordered notices to be issued under O. XXI, r. 66, and fixed the case for July 12th. On that date the decree-holder filed an affidavit to the effect that these notices had been duly served. At the same time, he asked that by way of precaution registered post-cards should be sent to the judgment-debtors, as none of them had entered appearance. The Court ordered this step to be taken and the case was adjourned for a week. On July 19th decree-holder filed and affidavit to the effect that the value of the *patni* tenure was Rs. 4,000 As the judgment-debtors did not appear and there was no other evidence before the Court in regard to the value of the property, it was ordered

that the approximate value of the property should be entered in the sale proclamation as Rs. 4,000 writ of attachment and sale proclamation were then issued, and an advertisement of the sale sent to the *Calcutta Gazette* for publication. September 15th was fixed as the date of sale. On that day one of the judgment-debtors (No. 2 not the contesting respondent) appeared and asked for an adjournment. The sale was put off to September 19th. On that date five of the judgment-debtors asked for an adjournment and the sale was again postponed but for one day only. On September 20th the sale took place and the property was sold for Rs. 5,200 to the appellant Debi Prasad Bhakat.

On November 3rd, 1921 the fourth judgment-debtor, Nagendra Kumar Naga applied under O. XXI, r. 90, to have the sale set aside. In his petition he alleged that the writ of attachment and the sale proclamation were not duly served, that the value of the property was at least Rs. 18,000, that the sale was the result of collusion between his brothers and the decree-holder, and the purchase was made for the benefit of his brothers, and that the inadequate value mentioned in the proclamation constituted a material irregularity.

The auction-purchaser opposed the application, but without success. The learned Subordinate Judge found that the value stated in the proclamation was less than half the real value, that this under-statement constituted a material irregularity, that the judgment-debtor had suffered material loss, that service of the notices under r. 66 had not been proved, and that the evidence as to the contents of the post-card was defective. On these findings he set aside the sale. In consequence, the auction-purchaser has preferred this appeal. The decree-holder who is entered as a respondent supports him. The petitioner Nagendra opposes the appeal.

With regard to the notices under rule 66 the peon reported that he could not effect personal service ; he says that he learnt from a villager that the female debtor was a *pardanashin* lady and that three male debtors were inside the house and that as the male debtors did not come out and no one appeared on behalf of the lady he affixed the notices on the main entrance of the petitioner's house and of the house occupied by the three others. I am disposed to think that this service was sufficient. It is not necessary to discuss the point, however, because there is the post-card notice. The form of postal service by registered post-card with an acknowledgment slip to be signed by the addressee. In spite of Nagendra's denial I am satisfied that it is his signature on the acknowledgment slip ; this view is the result of comparing the signature with the admitted signature on the *vakalatnamah* presented with the petition. The learned Judge appears also to think that the signature is Nagendra's, but he says that the evidence to show what message was written on the post card is defective. There is no doubt about the fact that the Court gave an order for the post-card notice to be issued, and the acknowledgment slip was returned to the Court. The decree-holder's agent was examined about the post cards : the record of his evidence is extremely meagre, but it seems impossible to think that it means anything less than that he wrote on the post-card that July 19th was fixed as the date for fixing details of the proclamation. There is further the fact that the petitioner did not produce any post-card to show that the one which he received contained a message of another kind. In my opinion, therefore, the learned Judge was wrong in holding that the service by post-card had not been properly proved. I hold that the petitioner did receive intimation by registered post-card that July 19th was fixed for settling details of the proclamation. That he received it in time for appearence to be possible is proved by the post-marks which show that the acknwledgment slip was back in Midnapur on July 18th. From evidence we know that petitioner's residence is only eight miles away from Midnapore. This finding alone would be enough to dispose of the appeal, but as all the evidence was placed before us I think I ought to deal with other arguments.

Regarding the petition for adjournment filed on September 19th it is curious that the order in the order sheet mentions that one of the debtors, the petitioner, did not join in it, for his name does appear in the petition. It is idle to speculate on why the order was recorded in such a form, for I think the petitioner should have the benefit of it.

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The value of the property was entered as Rs. 4,000. The learned Judge says that it should have been entered as at least as much as Rs. 10,000 and he relies upon the entry made in another execution case (No. 18 of 1918). The order ran as follows : "Let the properties sought to be sold be valued at Rs. 10,000 in the sale proclamation as stated by the judgment-debtor petitioner in his petition of objection, but the decree-holder will not be bound to bid the properties at Rs. 10,000." It is conceded that the property in that case was the *patni* tenure which forms the subject-matter of this appeal, but attention is drawn to the latter half of the order. I think the appellant's argument is correct : the Court did not in 1918 decide that the value of the tenure was Rs. 10,000 and it suggested that possibly the decree-holder would be allowed to buy it for less. I cannot, therefore, agree with the learned Judge that that order proves Rs. 4,000 to be inadequate.

There are other fragments of evidence on the record as to the value of the tenure. The petitioner's agent says that the *patni* includes 300 *bighas* of *nij jote* and he estimates the value of such lands at 50 to 60 rupees per *bigha* : he also says that the income from the rent paying lands is large enough to leave a profit of about 1,000 rupees after payment of the *patni* rent. The witness was not cross-examined about these statements but he is not a man on whom much reliance can be placed and it is obvious that if his statements as to the area of the *nij jote* lands and the gross profits from the *jamai* lands are correct, the property is worth at least double the value mentioned by the petitioner himself in 1918. On the other hand, it is an admitted fact that the *selami* paid at the creation of the *patni* was Rs. 4,000 and it is not unreasonable to find in that some indication of the value of the *patni* to a purchaser, while the fact that the landlord has had to sue for his rent more than once suggests that the margin of profit is not very large. There is also the fact that one Hem Chandra Santa, described by the petitioner's agent as a well-known physician of the town, (Midnapur), bid at the sale but would not go beyond the appellant's offer ; as the property is only eight miles from the town, this fact is against the petitioner's contention that the value of the property is as much as 10,000 rupees. This branch of the enquiry was conducted in rather a slovenly way, but I think the conclusion must be that the petitioner has failed to prove the true value of the *patni* to be much, if at all, in excess of the sum paid by appellant.

Granted, however, that the valuation of the tenure at 4,000 rupees was an under-statement, there is nothing to show that such under-statement was the cause of an inadequate price being offered. In some circumstances a connection of cause and effect may be presumed, but such circumstances have not been proved by the petitioner.

There remains for consideration the publication of the writ of attachment and the sale of proclamation. The learned Judge says in his judgment that he finds that "there was material irregularity in publishing and conducting the sale," but the remainder of his brief judgment shows that he came to no finding about the publication of the writ and the proclamation. On the one hand, evidence is given by witnesses whose names appear in the return, to the effect that they saw the publication of the processes : there are some slight discrepancies in their statements, but none of such a nature as to cast discredit on the witnesses: while, on the other hand, there is only negative testimoney of an unconvincing character. I think, therefore, that the decree-holder's evidence should be accepted.

My conclusion is that the petitioner was duly apprised of the date fixed for the settling of details of the proclamation, and that by his failure to attend without explanation, he has debarred himself from urging successfully that the value entered was inadequate ; that the value is not proved to be inadequate, and that, even if it be assumed to be inadequate, such inadequacy is not proved to be a cause of the price bid being inadequate, and that the sale proclamation and writ of attachment were duly served.

I think, therefore, that the appeal should be allowed and the judgment of the lower Court setting aside the sale reversed, and orders passed directing that the sale be confirmed, with costs in all Courts to be paid by the judgment-debtor Nagendra, hearing-fee in this Court being assessed at five gold mohurs.

Mukerji, J.:—I agree.

Z. K. *Appeal allowed.*

NANDKISHORE *v.* LALSINGH

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 414 OF 1922.

February 13, 1924.

Present :—Mr. Kotwal, A. J. C.

NANDKISHORE—PLAINTIFF—APPELLANT

versus

LALSINGH—DEFENDANT—REPONDENT.

C. P. Tenancy Act (I of 1920), s. 49—Mortgage of sir, without sanction—Foreclosure, effect of—Surrender of occupancy in favaur of Lambardar, *validity of—Mortgagee, rights of.*

On the foreclosure of a mortgage of *sir* lands, where the mortgage is without sanction to transfer cultivating rights in *sir*, the mortgagor becomes an occupancy tenant of the *sir* fields of which he is in possession, under the mortgagee and cannot surrender the fields to the *Lambardar*. On surrender the fields become the *khudkasht* of the mortgagor, and the *Lambardar* has no power to deal with them.

Dhondba v. *Vishwan*, 15 C. P. L. R 143, followed.

Appeal against the decree of the District Judge, Chhindwara, in Civil Appeal No. 33 of 1922, dated the 6th June 1922.

Mr. *M. Gupta*, for the Appellant.

Sir *B. K. Bose*, Messrs. *N. G. Bose*, *R. B.*, and Mr. *V. Bose*, for the Respondent.

JUDGMENT.—One Ramdayal, the predecessor-in-interest of Nandkishore, the plaintiff, obtained by foreclosure of a mortgage a two-anna share in *mouza* Umaria belonging to one Uderaj. As the mortgage was without sanction to transfer cultivating rights in *sir*, Uderaj's sons became, on foreclosure, occupancy tenants of certain *sir* fields of which they were in possession. They surrendered the fields to the *Lambardar* Deochand who leased them out to the defendant Lal Singh. Nandkishore sues to eject Lal Singh on the ground that he was the landlord of the fields and the *Lambardar* had no right to accept the surrender or to grant the lease.

Lal Singh pleaded that the fields were not the exclusive property of Uderaj and that Ramdayal did not become exclusive proprietor of them. These pleadings were embodied in the 4th and 5th issues which were as follows :—

"4. Did the sons of Uderaj become the occupancy tenants of the plaintiff alone or of the entire proprietary body ?

"5. Had the *Lambardar* Deo Singh any right to take the surrender of the lands from the sons of Uderaj and lease the fields to defendants, or is defendant a trespasser on the lands ?"

The trial Court found that Uderaj had a separate power of disposal over the fields and, relying upon *Dhondba* v. *Vishwan* (1), and Second Appeal No. 461 of 1919, held that the *Lambardar* had no right to take a surrender and that the defendant was a trespasser. The lower Appellate Court has relied upon clause 2 (*a*) of section 188 of the Land Revenue Act, 1917, and held that the *Lambardar* was competent to create a new tenancy over the field when the old tenants surrendered them. It has distinguished the two cases mainly on the ground that the *sir* in those cases was definitely distributed and was held in severalty by the co-sharers, whereas in the present case there was no evidence as to whether it was held in severalty by Uderaj and the other co-sharers when the mortgage was executed It has dismissed the plaintiff's suit.

It was contended on behalf of the defendant that, assuming that the plaintiff was the landlord, the surrender to Deochand amounted to a transfer of the holding and Deochand being a relative of Uderaj's sons who would inherit the holding under section 11, proviso 2, of the Tenancy Act the transfer was valid and could not be impeached by the plaintiff. But as there is no evidence of the alleged relationship between Deochand and Uderaj's sons the contention must fail.

It seems to me that the question whether the *sir* was held in severalty or not is immaterial for section 49 of the Tenancy Act impliedly treats it as held in severalty. It is not disputed that, on foreclosure by Ramdayal, Uderaj's sons became his tenants and that Ramdayal was their landlord. Why should the land on surrender not have become the plaintiff's *khudkasht* instead of the proprietary body's and why should the plaintiff's interest be affected by the tenant choosing to surrender to the *Lambardar* ?

(1) 15 C. P. L. R. 143.

It is not suggested that if Uderaj's sons had surrendered to the plaintiff that the *Lambardar* could have legally objected to the surrender. I do not think that section 182 (a) was meant to apply in a case like this so as to affect the rights of persons who already are landlords under the Tenancy Act.

In my opinion the decree of the first Court was correct. The decree of the lower Appellate Court is set aside and that of the first Court restored. The plaintiff will get his costs throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 101 OF 1923
AND
CIVIL REVISION CASE NO. 298 OF 1923.

February 26, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerjee.

DWARKADAS *alias* DWARKADAS MARWARI AND ANOTHER—PETITIONERS APPELLANTS

versus

JUDUB CHANDRA GANGULI AND OTHERS —OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 73—Contract Act (IX of 1872), s. 262—Rateable distribution, object of—Decree against partner in personal capacity—Decree against partnership—Order directing rateable distribution—Appeal, whether lies—Partner agreeing to share of other partner being sold, effect of.

J and A were two partners in a certain business. D obtained a decree for money against A in his personal capacity which was put into execution and certain moveable properties belonging to the partnership were attached upon which J preferred a claim and his half share was released on his agreeing to the other half being sold as the property of A. In the mean time, one S obtained a decree against J and A in respect of monies due from the partnership and attached and sold all the moveables belonging to the partnership including the half share already attached in execution of D's decree who then applied for rateable distribution. J objected to the rateable distribution and the executing Court overruling the objections ordered rateable distribution but the order was reversed by the District Judge on appeal;

Held Per Walmsley, J.—**That no appeal lay to the District Judge as the addit on of D, who was a stranger to the suit, to the proceedings had destroyed the sanctity of the element of identity which was a necessary ingredient of a proceeding under section 47 of the Civil Procedure Code and that that section was, therefore, inapplicable.** [p. 732, col. 2.]

Per Mukerji, J.—**(1) that the order of the executing Court was passed in a matter relating to the satisfaction of the decree between parties to the suit and was one falling within the purview of section 47 of the Civil Procedure Code and was, therefore, appealable ;** [p. 734, col. 2.]

(2) that the conduct of J in agreeing that the half share of moveables may be sold as A's property amounted to a declaration that the partnership had ceased and had the effect of divesting the said half share of moveables of its character as partnership property and that the provisions of section 262 of the Contract Act were, therefore, no longer applicable to such property ; [p. 735, col. 1.]

(3) that, consequently, the property was liable to rateable distribution.

An order under section 73 of the Civil Procedure Code is not appealable unless it also comes under section 47 of the Code and satisfies all the requirements thereof. [p. 734, col. 1]

Case law discussed.

One object of section 73 of the Civil Procedure Code is to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particulr property the necessity of each and every one attaching and separately getting the property sold. The other object of the section is to secure an equitable administration of the property by placing all the decree-holders upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. [p. 735, col. 1.]

Bithal Das v. *Nand Kishore*, 23 A. 106 ; A. W. N. (1901) 4, relied on.

Appeal against the order of the District Judge, Burdwan, dated the 25th November 1922, reversing the order of the Subordinate Judge, Asansol, dated the 22nd December 1921.

Babu *Bankim Chandra Mukerji* for the Appellant.

DWARKADAS *v.* JUDUB CHANDRA GANGULI

Dr. *Dwarkanath Mitter* (with him Babu *Bejoy Kumar Bhattacharya*), for the Respondent.

JUDGMENT.

Walmsley, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and I agree in the substance of the order that he proposes to make. If there is a right of appeal to this Court, that is, if the learned Judge was right in thinking that an appeal lay to him. I agree that his decision on the merits was wrong and should be reversed.

Personally, however, I do not think that an appeal lay and, consequently, I hold that we should interfere under the provisions of section 115, Civil Procedure Code. My reasons for thinking that no appeal lay are as follows. The view that the matter comes within the scope of section 47 Civil Procedure Code rests on the footing that the question has arisen between the parties to the suit brought by Sitaram. It must be that suit because Jadav was not a party to the other.

The parties to that suit are Sitaram on the one side and Jadab and Anil on the other side, and the order for rateable distribution can be treated as an order falling within the scope of section 47, Civil Procedure Code, only if it raised a question between the parties to that suit relating to the execution discharge or satisfaction of the decree. We have to see whether there was such a question. On behalf of Jadab it is argued that there was such a question, on the ground that but for the order of rateable distribution Rs. 2,932-15-0, would have been credited towards the satisfaction of Sitaram's decree, instead of Rs. 2,631-15-0. It is urged that in respect of the sum of Rs. 301 there is a question between Jadab and Sitaram relating to the discharge of Sitaram's decree. I agree that there is a question relating to the discharge of the decree but I cannot regard it as one between Jadab and Sitaram. The question is not whether Sitaram should relax his hold on any portion of the sale-proceeds, but whether Dwarka should be allowed by order of the Court to lay hands on that portion. If, however, it be conceded that the question has arisen between Sitaram and Jadab, it is obvious that it cannot be decided in the absence of Dwarka and Ram Kumar. That means that an outsider to the suit must be brought into the proceedings, and this addition destroys the element of identity which appears to be a necessary ingredient in proceedings under section 47, Civil Procedure Code.

As, however, I think that the Judge's order should be reversed, I see no reason to differ from the order proposed by my learned brother, and the appeal will be disposed of in accordance with his judgment.

Mukerji, J.:—Jadab Chandra Gangully and Pasupati Hazra were two partners in a certain business. Dwarka Das Marwari and Ram Kumar Marwari instituted a suit in the Small Cause Court at Assansol against Pasupati Hazra and one Umananda Hazra, and Pasupati Hazra having died during the pendency thereof, obtained a decree against Umananda Hazra and the heir of Pasupati Hazra, a minor named Anil Kumar Hazra. The decree was for money due from Pasupati Hazra and Umananda Hazra, in their personal capacities and had nothing to do with the partnership. The decree was put into execution against Anil Kumar Hazra in Execution Case No. 327 of 1920 of the Small Cause Court and certain moveable properties belonging to the partnership were attached, upon which Jadab Chandra Ganguly preferred a claim alleging that he had a half share therein and prayed for a release of the said half share from attachment in Claim Case No. 23 of 1920. To this Anil Kumar Hazra agreed on the understanding that his half share should be allowed to be sold in execution of the decree in the aforesaid Execution Case No. 327 of 1920. Orders to the said effect were passed on the 24th December 1920 and the sale was fixed for the 7th January 1921.

On the 7th January 1921, Jadab Chandra Ganguly preferred another claim in Claim Case No. 1 of 1921, objecting to the sale on the ground that the half share of Anil Kumar Hazra in the moveables, that is to say, the share that had been attached and was about to be sold was not saleable. The sale was accordingly put off, Jadav was called upon to submit accounts of the partnership business which he never did, and eventually the claim was dismissed.

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In the meantime, on the 3rd January 1921, one Sitaram Marwari obtained a decree against Jadab Chandra Ganguly and Anil Kumar Hazra in respect of monies due from the partnership, and on the 14th January 1921, in Execution Case No. 18 of 1921 of the Subordinate Judge's Court at Assansol, attached all the moveables, a half share of which had already been attached in Execution Case No. 327 of 1920 and the said moveables were sold on the 9th March 1921 for Rs. 3,025.

By petitions filed on the 1st March 1921 and 3rd March 1921 Dwarka Das Marwari and Ram Kumar Marwari tried to put off the sale impugning the *bona fides* of the decree obtained by Sitaram Marwari and also the conduct of Jadab Chandra Ganguly in at first consenting to the half share of Anil Kumar Hazra being attached and then getting the sale of that share put off by filing a further claim as aforesaid, and they prayed that that claim should be disposed of and the sale in execution of their decree might take place first. Eventually, on the 5th March 1921, they prayed for rateable distribution of the sale-proceeds of the share of Anil Kumar Hazra as between themselves and Sitaram Marwari. On the 19th March 1921, Sitaram Marwari put in a petition objecting to the rateable distribution on the ground that his decree was against the partnership and, therefore, the sale-proceeds must go to satisfy his decree but thereafter, on the 9th April 1921, he put in a further petition agreeing to the rateable distribution.

On the 30th July 1921, and again on the 7th December 1921, Jadab Chandra Ganguly put in petitions objecting to the rateable distribution mainly on the grounds that the sale-proceeds should go to satisfy the decree of Sitaram as that decree was for money due from the partnership, that the judgment-debtors in the two execution cases were different and, therefore, the prayer for rateable distribution was not maintainable.

The learned Subordinate Judge, by orders passed on the 22nd December 1921, held that the objection of Jadab Chandra Ganguly should be overruled on the ground of waiver and estoppel, and he ordered rateable distribution in the following way; that is to say, Sitaram Marwari was to get the costs Rs. 51-9 as. and poundage-fee Rs. 40-8 as. and out of the balance, that is to say, Rs. 3,025 less Rs. 92, 1-anna, a half *viz.*, Rs. 1,496-7-6 representing the share of Jadab Chandra Ganguly, and that the other half share, *viz.*, Rs. 1,466-7-6 representing the share of Anil Kumar Hazra was to be divided rateably between the two sets of decree-holders ; that is to say, Sitaram Marwari to get Rs. 1,165-7-6 and Dwarka Das Marwari and Ram Kumar Marwari were to get Rs. 301.

Against this order Jadab Chandra Ganguly appealed to the District Judge, of Burdwan and the learned District Judge overruling an objection as to the competency of the appeal before him, allowed the appeal and ordered the whole of the sale-proceeds to be paid to Sitaram Marwari.

The present appeal and application in revision have been preferred by Dwarkadas Marwari and Ram Kumar Marwari against the aforesaid order of the learned District Judge.

Of the contentions put forward on behalf of the appellant, it is necessary to notice only two, *viz.*, that no appeal lay against the order of the learned Subordinate Judge, and that Jadab Chandra having expressly consented to the attachment of the half share of Anil Kumar Hazra must be taken to have waived all objections to the rateable distribution of the sale-proceeds on the footing that they represented the proceeds of partnership property and must be availed of first to satisfy the debts of the partnership.

On behalf of the respondent it has been urged that the question decided by the learned Subordinate Judge was one between the parties to the suit and related to the execution, discharge or satisfaction of the decree passed therein and, therefore, came within the purview of section 47, Civil Procedure Code and was appealable, that the whole of the sale-proceeds must, in view of section 262 of the Contract Act, go towards the payment of the partnership-debts and, further, that the application for rateable distribution was not maintainable, inasmuch as the judgment-debtors of the two decrees are not precisely the same. The respondent also supports the view which found favour with the learned District Judge that he was not precluded from objecting to the rate-

able distribution by reason of his petition of consent releasing the half share of Anil Kumar Hazra in the moveables.

The first point for consideration, therefore, is whether an appeal lay to the District Judge against the order of the Subordinate Judge. Now, an order under section 73, Civil Procedure Code, is not appealable unless it also comes under section 47, Civil Procedure Code, and satisfies all the requirements thereof. (*Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (1). In order to be appealable, the order must, therefore, decide a question arising between the decree-holder Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Ganguly and Anil Kumar Haza on the other. In determining whether the order passed by the learned Subordinate Judge fulfilled these tests, the cases cited at the bar do not afford us any real assistance. In *Jagadish Chandra Saha* v. *Kripa Nath Saha* (2) the petitioners had a decree against certain judgment-debtors, the opposite party had a decree against certain judgment-debtors who were not exactly identical with the former set of judgment-debtors, the opposite party applied for rateable distribution, the application was refused by the Court of first instance; the opposite party appealed and an order for rateable distribution was passed by the Appellate Court. The petitioners then appealed to this Court and it was held that the order of the Court of first instance refusing rateable distributions did not come under section 244 of the old Code of Civil Procedure and, therefore, no appeal lay from it. This presumably was on the ground that this was no determination of any question relating to the execution, satisfaction or discharge of the decree which was under execution as between the parties to the suit in which it had been passed and the order only purported to decide a contest between two rival decree-holders.

In *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (1) the petitioners had obtained a decree against a firm, while the opposite party had obtained a decree against one of the partners of the firm. During the pendency of a proceeding for rateable distribution as between the opposite party and certain other execution-creditors of the said partner the petitioner had made an application for rateable distribution which was refused. That order was held as being one between two rival decree-holders which did not effect the interest of the judgment-debtor and so did not come under section 47, Civil Procedure Code so as to confer a right of appeal.

In cases where, as between the parties to the suit, a question relating to the execution, satisfaction or discharge of the decree passed therein has been decided by the order for rateable distribution, it has always been held that an appeal lies. (*Venkata Perumal* v. *Venkata Reddi* (3), *Sorabji Coovarji* v. *Kala Raghu Nath* (4).

In the case of *Kashi Ram* v. *Mani Ram* (5), the Court held that the order which was passed in that case and by which rateable distribution was refused did not decide a question which arose between the parties to the suit in which the decree was passed or their representatives within the meaning of section 244 of the old Code of Civil Procedure. In the case before us the order passed by the learned Subordinate Judge determined, as between Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Gangully and Anil Kumar Hazra on the other, a question was decided, on the application of Dwarkadas Marwari and Ram Kumar Marwari, as to what extent the decree under exetion was to be satisfied and, therefore, in my judgment, the order came under the purview of section 47, Civil Procedure Code and the learned District Judge was, in my judgment, right in his view of the competency of the appeal before him.

Coming now to the merits, the whole basis of the order of the learned District Judge is that the decree being for recovery of monies due from the partnership no rateable distribution could be made and the whole of the sale-proceeds should be available for its satisfaction. In my judgment, the petition of the respondent preferring a claim to a half share and consenting to a release of his half share

(1) 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202.
(2) 1 Ind. Cas. 788; 36 C. 130.
(3) 29 Ind. Cas. 231; 39 M. 570; 29 M. L. J. 96; (1915) M. W. N. 334; 17 M. L. J. 427.
(4) 12 Ind. Cas 911; 36 B. 156; 13 Bom. L. R. 1193.
(5) 14 A. 210; A. W. N. (1892) 56; 7 Dec. (N. S.) 505.

only and agreeing to the sale of the half share of Anil Kumar Hazra in execution of the decree for the personal debts of the latter's father amounted to a declaration that the partnership had ceased and had the effect of divesting the said half share of the moveable property of its character as partnership property, and to such property the provisions of section 262 of the Contract Act relating to partnership would no longer apply. The Subordinate Judge was, perhaps, not right in the view that the conduct of Jadav Chandra Ganguly amounted to waiver or estoppel and it may be that the principle that where a party has elected to adopt a certain course of action he will be confined to that course which he has deliberately adopted may not apply in the present case. It is clear, however, that neither Sitaram Marwari nor Jadab Chandra Ganguli, until he applied on the ground that the said half share was not saleable in execution of the decree of Dwarkadas Marwari and Ram Kumar Marwari treated this half share as still clothed with the incidents of partnership assets. In my opinion, the learned District Judge was wrong in the view that he took of the matter and the principle underlying the decision of the learned Subordinate Judge is the correct one to apply to the case.

As for the maintainability of the application for rateable distribution the contention of the respondent is based upon the amendment of the law due to the insertion of the word "passed" in section 295 of the Code of Civil Procedure (Act. X of 1882). As observed by Strachey, C.J., in *Bithal Das* v. *Nanda Kishore* (6). "The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceeding, to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property the necessity of each and every one separately attaching and separately getting the property sold; the other object is to secure an equitable administration of the property by placing all the decree-holders in the position as I have described upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. These objects would not be furthered but rather defeated by putting upon the rule the interpretation which the respondent asks us to adopt. In *Balmer Lawrie & Co.* v. *Jadunath Banerjee* (1) this Court declined to express any opinion on the question as to whether the principle enunciated in the Full Bench decision in the case *Ganesh Das* v. *Shiva Lakshman* (7) was affected by the alteration of the law. In my opinion, if the Legisature intended to effect any such alteration, it would have expressed it in terms more clear and specific. This contention put forward on behalf of the respondent must fail.

I, therefore, agree with my learned brother in reversing the order of the learned District Judge and restoring that of the learned Subordinate Judge with costs in all Courts—the hearing fee in this Court being assessed at three gold mohurs.

The rule is discharged.

Z. K. *Rule discharged.*

(6) 23 A. 106 ; A. W. N. (1901) 4.

(7) 30 C. 583 ; 7 C. W. N. 414.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 648 OF 1922.

November 29, 1923.

Present :—Mr. B. C. Kennedy, A. J. C.

FIRM OF BIRDICHAND POONAMCHAND—PLAINTIFFS

versus

THE SECRETARY OF STATE & B. B. & C. I. RY. COY.—DEFENDANTS

Railways Act (IX of 1890), ss 77, 140—Claim against Railway—Notice to Manager or Agent, necessity of—Notice to Subordinate officer—Burden of proof.

Section 77 of the Railways Act, read with section 140 of that Act, does not absolutely require that a person making a claim against a Railway should himself give notice to the Manager or Agent of the Railway, but if he chooses to run the risk of giving the notice to any person other than the Manager or Agent, it is necessary for him to show that the notice was delivered on his behalf to the proper person, that

is the Manager or the Agent of the Railway, as the case might be, within six months.

Mr. *L. P. Ferro*, for the Plaintiff.

Mr. *T. G. Elphinston*, for the Defendant.

JUDGMENT.—In this case it appears from the statements in the plaint that certain merchants consigned through the B. B. & C. I. Railway at Vadhnagar a consignment of 25 tins ghee to the plaintiffs in Karachi. The goods were booked under Risk Note Form "H" which charges a smaller rate and exempts the Railway from all risks except those due to thefts from a running train and wilful niglect of their employees. The consignment was made on or about the 15th March and only two tins on account of this consignment were delivered over to the plaintiff. The plaintiff, as a matter of fact, asserted that these two tins formed no part of the consignment, but, however that might be, 23 tins were totally lost. At Marwar Junction, the B. B. & C. I. Rilaway meets the Jodhpur-Bikaner Railway, and the latter (J. B. Railway) at Hyderabad meets the North-Western Railway which is a State Railway. The plaintiff having failed to recover these tins or their value from either defendant has brought this suit both against the N.-W. Railway, *i.e.*, the Secretary of State, and also against the B. B. & C. I. Railway for damages for the loss of that consignment.

I am of opinion that this suit must fail on the ground that the statutory notice required under section 77 of the Railways Act has not been given. Section 77 requires that a person making any such claim should prefer his claim in writing to the Railway Company or cause it to be preferred to the Railway Administration within six months from the date of delivery of the animals or the goods for carriage by the Railway. Section 140 prescribes that any notice so required to be served on the Railway Administration may be served in the case of a Government Railway on the Manager and in the case of a Railway Company on the Agent and prescribes the manner in which the notice is to be delivered. Now, it is admitted that the only notice given in this case was the notice given to the District Superintendent, N.-W. Railway, on the 13th May 1921. It has been held that the law does not absolute ly require that the claimant should himself give notice to the Agent but if he chooses to run the risk of giving the notice to any person other than the Agent, it is necessary for him to show that notice was delivered on his behalf to the proper person, *i.e.*, the Manager in the case of a State Railway and the Agent in the case of a Limited Liability Company, within six months There is no evidence at all in the present case that the claim reached the agent of the B. B. & C. I. Railway and it is very improbable that it would reach him. It is more probable that the notice given to the District Superintendent, Karachi, reached the Manager of the State Railway, but it is not shown that it so reached him within six months, and, that being so, I think there is a statutory bar to the suit proceeding.

It would also appear that the suit would be barred by limitation because the consignment was handed over to the Railway on the 15th March 1921. The two tins arrived on the 3rd April 1921, but the suit was not brought till 15th June 1922, whereas Article 30 of the Limiatation Aet requires that the suit should be brought within a year from the date on which the loss occurred, *i.e.*, somewhere between 15th March and 3rd April 1921. I, therefore, have no option but to dismiss the suit with costs. There will be two separate sets of costs.

Z. K. *Suit dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 36-B OF 1923.

February 11, 1924.

Present :—Mr. Kinkhede, A. J. C.

RANGRAO—APPLICANT
versus
PANDURANG AND ANOTHER—
NON-APPLICANTS.

Civil Procedure Code (Act V of 1908) s. 115, O. XLI, r. 33—Provincial Small Cause Courts Act (IX of 1887) s. 25—Revision—Court, whether can vary decree in favour of non-petitioner—Discretion of Court.

RANGRAO *v.* PANDURANG

Revisional jurisdiction is a discretionary jurisdiction, and the discretion should not ordinarily be exercised in favour of a negligent party. Where, however, an erroneous view of the lower Court has contributed to the bringing about of a result which requires to be redressed, the High Court would be failing in its duties if it were to refuse to exercise its revisional powers of supervision and correction which it exercises even *suo motu* for undoing any injustice which may have been done by decisions of lower Courts to litigants in cases in which no appeal lies to the High Court.

The High Court can deal with a case under section 115 of the Civil Procedure Code or section 25 of the Provincial Small Cause Courts Act, without there being any application by any of the parties, and in special cases can apply the principle underlying the provisions of r.33 of O. XLI of the Code, to applications in revision.

Golam Muhammad v. *Saroda Mohan Mitra*, 4 C. W. N. 695; *Puran Mal* v. *Janki Pershad Singh*, 28 C 680; 6 C. W. N. 114, relied on.

Revision against the decree of the Small Cause Court, Amraoti, in Civil Suit No. 2077 of 1922, dated the 4th December 1922.

Mr. *M. B. Niyogi*, for the Applicant.

Messrs. *M. R. Bobde* and *A. V. Khare*, for the Non-Applicants.

ORDER.—This revision is by the defendant No. 2 who was impeached as the person through whom the money sued for was to reach the defendant No. 1. The entry, Exh. P-1, in plaintiff's books which he signed on the occassion of the handing over of the money to him by plaintiff and the letter, Exh. P-2, written by defendant No. 1 to plaintiff as also the plaintiff's own statement before the Court clearly exonerate the defendant No. 2 absolutely from all liability as a debtor. The lower Court could not, therefore, pass any decree against him, against the wishes of plaintiff who is *dominus litis*. No decree which he does not want could be forced on plaintiff. He wanted a decree against defendant No. 1 and the only question which the lower Court had, therefore, to consider was whether he had succeeded in establishing his claim as against defendant No. 1. The lower Court has held that defendant No. 1 had not authorized defendant No. 2 to procure the loan for him This finding is against the evidence on record. The letter, Exh. P-2, clearly accepts liablility for the repayment of the loan obtained through defendant No. 2. This necessarily establishes an authority and the defendant No. 1's consequent liability for the loan and it was for him to show that the money had not reached him. There is absolutely no suggestion in Exh. P-3 that the amount of Rs. 400 did not reach defendant No. 1. All what it says is that the said amount may be debited to the man who carried it away and as regards the future dealings the defendant No. 1 says that the plaintiff may, if he likes, deal with each of the defendants in his own name, *i.e.*, individually. It will be seen that he asked for a reply to Exh. P 3. There is nothing to show that any reply was sent by plaintiff, and if any was sent what the contends thereof were. I have, therefore, no materials before me for holding that the plaintiff accepted the variation as regards the defendant No. 1's primary liability created by the loan, as proposed in Exh. P-3. If defendant No. 1's proposal had been accepted then, certainly, the plaintiff could have been bound by it and he could not proceed against the defendant No. 1. The liability of defendant No. 1 being thus clear, the claim ought to have been decreed against him. But the Court has dismissed it, and the plaintiff did not move this Court by filing an independent revision against the decision.

He has, however, now applied to this Court that, in the event of the Court setting aside the decree against the defendant No. 2, the claim may be decreed against defendant No. 1, as it would work great hardship on him to be deprived of the amount of the loan advanced by him. The prayer is opposed on the ground that this Court ought not to interfere in revision in favour of the plaintiff, as he omitted to move it within time and in conformity with the practice of this Court as the practice of the Court is the rule of the Court. It is also contended that, although in respect of appeals this Court has got jurisdiction to alter the decree in favour of a non appealing party, there is no jurisdiction for applying those provisions to revisions. That revisional jurisdiction is a discretionary jurisdiction and the discretion should not be exercised in favour of a negligent party. This is no doubt a plausible argument and, under ordinary circumstances, must prevail. But where, as I find, an erroneous view of the lower Court has contributed in no less degree to the bringing about of the result which requires to be redressed this Court

would be failing in its duties if it were to refuse to exercise its revisional powers of supervision and correction which it exercised even *suo motu* for undoing any injustice which may have been done by decisions of the lower Court to litigants in cases in which no appeal lies to the High Court. Wrong done to a party would remain undone. The matter having come under my attention in connection with the Civil Revision filed by defendant No. 2, I do not think I could not alter the decision in favour of the non-applicant plaintiff of my own motion. I have no hesitation in applying the principle that underlies the provisions of O. XLI r. 33, Civil Procedure Code, to the facts of this case. Just as under old section 622 corresponding to the new section 115, Civil Procedure Code, the High Court can and may deal with a case under that section without there being any application by any of the parties, as held in *Golam Mohammad* v. *Sarada Mohan Maitra*, (1) followed with approval in *Puran Mal* v. *Janki Pershad Singh* (2) Similarly, under section 25 of the Small Cause Court's Act, I think the High Court can and may in special circumstances pass such orders as it thinks fit if it is satisfied that the judgment of the Small Cause Court is not according to law. All the same, I have, however, taken a formal petition from the plaintiff praying for the alteration of the decree in his favour, I, therefore, direct that the decree passed by the Small Cause Court will be varied by ordering that the claim be decreed as against defendant No. 1 and dismissed as against defendant No. 2. In the circumstances of the case, I think I should allow plaintiff all costs except the pleaders-fee in the lower Court as it was the duty of his pleader to have pointed out that Court what the proper form of of relief should have been. The plaintiff will, however, have no costs of this Court. He will have, of course, to pay the costs of the applicant defendant No. 2 in both the Courts. Defendant No. 1 must pay his own costs in both the Courts.

Z. K. *Decree varied.*

(1) 4 C. W. N. 695.
(2) 28 C 680 ; 6 C. W. N. 114.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 35 OF 1923.

April 4, 1924.

Present :—Mr. Kendall, A. J. C.

COLLECTOR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 46—Mortgage—Amount left with mortgagee to pay off creditors of mortgagor—Period within which payment must be made—Reasonable time—Failure to make payment, effect of—Mortgagee, whether entitled to possession—Pre-emption—Pre-emptor, substitution of, in place of vendee, date of—Limitation Act (IX of 1908), Sch. I, Art. 6—Suit to recover payment made to avoid sale of property belonging to another.

Where a portion of the consideration of a mortgage is left with the mortgagee in order to pay off the mortgagor's debts, and no time is fixed for the payment of the debts, the payment must be made within a reasonable time. Where it was found that the object of the mortgagor in executing the mortgage was to consolidate his debts and to prevent interest running at a high rate and the major portion of the consideration for the mortgage was left with the mortgagee to pay off those debts ;

Held (1) that the mortgagee was bound to pay off the debts as soon as possible ;

(2) that the debts not having been paid off by the mortgagee within a reasonable time he was guilty of a breach of the mortgage contract and was not entitled to possession of the mortgaged property under the terms of the mortgage-deeds ;

(3) that his security was, however, good to the extent of the amount actually advanced by him.

The right of pre-emption is " a right to the benefit of a contract," or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee, in respect of all the rights and obligations arising from the sale under which he has derived his title.

Jagan Nath v. *Sheo Ratan Singh*, 7 Ind. Cas. 295 ; 13 O. C. 219, followed.

A right of pre-emption is not a mere right of repurchase, either from the vendor or from the vendee involving a new contract of sale, but it is simply a right of substitution. It is, in effect, as if in a

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sale deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place.

Gobind Dayal v. *Inayatullah*, 7 A. 775 at p. 815; A. W. N (1888) 228; 4 Ind. Dec. (N. S.) 611, relied on.

The substitution of a pre-emptor in place of the vendee takes effect from the date of the sale in favour of the vendee. Where a person who has no interest in a property pays off a mortgage-decree against the property in order to save the property from sale, his claim to recover the amount paid by him is governed by Article 61 of Schedule I to the Limitation Act.

Appeal against the decree of the Sub-Judge, Hardoi, dated the 29th May 1923.

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

Messrs. *Niamatulla* and *Mohd. Ayub*, for the Respondents.

JUDGMENT.—This appeal arises from a suit in which the plaintiffs-appellants, who claim under a mortgage-deed dated 1906 sued for mortgagee possession over the property mortgaged by that deed and also for a sum of Rs. 2,431-7-9, with interest, by sale of an area of 48 standard *bighas* of land in the village of Pandarwa, or, as an alternative to this latter relief, for a declaration that the said amount creates a charge on the property mortgaged by the deed of 1906. As there are some complications in the suit, on which little, if any, light has been thrown by the judgment of the Subordinate Judge, it will be convenient to say at the outset that there are four deeds of transfer with which the suit is mainly concerned, and that these are in chronological order:—

(A) 22nd March, 1882. Mortgage with possession to Deep Singh of a share in 6 villages.

(B) 5th September, 1889. Mortgage in favour of Rudra Singh of a share in Danpur, Madhopur, and of 48 *bighas* in Pandarwa.

(C) 3rd November, 1906. Mortgage to the plaintiff of shares in 7 villages, namely, those included in (A) with the addition of Bahadurnagar.

(D) 18th June, 1913. Sale to Munnoo Singh of a share in 4 of the villages included in (C).

In all these deeds, the transferors were the contesting respondents or their predecessors-in-interest. The plaintiff-appellant comes into Court as the mortgagee of the deed called (C), dated 1906. The nominal consideration for this deed was Rs. 6,658-8-0 of which only Rs. 2,000 was paid in cash to the mortgagors, carrying interest at 8 per cent, and the balance was to be paid by means of *dihandis* to prior creditors of the mortgagors, including the transferees of the deeds (A) and (B). The defence is, that these *dihandis* were never paid, that the plaintiff-appellant broke his contract, and that the mortgage-deed cannot be made the basis of the suit. The defence in regard to the second relief claimed will appear later. The learned Subordinate Judge dismissed the plaintiff's suit, and the plaintiff has appealed on various grounds, on the basis of which he contests the findings of the lower Court under four heads, which may be summed up as follows:—

(1) That the *dihandis* were not paid.

It is admitted that these were not paid, with possibly one exception, but it is claimed that this was not the appellant's fault.

(2) That the deed of 1906 (C) was extinguished by the plaintiff's pre-emption-decree.

It is pointed out that the pre-emption-decree in the plaintiff's favour by which he pre-empted the sale-deed numbered (D), related to only 4 of the 7 villages included in (C) and it is claimed that the mortgage in suit is still alive in regard to the three villages.

(3) That the suit is barred by section 11, Civil Procedure Code. It is argued that this is not so.

(4) That the amount claimed in regard to the land in Pandarwa is barred by limitation.

It is claimed that Article 32 of the Limitation Act applied to the case and that the claim is not barred. It will be convenient to take these four heads seriatim.

I have already said that the mortgage-deed on which the plaintiff-appellant sued, was executed in consideration of the payment of Rs. 2,000 in cash, and of Rs. 4,658 8-0 which was left with the mortgagee for payment of these *dihandis*. The *dihandis* in number were five, and not one of them was paid. In some cases a tender was made, but was refused, for the reason that a sufficient sum had not been tendered. The details of the *dihandis* are given in the pleadings and

in the judgment of the Subordinate Court, and I need not perhaps refer to them seriatim. It is, however, necessary to state what happened as the result of the *dihandis* not being paid. On 18th June 1913 the defendants had to sell their shares in four of the villages which had been mortgaged to the plaintiff in 1906. They executed the sale-deed in favour of Munnoo Singh, and in it they left with the vendee a sum of Rs. 3,000 as a *dihandi* to be paid to the present plaintiff, in order to clear the charge which he had in virtue of his mortgage-deed of 1906. Again, on account of the failure of the plaintiff to pay Rs. 772 to Thakur Rudra Singh, on account of the mortgage-deed referred to in the first paragraph as (B), the mortgaged property was put up for sale in execution of a mortgage-decree obtained by the mortgagee. This was in 1916 and the mortgage-debt had then swelled to Rs. 3,555-15-9. In the case of the sale to Munnoo Singh, the plaintiff pre-empted, and in the case of the mortgage-sale of 1916, the plaintiff intervened and paid the decree-money. He, therefore, became the owner of the properties, which had been transferred in the deeds referred to as (B) and (D).

It has been argued that the plaintiff's failure to pay the *dihandis* was not his own fault. There was no clause in the mortgage-deed of 1906 enjoining that the *dihandis* should be paid on any particular date, but it was stipulated that interest should only run on these amounts from the date of payment, and not from the date of the mortgage-deed. These arguments, in my opinion, are of no avail. Under section 46 of the Indian Contract Act, the engagement had to be performed within a reasonable time. The circumstances of the case make it clear that a reasonable time was as soon as possible. The object of the execution of the mortgage-deed was to consolidate the debts of the mortgagors, and to prevent interest running at a high rate. The result of the failure to pay the *dihandis* was that interest continued to run at the old high rates, to the very serious disadvantage of the mortgagors. The amount to which these old debts swelled may be judged from the instances of Rudra Singh's and Kunwar Chandra Singh's deeds. Although the *dihandis* were made payable in 1906, the earliest tender for payment was made in 1910. To take another instance, the first *dihandi* was of Rs. 1,200 due on the mortgage-deed referred to in paragraph 1 as (A). Under that deed, if the mortgage-money were not paid by 1319 F. (1912), there was to be conditional sale. No tender for payment was made until 1918. In these circumstances, I agree with the lower Court that the plaintiff-mortgagee broke his contract, and is, therefore, not entitled to possession of the property mortgaged to him under that deed, though, I must admit that his mortgage-debt is still good security for the Rs. 2,000 cash that was paid when the deed was executed, unless it can be shown that payment has been made The lower Court has decided that when the plaintiff pre-empted the sale-deed in favour of Munnoo Singh in 1913, the result was that his title as mortgagee in the deed of 1906, merged in his title as owner, but this is clearly not correct, because there were three villages mortgaged in 1906, which were not included in the pre-emption proceedings, and if any part of the mortgage is still alive, it might be held to be binding on these three villages.

It is now necessary to consider the effect of the plaintiff's action in pre-empting the sale to Munnoo Singh. I have said before, that in the sale-deed a *dihandi* of Rs 3,000 was left with the vendee, for payment to the plaintiff, on account of the mortgage of 1906. It is admitted that this three thousand rupees would have been sufficient to settle the plaintiff's mortgage-debt of Rs. 2,000 with interest up to the date of the sale. The result, however, of the plaintiff pre-empting the sale was, that the *dihandi* was not paid over to him in cash, but allowance for it was made in the price paid by him to the vendee. It is urged on behalf of the plaintiff-appellant that he did not receive this consideration until 1916, when the orders of the Appellate Court were issued in regard to the pre-emption decree. If this is the case, then the plaintiff's mortgage-debt was not paid by this *dihandi* and his mortgage is still alive to the extent of whatever balance may be found to be due. It is argued, on the other hand, that the effect of the pre-emption was that he stepped into the shoes of the vendee from the date of the sale. The question of the date, on which the pre-emption must be held to have taken effect, is,

therefore, of considerable importance in this case, not only in connection with the effect of this *dihandi* of Rs. 3,000 on the mortgage-deed of 1906, but also, as will appear later, on the plaintiff's action, in regard to Rudra Singh's mortgage decree.

Neither side has been able to cite any authority to show from what date a pre-emption sale must be held to take effect. The procedure in pre-emption is laid down in Chapter II of the Oudh Laws Act, 1876. Under section 10 of that Act, where any person proposes to sell any property, he is bound to give notice to the persons concerned (*i. e.*, the pre-emptor) and such persons under section 11 have a right to pre-empt within three months. The learned Counsel for the appellant had argued that the pre-emption does not take effect until the final Appellate Court has passed its order. I can find no authority for this. As a matter of ordinary common sense, it might be held that the pre-emption takes effect from the date on which the pre-emptor pays the purchase-money to the vendee. In *Jagan Nath* v. *Sheo Ratan Singh* (1), however, it was held that the right of pre-emption is " a right to the benefit of a contract ' or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee, in respect of all the rights and obligations arising from the sale under which he has derived his title." The learned Judges who gave that decision have referred to an elaborate and authoritative ruling by Mr. Justice Mahmood, reported in *Gobind Dayal* v. *Inayatullah* (2). In this it has been clearly held that a right of pre-emption is not a mere right of purchase, either from the vendor or from the vendee, involving a new contract of sale, but it is simply a right of substitution. "It is, in effect, as if in a sale deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property, by the so-called 're-purchase' from the vendee would be subject to another pre-emptive claim, dating, not from the original sale, but from such " re-purchase " a state of things most easily conceiveable where the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that " pre-emptive litigation could never end." (809). Following this decision, I must hold that the plaintiff stepped into the vendee's shoes, and that this substitution must be held to have had effect from the date of the sale in favour of the vendee. On that date, therefore he received consideration in the form of the *dihandi* of Rs. 3,000 and on that date, it is admitted, that this sum was sufficient to discharge his mortgage-debt The result of his pre-empting the sale in favour of Munnoo Singh, therefore, was to discharge the mortgage of 1906 completely.

It follows from this, that when the plaintiff paid Rs, 3 555-15-9 to liquidate the mortgage decree in favour of Rudra Singh, on the basis of the letters' mortgage of 1899 (B), he had no live interest in the property which was being sold. The respondent has in fact argued that his intervention was an officious act. The appellant contends that he intervened as a mortgagee, who had an interest in two out of the three properties which were the subjects of the mortgage-decree. The relief that the plaintiff claims in connection with this transaction is as follows:—

He admits that in regard to two of the properties, Danpur and Madhopur, his mortgagee-rights have merged in his rights as owner. With regard to the third property, however, Pandarwa, he claims a charge on account of the money he has paid. He has worked out the proportionate charge which may be held to be due on account of Pandarwa. I need not, however, go into this in further detail. I agree with the lower Court that the Article 61 of the Limitation Act must be held to apply to any payments that he made on behalf of the defendants, and that the claim is, therefore, barred by limitation.

There is no other point in this somewhat complicated case that it is necessary for me to decide. The result of the above finding is that the appeal fails and is dismissed with costs.

Z. K.

(1) 7 Ind. Cas. 295 ; 13 O. C. 219.
(2) 7 A. 775; at p. 815 A. W. N. (1885) 228, 4 Ind. Dec. (N. S.) 611.

ABDUL AZIZ MIA *v* AMANMAL BATHRA

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 280 OF 1922.

February 26, 1924.

Present :—Mr. Justice Newbould and Mr. Justice B. B. Ghosh.

ABDUL AZIZ MIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMANMAL BATHRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Mortgage-deed—Oral agreement varying rate of interest, whether can be proved—Conduct of parties, effect of.

Evidence of a contemporaneous oral agreement between the parties to a mortgage-deed that compound interest should be mentioned in the deed but that simple interest only would be realised and compound interest would never be claimed, is not admissible by virtue of the provisions of section 92 of the Evidence Act. Nor would the fact that only simple interest was, as a matter of fact, realised entitle the mortgagor to a variation of the written contract.

Pertap Chunder Ghose v. *Mohendra Nath Purkait*, 17 C 291; 16 I. A. 238 ; 13 Ind. Jur. 370 ; 5 Sar. P. C. J. 444 ; 8 Ind Dec. (N. S.) 733 (P. C.) ; *Nadia Chand Saha* v. *Birendra Chandra Dutt*, 37 Ind. Cas. 126 ; 20 C. W. N. 1067, distinguished.

Appeal against the decree of the Subordinate Judge, Assam Valley Districts, at Dhubri, dated the 20th July 1922.

Babu *Bimal Chandra Das Gupta*, for the Appellants.

Babu *Girija Prosana Sanyal*, (with him Babu *Inder Prokas Chatterjee*), for the Respondents.

JUDGMENT.—This is an appeal by the defendants against the decree in a suit on a mortgage-bond. The execution of the bond was admitted. The defences raised by the defendants were that the stipulation for compound interest was not enforcible, that it was penal and that certain payments made by them had not been credited.

The learned Subordinate Judge held that it was not necessary to take any evidence except as to the alleged payments. As these were [illegible] amounts the plaintiff raised no objection to these being credited against their claim. It is contended that the defendants should have been allowed to adduce evidence on the other issues. Referring to the defendants' written statement it is clear that no evidence would have been admissible in support of their pleas. The allegations amount to a contention that there was a contemporaneous oral agreement that compound interest should be mentioned in the bond but that interest would never be claimed according to it and that simple interest only would be realised. This section 92 of the Evidence Act bars the defendants from proving. There is, further, an allegation in the plaint that, as a matter of fact, only simple interest was realised. Even if this were so, this would not entitle the defendants to a variation of the written contract.

Our attention has been drawn to the cases of *Pertap Chunder Ghose* v. *Mahendra Nath Purkait* (1), a decision of the Judicial Committee of the Privy Council, and *Nadia Chand Sahu* v. *Birendra Chandra Dutt* (2), a decision of a Divisional Bench of this Court. Both these cases are clearly distinguishable. In the former it was held that there was misrepresentation of the existing law which was sufficient to support the finding that the contract had been obtained fraudulently. In the second of these cases the question was not as to the effect of a written contract but as to the terms on which the defendant was holding the land after the termination of the period of the lease. We see no ground whatever for holding that the stipulation for compound interest which is in the ordinary terms was of a penal nature.

The appeal is dismissed with costs. We assess the hearing fee at ten gold mohurs.

Z. K. *Appeal dismissed.*

(1) 17 C. 291 (P. C.); 16 I. A. 233; 13 Ind. Jur. 370 ; 5 Sar. P. C. J. 444; 8 Ind. Dec. (N. S.) 733 (P. C.).
(2) 37 Ind. Cas. 126 ; 20 C. W. N. 1067.

MEGHRAJ *v.* RAMGOPAL

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 164 OF 1923.

February 7, 1924.

Present :—Mr. Baker, J. C.

MEGHRAJ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMGOPAL—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (I of 1920) s. 104, Sch. II, para. 1 —Suit to recover possession by tenant—Dispossession by person not claiming through landlord—Limitation.

The words " by any person " in paragraph 1 of Schedule II to the C P. Tenancy Act of 1920, have their ordinary meaning and are not confined to a person claiming under the landlord, they are wide enough to include a trespasser.

For the purpose of construing an Act a Court may refer to the statement of objects and reasons.

Seth Gangabishan v. *Balmukund*, 8 N. L. R. 40 at p. 45, followed.

Appeal from the decree of the District Judge, Nimar, dated 8th January, 1923.

Messrs. *S. B. Gokhale* and *K. K. Gandhi*, for the Appellants.

Mr. J. *Sen*, for the Respondent.

JUDGMENT.—The plaintiffs sued the defendant to recover possession of some absolute occupancy land, alleging that in consideration of a debt due by the defendant to them an award was passed by the Conciliation Board on which a decree was obtained giving the plaintiffs possession of the land in suit. The plaintiffs took possession through the Court on 3rd March 1909, but were forcibly dispossessed in July 1919. The present was brought in March 1922.

The defendant pleaded that by reason of an agreement between him and the plaintiffs, subsequent to the award, he was to get back the land and that a Settlement *patta* was granted to him.

The first Court, Subordinate Judge, Harda, passed a decree in the plaintiffs' favour but on appeal this was reversed by the District Judge, Nimar, on the ground that the suit was barred by limitation by Schedule II, paragraph 1, of the Tenancy Act of 1920, the suit not being brought within two years from the date of dispossession. The plaintiffs make this second appeal.

The learned pleader for the appellants has referred to a number of cases in which a limited meaning has been put on sections of the old Tenancy Act, but it is not necessary to go into these points for the determination of the present case. Rulings on other sections of the old Act can have no application to the section we are now concerned with, *viz.*, section 104, read with schedule II. The whole law has been altered as regards limitation.

It is contended on behalf of the appellants that the dispossession referred to in Schedule II must be by the landlord or by some person claiming under him. This was the view taken under the old Act but is no longer applicable. The wording of the second Schedule of the Tenancy Act paragraph 1, is : "For possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by *any person*." The wording of section 94 of the old Act of 1898 was: "The period of limitation for a suit instituted by a tenant other than an absolute occupancy tenant to recover possession of land from which he has been ejected, shall be two years from the date on which he is ejected," and it was held in a number of cases, of which the principal are *Debidin Kalar* v. *Hari* (1), *Sonsa Chamar* v. *Puran Singh Rajput* (2), and *Dinabandhu* v. *Dukhu Mirda* (3), that if a tenant was excluded from possession by another tenant without the intervention of the landlord, the limitation of two years would not apply. It was to meet this objection that the Law has been changed, and this will be clear from the statement of objects and reasons presented along with the new Act and printed as an appendix to Gokhale's commentary on the Central Provinces Tenancy Act. For the purpose of constructing the Act a Court may refer to the statement of objects and reasons. This has been held in *Seth Gangabishan* v. *Balmukund* (4), in which the cases quoted to the contrary

(1) 15 C. P. L. R. 125.
(2) 16 C. P. L. R. 145.
(3) 1 N. L. R. 73.
(4) 8 N. L. R. 40 at p. 45.

by the appellants' pleader have been considered. It is quite clear from the statement of objects and reasons that the Law has been intentionally altered in order to get over the effect of the above decisions, for it is stated that it is desirable that disputes regarding the right to hold tenancy land should be decided as early as possible, whether the dispute is between the tenant and the landlord or another person, and the clause has been amended accordingly.

It is clear, therefore, that the words "by any person" have their ordinary meaning and are not confined to a person claiming under the landlord, and, in my opinion, they are wide enough to include a trespasser. That point, however, does not really arise in the present case because the defendant in this case was admittedly originally an absolute occupancy tenant of the land, and he claims to be still such, the effect of the award and the decree having been nullified by an agreement between himself and the plaintiffs. This is, therefore, a dispute between two persons, each claiming to be the absolute occupancy tenant of the land. As such, it clearly falls under the provisions of limitation in Schedule II of the Tenancy Act and referred to in section 104 thereof, and the suit must be brought within two years of the date of dispossession. Admittedly, this has not been done, as the dispossession was in July 1919 and the suit was brought in March 1922. The view of the lower Appellate Court is, therefore, correct; the suit is barred by limitation.

The decree of the lower Appellate Court is confirmed and the appeal dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2294 OF 1922.

February 19, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

GOUR KRISHNA SARKAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NILMADHAB SAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) s. 50 (2)—Fixity of rent—Presumption—Sub-division of tenure, effect of.

The sub-division of a tenure does not operate as a breach of the continuity of the tenure. If the different parts into which the tenure is divided are held at a proportionate rent and the aggregate rent equals the original rents, the tenure-holders are still entitled to the benefit of the presumption arising under s. 50 (2) of the Bengal Tenancy Act.

Krishna Kamini Dasi v *Nil Madhub Saha*, 73 Ind, Cas. 312; 36 C. L. J. 382; (1923) A. I. R. (C.) 66. followed. *Uday Chandra Karji* v. *Nripndro Narayan Bhup*, 1 Ind. Cas. 4; 36 C. 287; 13 C. W. N. 410, dissented from.

Appeal against the decree of the District Judge, Nadia, dated the 5th April, 1919 modifing the decree of the Revenue Officer of that District, dated the 14th December, 1916.

Babu *Mahendra Nath Roy*, (with him Babu *Baranashibasi Mukerjee*), for the Appellants.

Babu *Upendra Nath Bagchi*, for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.—The question raised in this appeal is whether on the facts found the presumption under section 50, Bengal Tenancy Act, ought to be raised in favour of the appellants. The appellants are the tenants. The landlords opposite party brought a suit under section 105, Bengal Tenancy Act for enhancement of the rent of the holding in possession of the appellants. It was found by the Court of first instance that the status of the appellants was that of tenure-holders, that the holding was divided into two equal halves between the heirs of the original tenure

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holder, that the rent paid in respect of each half was proportionate and that the rent had been uniform for more than 20 years. On these findings it was held that the presumption under section 50 ought to be raised in favour of the tenants that the tenancy existed from the time of the Permanent Settlement and the rent of it is not liable to enhancement. There were several other cases tried along with the present case and they were similarly decided. On appeal, the learned Special Judge held that as the original tenure was divided it amounted to creation of new tenancies at the time of the division. As the creation of new tenancies took place after the Permanent Settlement, the presumption under section 50 ought not to apply to the present case. There were several appeals against this judgment by several tenants affected by it. All these, including the appeal by the present appellants, came up for hearing before a Bench of this Court consisting of Mookerjee and Rankin JJ. It was held by the learned Judges that the sub-division of a tenure does not operate as a breach of the continuity of the tenure, if the different parts into which the tenure is divided are held at a proportionate rent and the aggregate rent equals the original rent, the tenure-holder is entitled to the benefit of the presumption under section 50, clause (2), Bengal Tenancy Act. The appeal by the present appellant, however, could not be proceeded with because a formal defect was discovered which necessitated the dismissal of the appeal. It appears that before the filing of the appeal to this Court the appellants had submitted an application for review before the learned Special Judge. That review was partially granted and the judgment and decree previously passed by the learned Judge were modified. It was, therefore, held that the appeal by the present appellants was incompetent inasmuch as the decree from which that appeal was preferred was subsequently vacated and a new decree substituted in its place. The decision of this Court in this matter is to be found in *Hara Kumar Mitter* v. *Murari Mohan Bose* (1). The appellants, therefore, preferred another appeal (which is the present appeal) against the decree as made after review. The same question is raised in the present appeal as was raised in the appeal to which we have referred and the decision of which is to be found in *Krishna Kamini Dasi* v. *Nil Madhub Saha* (2). The point which has been raised in this appeal has been set at rest by the decision referred to above. But it is urged by the learned Vakil who appears on behalf of the minors that this decision being in direct conflict with the decision in the case of *Uday Chandra Karji* v. *Nripendro Narayan Bhup* (3), the question should be referred to a Full Bench, considering how the latter case has been dealt with since the decision was pronounced. We do not think that the course suggested is necessary. The decision in the case of *Uday Chandra Kharji* v. *Nriperdro Narayan Bhup* (3) has never been followed. An attempt was made to distinguish it in all subsequent cases until we come to the case of *Chandra Kant Chukravarty* v. *Ram Krishna Mahalnabis* (4) when its correctness was doubted; and in the case of *Krishna Kamini Dassi* v. *Nil Madhub Saha* (2) it has been expressly dissented from. One ground for questioning the correctness of this decision is that it has not taken note of the state of the law previous to the passing of the Bengal Tenancy Act and the arguments that as that law was in conformity with the view taken in the case of *Krishna Kamini* v. *Nil Madhub* (2) and as it was not expressly abrogated by the Legislature it must be taken to be unaffected by the Bengal Tenancy Act. The ommision to take note of the pre-existing law has very much weakened the authority of *Udoy ChandraKarji* v. *Nripendro Narayan Bhup* (3). We think that the case was not correctly decided and we prefer to follow the decision in *Krishna Kamini* v. *Nilmadhub* (2).

We are further asked by the learned Vakil for the respondent to send this case back to the Special Judge for trial of the question as to whether the landlords have been able successfully to rebut the presumption under section 50, Bengal Tenancy Act. We find that the only ground raised in order to meet the contention of the tenants that they were entitled to the benefit of the presumption under section 50, Bengal Tenancy Act was that the

(1) 60 Ind. Cas. 1003; 36 C. L. J. 184; (1922) A. I. R. (C) 572.
(2) 73 Ind. Cas. 312; 36 C. Ll. J. 382; (1923) A.I.R. (C) 66.
(3) 1 Ind. Cas. 4; 36 C. 287; 13 C. W. N. 410.
(4) 36 Ind. Cas. 707; 24 C. L. J. 275; 20 C. W. N. 1002.

tenancy was sub-divided after the Permanent Settlement and, therefore, the presumption under that section could not arise. No other ground was raised and we do not think that any useful purpose will be served by sending the case back to the lower Appellate Court.

The result it that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Settlement Officer restored with costs. The appellants are entitled to their costs in this Court as also in the Court of Appeal below. They are also entitled to their costs of the review application before the learned Special Judge. We assess the hearing fee in this Court at one gold mohur.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 153-B OF 1923.

February 15, 1924.

Present:—Mr. Hallifax, A. J. C.

RAMJI PATEL—APPLICANT

versus

KARKAJI—NON-APPLICANT.

Civil Procedure Code (Act V of 1908) O. XXI, rr. 68, 90—Execution of decree—Sale proclamation, publication of, less than thirty days before sale—Irregularity—Substantial injury, proof of.

The mere fact that a sale proclamation is published less than thirty days before the date of the sale is a mere irregularity which does not vitiate the sale in the absence of proof that substantial injury has been caused to the judgment-debtor as a result of the irregularity.

Ganga Prasad Rai v. *Jag Lal Rai*, 11 A. 333 ; A. W. N. (1889) ; 115 ; 13 Ind. Jur. 471 ; 6 Ind. Dec. (N. S.) 640, referred to.

Application for revision against the decree of the Additional District Judge, Akola, dated the 24th August 1923.

Mr. *V. R. Pandit, B.B.*, for the Applicant.

Mr. *V. Bose*, for the Non-applicant.

ORDER.—The learned Counsel for the applicant has pointed out that the lower Appellate Court was wrong in thinking that the date of the posting of the proclamation of sale in the Court-house of the Judge who ordered the sale was the 5th of March 1921. From the endorsement on the proclamation it appears that it was published in the village where the property is situated on that date, but was not posted in the Court-house till the 9th of March 1921. The sale was held on the 7th of April 1921, twenty-nine days later, that is, one day less than the period prescribed by r. 68 of O. XXI.

That matter appears to me merely to be one more material irregularity, which has to be put to the same test as that to which the others have already been put. The judgment of Edge, C. J., in *Ganga Prasad Rai* v. *Jag Lal Rai*, (1) is cited as authority for the proposition that that particular irregularity or illegality is sufficient of itself to vitiate a sale, which must be set aside when it has occurred even though no substantial injury has been caused. With all respect, I prefer the contrary opinion expressed by Brodhurst, J., in the same case, and it is obvious that it made no difference in this case to anybody whether the sale was held on the twenty-ninth day after the posting of the proclamation or on the thirtieth.

Even, however, if the test of "substantial injury" is not to be applied to such a *sale* under r. 90 of O. XXI in execution proceedings or in an appeal, it must certainly be applied under section 115 in proceedings in revision. The permissive form of words used in that section would otherwise be futile. Even, therefore, if the refusal of the lower Appellate Court to set aside the sale was directly illegal, it could not be disturbed in revision unless further cause were shown, such as, that it caused injustice or hardship.

I cannot find any reason also for differing from the finding of the learned Additional District Judge to the effect that there was no injury of any degree caused to the applicant by the other irregularities that took place and that no higher price would have been obtained for the property if they had not taken place.

(1) 11 A. 333 ; 9 A. W. N. (1889) 115 ; 13 Ind. Jur. 471 ; 6 Ind. Dec. (N.S.) 640.

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The application for revision is accordingly rejected. The applicant must pay all the costs, in which the pleader's fee will be twenty rupees.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 29 OF 1924.

February 18, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

SARADA SUNDARI BASU—DEFENDANT —PETITIONER

versus

AKRAMANNESSA KHATUN AND OTHERS —PLAINTIFFS—OPPOSITE PARTIES.

Suits Valuation Act (VII of 1887), s. 8—Court-Fees Act (VII of 1870), s. 7 (ix)—Redemption suit—Jurisdiction, valuation for purposes of.

Prima facie it is the plaintiff's claim which determines jurisdiction, and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive. [p. 749, col. 1.]

Section 8 of the Suits Valuation Act does not cover redemption suits, so that in such a case valuation for the purpose of jurisdiction does not necessarily follow the valuation for the purpose of Court-fees. [p. 748, col. 1.]

The valuation of a suit for redemption for the purpose of jurisdiction depends not on the amount assured but on the amount ultimately found to be due. [p. 748, col. 2.]

Case-law discussed.

Rule against the order of the Sub-Judge, 2nd Court, Backergunge, dated the 17th September 1923, in Miscellaneous Appeal No. 142 of 1922, against the decision of the Munsif, 7th Court, Barisal, in Title Suit No. 521 of 1920, dated the 25th April 1922.

Babu *Suresh Chandra Talukdar*, for the Petitioner.

Babu *Abinash Chandra Guha*, for the Opposite Parties.

JUDGMENT.—This Rule was obtained on grounds Nos. 4 and 6 of the petition which are as follows:—

" For that on a valid and correct construction of law on the subject the learned Subordinate Judge ought to have held that the suit was beyond the pecuniary jurisdiction of the learned Munsif.

" For that the learned Munsif having heard all the evidence and arrived at his own finding thereon, the learned Subordinate Judge has erred in law and acted without jurisdiction in not expressing his definite conclusions thereupon."

The suit was one for redemption and the Munsif before whom it was instituted proceeded by way of a preliminary issue to decide the question whether he had the pecuniary jurisdiction to try it. Evidence was led on both sides and upon it he came to the conclusion that the debt due by plaintiff to defendant was over Rs. 1,000 and that, consequently, the suit was beyond his jurisdiction. He accordingly returned the plaint for presentation to the proper Court. Plaintiffs appealed and the learned Subordinate Judge reversed the order and remitted the case to the lower Court for trial on the merits.

He pointed out that a redemption suit comes under section 7, clause IX of the Court-Fees Act and the plaint has to be stamped with Court-fees payable on the principal sum assured. But section 8 of the Suits Valuation Act does not cover redemption suits, so that valuation for the purpose of jurisdiction does not necessarily follow valuation for the purpose of Court-fees. The Allahabad and Madras High Courts say that section 8 does not lay down either that the valuation for the purpose of jurisdiction must necessarily be different from that for the purpose of Court-fees.

The learned Judge further observed that he saw no practical difficulty from O. XXXIV, rr. 7 and 8 of the Code of Civil Procedure because the Court would not direct the plaintiffs to pay a certain sum but only direct that if a certain sum was paid within a certain time plaintiffs would have a certain relief in respect of the mortgaged property, and if they failed they would be debarred from getting it in

future. If no payment were made the mortgagee would be entitled to ask for the sale of the property but that would be no part of the decree though it could follow from the decree incidentally.

The learned Judge then proceeded to make some observations on the evidence recorded by the Munsif, adversely criticising his findings though not definitely disagreeing with them.

The learned Vakil who has appeared in support of the Rule urges that the procedure adopted by the Court of Appeal below was erroneous and that the learnnd Judge should have come to a definite finding on the evidence.

As regards the second contention, we are of opinion that though the learned Judge may possibly have carried his criticisms a little too far it was not his intention to consider the evidence except from the point of view of the Munsif's jurisdiction and he was careful to guard against the imputation of having prejudged the case by saying: "it is not my intention to thrust my views upon the Court which would have to try the case and the Court should try it uninfluenced by my observations."

We think, however, that as the facts stand, the learned Judge was in error in remitting the case to the Munsif for trial on the merits.

He has relied on the case of *Kedar Singh* v. *Matabadal Singh* (1),which follows earlier cases of that Court, as an authority for the proposition that the value for purposes of jurisdiction of a suit for redemption of a mortgage is the amount of the principal mortgage-money and not the value of the property mortgaged and that the law has not been affected by the passing of Act VII of 1887, section 8.

That view was also taken by the Madras High Court in the case of *Jallaldeen* v. *Vijayaswami* (2).

It is said in these cases that section 8 of the suits Valuation Act does not cover redemption suits so that valuation for the purpose of jurisdiction does not necessarily follow valuation for the purpose of Court-fees nor will valuation for the purpose of jurisdiction necessarily be different from that for the purpose of Court-fees. Therefore, the law as laid down in the earlier cases is unaffected by the Suits Valuation Act.

With great respect to the learned Judges who decided these cases, we cannot but feel considerable doubt as to the correctness of these decisions. If the Legislature had not contemplated a change in the law it is not easy to understand why redemption suits should have been expressly excluded from the operation of section 8 of the Suits Valuation Act. The section does not say that the value determinable for the purpose of jurisdiction is the value determinable for the purpose of the initial paymentof Court-fees. We are, therefore, inclined to the view that jurisdiction will depend not on the amount assured but on the amount ultimately found to be due.

Our attention was drawn to the case of *Rameswar Mahton* v. *Dilu Mahton* (3), where it was held that in a suit for possession with mesne profits the Munsif had jurisdiction to ascertain the mesne profits and to give effect to the order made in the decree notwithstanding that the amount of such mesne profits when added to the value of the suit might come to a sum in excess of the hearing jurisdiction of his Court.

That case was considered and distinguished in *Golap Singh* v. *Indra Kumar Hajra* (4). At p. 377 it was pointed out that "the amount of mesne profits for which the Munsif made a decree had accrued entirely after the institution of the suit and depended upon the length of time during which the defendant might manage to keep the plaintiff out of possession in spite of the decree in his favour."

The decision on principle too which had been doubted in *Ijjatulla* v. *Chandra Mohan Banerjee* (5), was disapproved.

It is also pointed out (at p. 374) that the provision of the Suits Valuation Act only shows that for purposes of jurisdiction the value of

(1) 1 Ind. Cas. 703; 31 A. 44; A. W. (1908) 276 ; 5 A. L. J. 713.
(2) 28 Ind. Cas. 629, 39 M. 117, 29 M. L. J. 119; (1915) M W N. 289.
(3) 21 C. 550 ; 10 Ind. Dec. (N. S.) 997.
(4) Ind. Cas. 86 ; 9 C. L. J. 367; 13 C. W. N. 493 ; 5 M. L. T. 360; 954 ; 6 C. L. J. 255 ; 11 C. W. N. 1133.
(5) 34 C.

the suit must be taken to be determined by the value determinable for the completion of Court-fees. But this does not conclude the question whether a Court of restricted pecuniary jurisdiction is competent to make a decree in a suit for accounts valued at less than Rs. 1,000 for an amount in excess of Rs. 1,000 which is the pecuniary limit of its jurisdiction.

It may be conceded that a suit should be instituted in the Court of the lowest grade competent to try it (section 15, Code of Civil Procedure). Competency means jurisdiction and the competency of a Court depends upon the nature of the suit and upon its own pecuniary jurisdiction. That jurisdiction must be determined with reference to the various Acts constituting the Courts and the question of valuation by reference to the Court-Fees and Suits Valuation Act.

The jurisdiction of the Munsif here is limited to the trial of suits the value of which does not exceed Rs. 1,000. Now, *prima facie* it is the plaintiff's claim which determines jurisdiction and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive. It is precisely such a contingency which has arisen in the present case. The evidence recorded by the learned Munsif satisfied him that the debt due by the plaintiffs on the bond was more than Rs. 1,000. He, therefore, held that the suit was beyond his pecuniary jurisdiction. In our judgment that view was correct both in law and on principle.

We are further of opinion that the learned Judge has failed to appreciate the mandatory effect of O. XXXIV, rr. 7 and 8. The Court must declare the amount due at the date of the decree and direct its payment within a certain time. If the money is not paid, the Court must, on defendant's application under r. 8 (4), pass a decree for the sale of the property. It is difficult to understand, therefore, how such an order would "be no part of the decree, though it would follow from the decree incidentally."

The substance of the matter is that if the Court has no jurisdiction to try the suit, it has no jurisdiction to make the decree. As explained in *Golap Singh's case* (4), cited above, at page 375: "if a Court of limited pecuniary jurisdiction took cognizance of a suit in which the sum claimed was larger than the amount over which the Court had jurisdiction and judgment it might give would be void."

The result, therefore, is that the rule is made absolute with costs two gold mohurs and the order of the lower Appellate Court discharged. The plaint will be returned to the plaintiff for presentation to a Court of competent jurisdiction.

Z. K. *Rule made absolute.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 388 OF 1921.

August 15, 1923.

Present :—Mr. Justice Jwala Prasad, and Mr. Justice Ross.

RAM PARGASH SINGH—PLAINTIFF—APPELLANT

versus

Musammat DHAN BIBI AND OTHERS DEFENDANTS—RESPONDENTS.

Hindu Law, definition and applicability of—Dancing girls and prostitutes, whether recognised—Law applicable— Mitakshara — Succession— Daughter—Unchastity, whether ground for exclusion—Joint family—Conversion of one member—Separation—Presumption —Re-union—Burden of proof—Caste Disabilities Removal Act (XXI of 1850), effect of.

The Hindu Law, as now understood, is the law of the Srutis and Smrities including the recognised customs as administered and interpreted in the light of judicial decisions, and this law is applicable to all persons in India who have not adopted some other personal laws of their own. [p. 757, col. 2.]

The Hindu Law applies not only to the Aryan settlers in India and such aboriginal races as have been completely absorbed in the Aryan community, but also to the descendants of the original tribes who more or less avoided complete conversion to the Brahminical religion. [p. 759, cols. 1 and 2.]

The class of dancing girls and prostitutes have been recognised as a caste among the Hindus, like the four castes, either as a separate fifth caste or as included

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in the residuary caste of Sudras. They and their parents, the Naiks, are, therefore, governed in matters of succession by the rules laid down in the Mitakshara. [p. 759, col. 1.]

Under the Mitakshara Law an unchaste or immoral daughter is not excluded from succession. By the Caste Disabilities Removal Act the Legislature has virtually set aside the provisions of the Hindu Law which penalise the renunciation of a religion or exclusion from caste. [p. 761, col. 2.]

Therefore, a convert from Hinduism or an outcaste retains his right of inheritance under the Hindu Law whether the right accrues before or after his conversion to another religion or exclusion from caste. Where one member of a joint Hindu family is converted to Islam, there is a disruption of the entire joint family, and all the members must be deemed to be separate unless their re-union is established the *onus* of which lies upon the person who asserts it. It depends upon the circumstances of each case, however, what amount of evidence is required to discharge this *onus*. [p. 762, col. 2.]

Texts and authorities cited and discussed.

Appeal from a decision of the Judicial Commissioner, Chota Nagpure, dated the 28th June 1920, affirming a decision of the Special Subordinate Judge, Palamau, dated the 29th November 1918.

Messrs. *K. P. Jayaswal, Rai Gurusaran Pd.* and *Janak Kishore*, for the Appellant.

Messrs. *Manohar Lal* and *N.K. Prasad II*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This second appeal raises very important questions of law, in order to appreciate which, the facts need be stated at some length.

The plaintiff Ram Pergash Singh *alias* Jang Bahadur Singh is the appellant. He is the fourth in descent from Bhola Ram, brother of Kishun Dayal. Kishun Dayal had three daughters and three sons, Lalji, Beni Ram and Ragho. Lalji became a Muhammadan. His son is Kapil Ram and grandson-Chanchal. Beni Ram died in 1907 leaving two daughters Bhagwari Bibi Tewaif (died in 1908) and Dhan Bibi Tewaif, defendant No. 1. Defendant No. 3 Kawal is a minor son of Dhan Bibi, Brij Behari Ram, defendant No. 2, is son of Ragho. The other members of the family given in the genealogy attached to the judgments of both the Courts below need not be mentioned for the purpose of this appeal.

The plaintiff's case is that by custom of the family, which is known as the "family of Naiks," the male members and the Gotias of the family carry on the occupation of singing and dancing and so do generally the daughters and frequently the females, who adopt the profession of Tewaif, embrace the Muhammadan religion and the children born in the state of prostitution live with there "Hindu father and brother as Hindus"; that by the custom and usage prevailing amongst the Naik sect, specially in the family of the parties to the suit, from time immemorial which has the effect of law, when a father dies his estate is equally divided among his sons and daughters and no distinction of males and females is made with respect to his inheritance and succession; that the daughters are entitled to get inheritance as sons irrespective of what religion they follow and are fully entitled to enjoy and transfer the property inherited by them like males; that when a father dies leaving only daughters and no sons, his daughters equally inherit his estate whether they be followers of Hindu or Muhammadan religion and the agnates do not get any share so long as the daughters are alive; that the widow inherits the estate of her husband only when he has not left any son or daughter and so long as there is a son or daughter living the widow does not inherit; that if a Tewaif, before inheriting the property, marries in Nikah form a man of any religion she is deprived of the inheritance; that this custom and usage of the daughters succeeding equally and in the same way as the sons is based upon the fact that the daughters give their parents the earnings of their profession wherewith their fathers and brothers purchase property and consequently on the death of the fathers and brothers, the daughters with whose earnings the property is purchased inherit the same, and that their following any other religion does not deprive them of the inheritance of the property of their parent's family.

The plaintiff alleges that the aforesaid custom and usage which is the Kulachar of the Naiks sect, and of the family of the parties in this case, is in vogue from time immemorial and is just and reasonable and has always been acted upon; that according to the aforesaid Kulachar defendant No. 1 Dhan Bibi

and her sister *Musammat* Bhagwari Bibi inherited the entire estate of their father Beni Ram (who died in 1907) in the Districts of Palamau and Gaya and on the death of Musammat Bhagwari Bibi in 1908, *Musammat* Dhan Bibi and Bhikhan Ram, son of Bhagwari Bibi, inherited the entire estate in equal shares and are in possession thereof; that after the death of Beni Ram (in 1907) defendant No. 1 and Bhagwari Bibi applied for the mutation of their names with respect to the estate of Beni Ram ; that the defendant No. 2 Brij Behari, nephew of Beni Ram, objected to this, and applied for the mutation of his own name on the ground that Beni Ram and himself were members of a joint *Mitakshara* family and that the former died while in a state of jointness leaving defendant No. 2 as the sole surviving member and consequently he succeeded to the entire estate by right of survivorship ; that in in order to meet the expenses of the mutation case the defendant No. 1 borrowed Rs. 1,200 in cash from the plaintiff and executed a registered *zarpeshgi* deed, dated the 16th November 1907, in favour of the plaintiff with respect to the *mauzas* contained in schedule A to the plaint, and put him in possession thereof; that on the 18th December 1907, the mutation case was decided against defendant No. 1 and in favour of defendant No. 2 whose name was accordingly recorded in the Government Register with respect to the estate of Beni Ram, deceased ; that against the decision of the Deputy Collector, the defendant No. 1 and *Musammat* Bhagwari Bibi preferred an appeal. Bhagwari Bibi died during the pendency of the appeal, and the defendant No. 2 having been won over by defendant No. 1 withdrew the appeal, and hence the decision of the original Court was confirmed on the 31st July 1908, on the strength whereof the defendants 1 and 2 in collusion with each other dispossessed the plaintiff of the *zarpeshgi* properties on 10th Pous 1315 and the defendant No. 1 took possession thereof ; that the plaintiff commenced an action against the defendants to enforce his mortgage by filing suit No. 45 of 1911 against defendants Nos. 1 and 2 in the Court of the Deputy Commissioner of Palamau vested with the power of Subordinate Judge, which on transfer to the Subordinate Judge was numbered 8 of 1912 and was disposed of by him on the 4th March 1913 but the Subordinate Judge granted to the plaintiff only a money-decree for Rs. 2,328 against defendant No. 1 inasmuch as he felt difficulties in disposing of the question raised by the defendants with regard to the rules of succession governing the Naiks sect and left the title of defendant No. 1 to the *zarpeshgi* properties open and undetermined.

Then the plaintiff levied execution (No. 4 of 1915) of his money decree and sought to attach and sell the *zarpeshgi* properties which, upon the claim preferred by the defndants Nos. 1 and 2, (Dhan Bibi and Brij Behari) were released from attachment and sale by the order of the Court passed on the 19th August, 1915.

In short, the plaintiff's case is that the properties in dispute belonged to defendant No. 1 as her parental estate and are in her possession, and that defendant No. 2 has nothing to do with the same, and his claim that the entire estate of Beni Ram devolved on him, under the rule of survivorship, is false.

Upon these allegations, the plaintiff brought the present action stating that the cause of action arose on the 10th Pous 1315 when he was dispossessed, and on the 9th August 1915 when the claim case of defendants Nos. 1 and 2 was decided, and he wants a declaration that the properties in dispute belong to defendant No. 1 and that she is in possession thereof and the defendants 2 and 3 have nothing to do with the same and that the said properties are liable to be sold and attached in execution of the plaintiff's money decree.

Defendant No. 1 has not entered appearance. Defendants 2 and 3 have filed separate written statements, but the grounds taken in the written statements are *mutatis mutandis* the same. They deny the several customs or Kulachar allged in the plaint as prevailing in the sect of Naiks or the family of the parties, or that the said custom governs them. They assert that the Naiks who live and die as Hindus are governed by the ordinary *Mitakshara* Law of inheritance and the females do not succeed in the presence of males and when they do succeed in the case of a separate family they acquire a limited interest as in the case of a family governed by the *Mitakshara* Law and never take an absolute inheritance as is alleged by the plaintiff ; that P was

a Hindu and died while joint in estate with defendant No. 2, his brother's son, and on the death of Beni Ram, the properties devolved upon defendant No. 2 by right of survivorship, that Bhagwari Bibi and Dhan Bibi became Tewaifs during the lifetime of their father Beni Ram and embraced the Muhammadan religion; that they were, therefore, excluded from inheritance; that Beni Ram left a widow Misran Kuer; that Dhan Bibi never held possession of the disputed properties; that the *zarpeshgi* deed set up by the plaintiff was without consideration. They also disputed the correctness of the genealogy attached to the plaint, but gave no fresh genealogy nor any evidence showing the inaccuracy of the plaintiff's genealogy. The Court below has attached to its judgment a family tree based upon the plaint and amplified from the evidence.

We are concerned only with issues Nos. 4 and 7 and the consequential issue No. 8 which relates to what relief the plaintiff is entitled to. The other issues have been set at rest by the findings of the Court below. Issues Nos. 4 and 7 are as follows:—

"4. Are the parties to the suit governed by the ordinary rule of *Mitakshara* or is there any special custom of daughter's succession as alleged by the plaintiff?"

"7. Has defendant No. 1 any title to or possession over any of the properties mentioned in the schedule to the plaint?"

Both the Courts below decided these issues against the plaintiff. They held that the plaintiff failed to establish the Kulachar or the special customs and usages set up by him as governing the family in question in matters of succession and inheritance; that the family is governed by the Hindu Law; that Beni Ram and his nephew Brij Behari were members of a joint *Mitakshara* family and that Beni Ram died while in a state of jointness and Brij Behari, defendant No. 2, succeeded to the properties in question by right of survivorship under the Mitakshara Law and that the daughters of Beni Ram, Bhagawari Bibi and Dhan Bibi (defendant No. 1) became Tewaifs (dancing girls and prostitutes) and embraced Muhammadanism during the lifetime of Beni Ram and they did not inherit the properties in dispute which were ancestral properties of Beni Ram. On these findings the Courts below held that the plaintiff failed to prove that defendant No. 1 had any title to the properties in dispute and accordingly dismissed the suit. The plaintiff has come to this Court in second appeal.

Mr. Jayeswal on behalf of the plaintiff contends that the finding of the Court below that the plaintiff failed to establish the custom set up by him has been vitiated by reason of its not having considered the effect of some important evidence. In particular, our attention has been drawn to Exhibit 7, deposition of Bhairo Naik, dated the 19th June, 1876.

This document has been referred to in the judgment of the Subordinate Judge who disposes of it in the following words:—

> "In proof of this custom the plaintiff also relies upon a deposition (Exhibit 7) of one Bhairo Ram recorded in Urdu on 19th June 1876. Defendants strongly deny that this person Bhairo Ram was an ancestor of their family and that his statement could not be binding upon them. The passage relied upon in this document runs as—
>
> '*hum logon ke jaidad main Tewaif ka hissa barrabar hota hai.*'
>
> "It is difficult to see what the statement actually signifies. The defence reads this as alluding to their professional earnings and not to any inheritance of the kind now in dispute. In my opinion this statement is not binding upon the defendants and cannot be of any avail to plaintiff in proving the alleged custom."

The words quoted above are the very last words in the deposition and are wholly unconnected with the tenor of the deposition in the preceding portion of it, and there is nothing in the context to amplify or explain them. The words are in themselves vague and not sufficient to establish any custom. Even if they refer to any custom, there is nothing to show that the deposition is with respect to the custom of the family in question, inasmuch as the parties in that case have not been connected with those in the present case. There is also nothing to show that the aforesaid passage in the deposition was referred to or relied upon by the appellant

in the Court below. There is no affidavit to the effect that it was referred to in the argument in appeal before the learned Judicial Commissioner. Ground No. 19 which relates to this point does not state that the aforesaid passage was relied upon in argument before the Judicial Commissioner. It is possible that after the remark of the Subordinate Judge with regard to the passage in question referred to above, it was not thought worth while to refer to it again before the learned Judicial Commissioner. I do not think that the omission to consider this document vitiates the finding of the learned Judicial Commissioner Both the Courts below have referred to instances disproving the alleged custom and they seem to have arrived at their finding upon an appreciation of all the evidence—oral and documentary—bearing upon the point. The evidence is ample in favour of the view taken by them. Therefore, we cannot interfere with this finding in this case.

The plaintiff's case is entirely based upon the custom set up in the plaint for a declaration of the title of defendant No. 1 to the properties in suit. The Courts below have held that defendant No. 1 never possessed the properties in question and that after the death of her father Beni Ram the properties came to be in possession of defendant No. 2 Brij Behari, his nephew. This finding is supported by the decision of the Land Registration Deputy Collector, dated the 31st July, 1908, which was upheld in appeal (Exhibits 3 and 4), and the name of Brij Behari, defendant No. 2, was recorded in the Collectorate Register D. This is also supported by the decision of the Execution Court, dated the 19th August 1915, upholding the claim of defendant No. 2 on the ground of his possession and releasing the same from attachment for satisfaction of the money-decree of the plaintiff. The finally published Record of Rights, also supports the possession of defendants 2 and 3.

Therefore, the plaintiff must show how the defendant No. 1 acquired title to the properties. In order to prove her title the plaintiff sets up special customs in the plaint by which he says that she inherited the properties of her father. He has failed to establish those customs. He does not say in the plaint that she succeeded to the properties by any other rule or law.

Mr. Jayaswal does not rely upon the statements made in the body of the plaint, but in the pedigree attached to it and says that upon the pedigree Beni Ram could not be a Hindu. For this contention he carries us a degree above Jaimangal Ram, grandfather of Kishun Ram, mentioned as the starting ancestor in the pedigree attached to the judgment of the learned Judicial Commissioner. Mr. Jayaswal says that Jaimangal's mother is mentioned in the genealogical tree of the plaint to be Rai Kuer Tewaif, and that the word "Tewaif" connotes that she must have been a Muhammadan and hence her son Jaimangal could not be a Hindu by *birth* and so also Beni Ram, grandson of Jaimangal. Therefore, Mr. Jayaswal contends that succession to the estate of Beni Ram should not be governed by the Hindu Law.

The genealogical tree attached to the plaint does not expressly describe the mother of Jaimangal as a Muhammadan, nor does the plaint state that, Mr. Jayaswal says that the appellation "Tewaif" must necessarily imply that she had become a Muhammadan. In paragraph 3 of the plaint it is simply stated that "frequently the females who adopt the profession of Tewaifs embrace the Mohammadan religion and the children born in the state of prostitution live with their Hindu fathers and brothers as Hindus." The word used in the plaint is "*aksar*" (which means 'often'), and not '*hameshai*' (which means 'always' or 'invariably'). The above passage is a free translation of the plaint, and not a literal one. It omits the word '*aur*' (and) which occurs between the word "Tewaifs" (who carry on the profession of singing and dancing) and those of them who embrace the Muhammadan religion." The vernacular passage makes it clear that "Tewaif" does not necessarily imply embracing the Muhammadan religion, but that some of the Tewaifs do embrace that religion.

The written statement also does not admit that a Tewaif is necessarily a Muhammadan. Paragraph 13 of the written statement implies that in order to be a Muhammadan a Tewaif has to be converted to that religion.

Reliance has been placed upon the following passage in the judgment of the learned Judicial Commissioner :—

> "nor is the evidence very satisfactory that all the daughters of Jaimangal Ram and Kishun Dayal had married before the death of their father and some of them must have been Tewaifs as they had Muhammadan names."

This does not mean that all Tewaifs are Muhammadan, but that the Muhammadan names indicate that they must have carried on the profession of Tewaifs, that is, of dancing and singing. Such a proposition as is stated by Mr. Jayaswal that Beni Ram and his grandfather Jaimangal Ram must have been Muhammadans as they were born of a Muhammadan mother Rai Kuer Tewaif is of so great an importance in determining the status of Beni Ram and the law of succession applicable to him, that it could not have been lost sight of and omitted from the plaint. It was not only important but essential and is expressly required by the rules of pleading to be clearly and distinctly stated. Far from stating that Beni Ram was a Muhammadan, the aforesaid passage implies that even when the Tewaifs of the family embrace the Muhammadan religion, their children born in the state of prostitution live with their Hindu fathers and brothers as Hindus.

Now, assuming for the sake of argument that the word "Tewaif" necessarily implies conversion to Muhammadanism, there is nothing to show when the mother of Jaimangal became a Tewaif. It may be that she adopted the profession of Tewaif, that is, of singing and dancing, after the birth of Jaimangal. In that case, Jaimangal will not be a Muhammadan by birth.

Now, Jaimangal had brothers and uncles shown in the pedigree, and their ancestors have Hindu names : Ganga Ram and Basan Ram. Applying the principles stated in the aforesaid passage of the plaint, Jaimangal must have lived with his Hindu father and brother as Hindu and it is not expressly stated that he deviated from the aforesaid custom and became a Muhammadan.

The pedigree attached to the lower Appellate Court's judgment makes a distinction between the Hindu and the Muhammadan members of the family by describing them as such. This pedigree, the learned Judicial Commissioner says, was prepared by him in accordance with the evidence in the case.

In the plaint it is nowhere stated that Beni Ram was governed by any law other than the Hindu law. On the other hand, it assumes in the passage quoted above as well as in paragraph 14 that the family is governed by the Hindu Law of *Mitakshara* including the rule of survivorship subject to the special customs set fourth in the plaint as exceptions to the Hindu Law giving right of succession to the daughters equally with the sons.

The defence in the written statement expressly asserted that the Hindu Naiks were governed by the Hindu Law of the *Mitakshara* School. The plaintiff did not refute it. On the other hand, he states in his deposition "The offsprings of these (Tewaifs embracing Muhammadan religion) will be and are recognized as Hindus. Their sons and unmarried daughters will live with their progenitors and maternal uncles and grandfather in the same mess and will be considered to be Hindus." He gives the definition of 'Tewaif' in the following words :—"Dancing and singing females are called Tewaifs", and does not say that they become Muhammadans. About his own mother, he says : "My mother named Jasoda (still alive) is a Tewaif lady who was in the keeping of Babu Padarath Singh . . . . . I am born of that connection. Mostly, the Tewaifs remain unmarried. Some remain in the keeping of Hindus, a still lesser number marry in Nikah" (Muhammadan form of marriage.)

Therefore, it is not necessary that Tewaifs must be Muhammadans. His mother is a Tewaif ; still he says "I am a Hindu. I would not dine with a Muhammadan."

About Beni Ram and his family, he says—

> Beni Ram was a Hindu ; so is Brij. Yes, Beni Ram's dead body was burnt. He died of plague. Brij performed his *Daswan* at the cost of Beni Ram..... *Garur Puran* was read at the *Daswan*. The ceremony was in every respect a Hindu one .....A Naik man or lady (not Tewaif) marries according to Hindu custom. *All Naik girls do not become Tewaifs.* Those who are trained by

their parents in their profession become Tewaifs. The wife of Beni Ram and the mother of Brij were sisters; that is the two brothers had married two sisters. They had not taken to the profession as they were not Tewaifs. *They remained like Hindus as they were Hindus.*"

Upon this evidence of the plaintiff it is futile to contend that Beni Ram was not a Hindu and that the succession to his estate would not be according to the Hindu Law. Even if they were not Hindus by birth, which does not appear to be the case, they called themselves Hindus, were recognized as Hindus for generations and governed themselves by the Hindu rules of birth, death and succession. The learned Judicial Commissioner was, therefore, right in not accepting the contention that the Hindu Law should not be applied to the Naiks unless special custom to the contrary was established. No issue was raised nor any suggestion made in the trial Court that the ordinary Hindu Law is inapplicable to the parties. Therefore, the plea now taken is not admissible; vide *Azhimanila Veettil Kannu Pillai* v. *Kayinari Gopalan Nair* (1).

On appeal, as appears from the judgment of the learned Judicial Commissioner, the contention for the first time was raised that the "Naiks were not a Hindu community but so mixed in their religion and so estranged from Hindu ideas of morality in their customs" particularly "where their daughters become Muhammadan prostitutes and the sons of these daughters are taken into the family of their nominal Hindu grand-parents again and are brought up as Hindus", that the applicability of the Hindu Law would be "repugnant to the sacred character of the Hindu Sastras."

This contention has not been accepted by the Court below, and Mr. Jayaswal repeats it strenuously in this Court. Mr. Manohar Lal, on the other hand, opposes it with equal vehemence.

The contention of Mr. Jayaswal has raised important questions as to what the Hindu Law is and to whom that law is applicable.

(1) 26 Ind. Cas. 337; (1914) M. W. N. 888.

Before I proceed to describe what is now known as the Hindu Law, some references to the primitive law-giver Manu may be useful.

After giving the metaphysical process of the evolution of the universe and the creation of men by the self-originated deity Brahma, Manu says:

"For the preservation of all this creation, He of great effulgence, laid down separate duties for those originated from his mouth (Brahmanas), from His arms (Kshatriyas), from His thighs (Vaisyas), and from His legs (Sudras). Manu, Chapter I, Sloka 87)."

The study of Vedas and the performance of sacrifices were assigned to the Brahmanas, the protection of the people and performance of sacrifices to the Kshatriyas, the rearing of wealth by merchandise, money-lending, agriculture, etc., to the Vaisyas, and service to the Sudras: (Manu Chapter I, Slokas 89 to 91). These duties would seem to be exhaustive for all civil and religious purposes and, therefore, he says "Conduct is the highest virtue, as inculcated by the Smriti and the Sruti (Vedas)," (Manu Chapter I, slokas 107 and 108) and exhaustively deals with the rules of conduct and the duties of citizenship in allaspects which govern the four social orders of humanity.

Among others he lays down the laws of punishments and penances for dereliction of duties, the law relating to debts and properties and rules for the administration of those laws by Kings. These laws and rules, according to Manu, were laid down for the whole humanity. In Chapter 11, slokas 17 to 22, he describes certain tracts in India and names them in order of sanctity for the performance of sacrifices and religious ceremonies by reason of the course of conduct followed from generation to generation both among twice born and the mixed castes, Brahmavartam (the land of the Brahmarshis), Madhyadesa (central country), and Aryavarta (the country of the Aryans). Then, in Sloka 23 he says that the tract of land in which black antelopes are found to roam about in nature should be considered as the land fit for performing sacrifices; and the rest is to be considered as Mlechchas Desha. In Sloka 24 he says that the twice-born should live in these tracts, and

a Sudra may live anywhere in the world where he can find his living.

The laws laid down by Manu would appear to be applicable to the people inhabiting India and the rest of the world, for he permits the Sudras to live anywhere in the world they like and restricts the tracts of sanctity to the twice-born only.

Again, the religious rites and ceremonies can be performed in any country where black antelopes are found to roam about and these necessarily need not be confined to India.

The primary sources of all laws governing the civil conduct and religious ceremonies are the Srutis or the Vedas which have their origin in the Creator Himself and consequently govern the whole mankind, as expressly stated by Manu in Chapter 1, Sloka 87, that these duties were enjoined by the Creator for "the preservation of all "His creation."

The Institutes of Manu and other sages enumerated in Yajnawalkya, Sloka 4 of Chapter 1, called the Smritis, lay down rules for the purpose of regulating the conduct of the whole mankind.

Then grew a large number of Commentaries, the different parts of the countries accepted the authority of the different commentators, thus giving rise to the different Schools, such as, Benares, Mithila, Bengal, etc.

Besides these, the usages and customs determined by the course of conduct of men from generation to generation were declared to be binding, and the King was enjoyed to administer them: (Manu, Chapter I, sloka 108; Chapter II, sloka 18; Chapter VIII; sloka 3).

Thus, the Srutis and Smritis with their Commentaries and supplemented by recognised customs and usages constitute the moral law as well as the municipal and positive laws (for in ancient jurisprudence there was no difference between the two) regulating the civil conduct of men as well as the performance of religious ceremonies. These laws applied to all classes of men.

When the country passed into the hands of the Muhammadans and the Muhammadan Government was established, they did not interfere with the internal affairs of the country, [illegible]w of the Sruitis and the Smritis modified by recognised customs remained unaffected.

On the advent of the British, with a view to preserve the personal law and customs of each and everyone of the diverse races inhabiting India, the preamble to 21 Geo., Ch. 70 stated that the inhabitants of the country should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges: while the Act provided that inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party shall be determined in the case of Muhammadans by the laws and usages of Muhammadans, and in the case of Gentus by the laws and usages of Gentus. The Charters of the several High Courts and the Civil Courts Acts declared that in cases relating to marriage, succession, etc., the "Hindu Law" shall apply to the Hindus and the "Muhammadan Law" to the Muhammandans.

The words "Hindu", "Hindu religion" "Hindu Law" are not to be found in any of the Sastras. The word 'Hindu' is supposed to be derived from the word "Indus" or "Sindhu" and was used by the Muhammadans to designate the people living to the east of the river Indus and generally all the inhabitants of India which in itself is a modification of the word "Indus." Accepting this significance of the words, the British Legislature recognised two laws, and only two laws, governing the people of the country, namely, the Muhammadan Law and the Hindu Law. Therefore, the words "Hindu" and "Hindu Law" which occur in the legislative enactments referred to above, would apply to all the people who are not Muhammadans. In order to make the Hindu Law exhaustive and applicable to the diverse sects and communities whether following the Brahmanical religion or not the special customs and usages of the several communities were declared to be binding. In the case of *Collector of Madura* v. *Muthu Rama linga Sattupathi* (2) their Lordships of the Judicial Committee observe:

> "The duty, therefore, of an European Judge who is under the obligation to adminster Hindu Law, is not so much to inquire

(2) 10 W. R. 17 (P. C.); 1 B. L. R. 1; 12 M. I. A. 397; 2 Suther 195; 2 Sar. P. C. J. 361.

whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanction by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

This is in accordance with what Manu ordains that immemorial custom is the transcendent law approved in the sacred scripture and in the code of divine legislators, and directs kings to observe the rules drawn from local usages. Therefore the Hindu Law as laid down in the aforesaid authority is the law of the Srutis and Smritis and the approved customs and usages of the various people inhabiting the country.

The Muhammadans brought their own personal laws and chose to be governed by those laws. The Srutis and Smritis recognise the laws of a particular class of people, and indeed every community has a right to be governed by its own recognised usages and customs. The same would apply to other communities inhabiting India or coming from outside who choose to be governed by their own laws. But those who have not expressly so chosen to be governed by particular rules of their own in the shape of usages and customs, will be governed by the comprehensive laws of the Srutis and Smritis which apply to all people.

The law of Succession and Inheritance found in Chapter IX of Manu and in Chapter II of Yajnawalkya, the different commentaries of which have given rise to the different Schools of Hindu Law in the country, as observed above, apply to persons who follow the religious rules as well as to those who do not follow the religious rules of the Srutis and the Smritis. The religious rites are dealt with in different chapters from those relating to rules of succession, and even those who fall off from religion and are outcaste are governed by the rules of succession to property. Similarly, the rules relating to crimes dealt with in the Srutis and Smritis are applicable to all irrespective of whether they follow the religious rites or not, for criminals having no religion or having lost or abandoned their religion were equally amenable to those laws. Therefore, even those who abandon the religion of the Srutis and Smrities and do not adopt another religion signifying thereby their intention to adopt the laws of succession of the community following the religion newly adopted, will be governed by the Hindu Law. The word "Hindu" was applied by the Muhammadans not only to those who followed the religion of the Srutis and Smritis but to all people who lived to the East of the river Indus now India. Therefore, it was a local name given to the people inhabiting the said locality regardless of what their religion was.

The Srutis and Smritis recognise freedom of choice both in religion as well as in law, and do not make the one dependent upon the other, though the profession or adoption of or conversion to a religion may raise a presumption of the intention to be governed by the laws regulating the community which generally follows that religion. The judicial decisions, some of which will be noticed presently, have from time to time recognised this.

Therefore, I would answer the question raised by Mr. Jayaswal that the Hjndu Law as now understood is the law of the Srutis and Smritis including the recognised customs as administered and interpreted in the light of judicial decisions and the said law is applicable to all who have not adopted some other personal laws of their own.

The question then is whether the Naiks whose daughters become Muhammadans and the sons of those daughters are taken in the family of their Hindu grand-parents and are brought up as such are governed by the Hindu law or not. In order to answer this, I would again revert to Manu. He deals with different kinds of marriages no less than eight which exhaust all conceivable forms of marriages from almost promiscuity to a lawful marriage. In Chapter X he deals with offsprings from lawfully married wives belonging to their respective social orders or castes and those belonging to different castes, lower and higher; and assigns to them their respective places in the social order and their denominations, such as, Suta, M'agadhas, Vaidehas, Ayogyas, Kshattas, Chandals. These he calls hybrid castes, and deals with the offsprings produced through intermarriages among these hybrid castes. In this way he divides men into castes and sub-castes, high and low, and thus exhausts all classes of

men, Aryans, non-Aryans, Yogyas and Ayogyas, Dasyyas-Mlechchhas—whether they speak the Aryan or non-Aryan tongue—even those who renounce the religious rites. He also prescribes rules, penances and *yogas* for the purification of the low and hybrid castes, thus gaining higher status in society. It is well-known that Vishwamitra, a Kshatriya by caste, attained the status of a Brahman and became Brahmarishi.

In Slokas 43 to 45 of Chapter X Manu describes the hybrid castes as follows :—

"The following Kshatriya castes, through the extinction, (non-performances) of their proper religious rites and on account of not seeing (*i.e.*, in the absence of their contact with) Brahmans, have been degraded to the Sudra caste in this world."

"(They are) the Paundrakas, Andras, Dravidas, Kamvojas, Javanas, Sakas, Parandas, Pandavas, Chinas, Kiratas, Daradas, Khashas (Kshatriyas of these countries have become Sudras for having renounced the "religious rites.)"

"Members of castes, respectively originated "from the face, arms, thighs and legs of "Brahman, (*i. e.*, Brahmaha, Kshatriya, Vaisya and Sudra) "who have been comprised outside the pale "of these four castes for the extinction of "their religious rites, are all called Dasyus, "whether they speak an Aryan or a non-Aryan "(Mlechchha) tongue".

The same is the view of Haribansha, Chapter 22, Sloka 123.

Pandyas, Keralas, Kolas and Cholas were all descendants of the Kshatriyas, but on account of their wicked character they were outcasted by the kind named Sagar (that is, they were degraded from Kshatriya caste to Sudra Caste, the full story of which is to be found in Chapter XIV).

Hemchandra would include Malas, Billas and Kirates into Mlechchha caste, among whom are numerous classes of people, such as washermen, chamars, dusadhs, Mallahas, Medas and Billas, etc., (Prayashchittatattvam, Parassar Paddhati).

According to Matsya Purana Chapter 34, the Yavanas were the descendants of Turvasu and the Mlechchhas were the descendants of any the sons of king Yayati.

According to Brahmavaivarta Purana, Prakriti Khanda, Chapter 28, a woman having one husband is called Patibrata. having two husbands Kulata, having three husbands Brihali, having four Punschali, having five to six husbands Vesya, having seven to eight Yungi, and having more than eight husbands Maha Vesya, in all castes. These Vesyas and Maha Vesyas were considered to be so low as not to be touched. Thus we get here a class of women who almost led the life of prostitutes.

Reverting to Manu we find a class of women as attendants of the Gods who were supposed to be the creations of the superior kind of activity or rajas. They are called Gandharvas, Guhyakas, Yakshas and Apsaras. Says Manu.

"Births as Gandharvas, Guhyakas, Yakshas, attendants of the Gods, and Apsarasas are the effects of the superior kind of Rajas".

The Dasis and female courtesans and attendants so prevalent in the country trace their descent from Gandharvas and Apsarasas of the Gods referred to in Manu. They began to be called Ghandarvas or Vesyas.

Vatsyayana in his Kamasutra, book VI, Chapter 7 (written in about 300 B. C. the period of Nand Mauryan Dynasties) mentions nine classes of courtesans or Vesyas :—

1. Kumbhadasi—a low class of courtesans.

2. Paricharika—a servant woman that has become a concubine to her master.

3. Kulata—one who though having husband, misconducts herself with others.

4. Saviarini—a bold self-willed woman who misconducts herself in defiance of her husband.

5. Nati—one who ostensibly follows the profession of an actress but at the same time carries on love intrigues with others.

6. Silpakarika—one who ostensibly engaged in some handicraft, etc., but secretly carries on amourous intrigues.

7. Parakasavinasta—a public spoiled woman.

8. Rupajiva—one trading on her good looks

i.e., her beautiful person, lending herself to men for enjoyment in return of their money, and

9. Ganika—an honourable class of courtesans having some rules of conduct.

The Naik or Naikin sect in the present case would probably come in class 5 referred to above, or at any rate in one of the classes mentioned above. The Vesya caste came to be regarded as a distinct caste of Hindus.

Now Yajnawalkya, while dealing with adultery and punishment for the same in Chapter II, Sloka 290, says—

"(A king) should inflict the highest form of pecuniary punishment (upon a person) who carries away a maiden of the same caste, adorned (for marriage); in ordinary cases the lowest form of pecuniary punishment should be his penalty. (In the case of carrying away) a maiden of a higher caste, sentence of death is laid down by law."

Commenting upon the aforesaid Sloka of Yajnawalkya, Vijnesvar would include the Vesya caste in the word—

He says: The Vesya caste which follows the profession of prostitution with men of equal or higher caste is from the beginning of the world like the four caste, of Brahmanas, Kshatriyas, Vaisyas, and Sudras. In the Skanda Purana it is found that the Vesya caste is the descent of a divine nymph named Panchahuda and it is a fifth caste.

It is needless to pursue the subject further, for we find that, apart from Manu and other authorities, the class of dancing girls and prostitutes have been recognised as a caste like the four castes—whether they are to be regarded as a fifth caste or included in the residuary caste of Sudra as Manu would have it. They, the Vesyas, exist among the Hindus. They will therefore, be governed in matters of succession by the rules laid down in the *Mitakshara*. If these professional women are governed by the Hindu Law the Naiks, that is, their parents, would be much more governed by the Hindu Law. It is not necessary to find out whether they were the aboriginal races of the country or were the Aryans or non-Aryans in their origin, for the Hindu Law will apply not only to the Aryan settlers and such aboriginal races as have been completely absorbed in the Aryan community but also to the descendants of the original tribes who more or less avoided the complete conversion to the Brahmanical religion.

Sir Gurudas Banerji, in his Tagore Law Lectures, recognised that the class of dancing girls and prostitutes has found place in the Hindu community in spite of their existence being repugnant to the high standard of morality set up by the Sastras.

The Smritis have, however, regarded them as a degraded class of people, and have condemned and prescribed punishments also for persons carrying intrigues with them but in the nature of things the class has existed. Therefore, the Smritis had to provide rules of inheritance and succession for them and their off-springs, as they must necessarily hold and inherit properties. Therefore, it cannot be said that their existence was in any way encouraged; on the other hand, it was condemned. The laws have, however, to provide for every class of persons.

In the case of *Rani Bhugwan Koer* v. *Bose* (3), it was observed that there are various sects of importance, such as the Buddhists, the Jains, the Brahmos and the Sikhs who have entirely repudiated Brahmanism and to them the Hindu Law applies as much as to those who accept the authority of the Vedas. In that case their Lordships observe that the legislative provisions requiring Hindus to be governed by the Hindu Law came in course of time to be applied to various religious bodies in India which at various periods and under various circumstances developed out of or split off from the Hindu system but whose members have nevertheless continued to live under the Hindu law, and in dealing with them "the Courts have always put a liberal construction upon the enactments by which the Muhammadans and the Hindus were secured in the enjoyment of their own laws."

The Hindu Law has been held to apply to a considerable portion of the population of the Madras Presidency, the Central India and the hill tribes of the various parts of India. Their customs and religion differ widely from those of the Hindus properly so called. They have no Codes of Law, but in some instances they

(3) 30 I. A. 249; 31 C. 11; 7 C. W. N. 895; 5 Bom. L. R. 845; 18 M. L. J. 38; 84 P. R. 1903; 135 P. L. R. 1903; 8 Sar. P. C. J. 548 (P.C.).

have adopted much that is Hindu in their customs and religion, and some of these perhaps, such as Kooh and others have been described by Dalton as the Hinduised aborigines of India. These semi-Hindu races have been sometimes regarded as Hindus and, therefore, subject to Hindu Law, for instance, the Jats, *Bhagwani* v. *Khushi Ram* (4), the Dubias, *Shaik Ibrahim Rowther* v. *Muhammad Ibrahim Rowther* (5), and the Chetties, *Azhimanila Veettil Kannu Pillai* v. *Kayinari Gopalan Nair*, etc. (1)

Dr. Gour in his Law of Transfer in British India, Volume I, pages 28 and 29, says—

> "Although the term 'Hindu' is properly understood to comprise only such people as follow the Hindu religion, or rather its ceremonial observances, a wider class of people are subject to Hindu Law. And while it may truly be said of a Hindu, *nascitur non fit*' he is born, (not made) still it is often difficult to reconcile the juristic conception of the term with its popular notion."

Trevelyan on Hindu Law says the expression 'Hindus' includes not only the persons who profess what is called the Hindu religion, but also such of their descendants as have not openly abjured that religion.

Mr. Justice Tudball of the Allahabad High Court in *Mussammat Bhagwani* v. *Khushi Ram* (4) applies the Hindu Law to the case of Jats on the ground that whatever the origin of the Jats may be, whether they were aborigines of the country or whether of Aryan origin, they are and always have been held to be Hindus and Hindu Law has always been applied to them except where customs have been established at variance with the Hindu Law.

It is, therefore, not necessary in the present case to find out whether the Naiks family in question were originally aborigines or Aryans. They were Hindus and are called such and for aught that is known they were originally Hindus.

(4) 24 Ind. Cas. 982.
(5) 30 Ind. Cas. 806; 39 M. 664; 29 M. L. J. 768; (1915) M. W. N. 866.

The Hindu Law has been applied to dissenters and non-conformists and to those who have ceased to conform to the rules of Hindu Law.

The argument of Mr. Jayaswal is that the Hindu Law should not apply to the girls of the family because they adopted the profession of dancing and became prostitutes. It may be repugnant to the ideas of morality, yet it does not cause exclusion from succession, *Hiri Lal Singha* v. *Tripura Charan Ray* (6), *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (7), *Subbaratna Mudali* v. *Balakrihnaswami Naidu* (8) and *Muthusami Mudaliar* v. *Masilamany* (9). This contention of Mr. Jayaswal must, therefore, fail.

Mr. Jayaswal then relies upon the case of *Abraham* v. *Abraham* (10), *Jowala Buksh* v. *Dheru Singh* alias *Imdad Ali Khan* (11), and *Ujijara* v. *Tilochan Gond*, (12) and various other authorities which hold that upon apostacy from Hindu religion which takes the form of conversion to another religion, the convert ceases to be governed by the Hindu Law except on proof of a well established custom to the contrary. These cases do not apply to the present case, inasmuch as Beni Ram or his ancestors were never converted to Muhammadanism. They continued to be Hindus according to the case of the plaintiff himself and to observe all the Hindu rites and ceremonies. They must, therefore, be governed by the Hindu Law.

The plea that Hindu Law is inapplicable to them was never taken in a definite form and cannot, therefore, be now admitted.

I need not refer in detail to the other authorities referred to at the Bar.

In my opinion it has not been shown by the plaintiff that the parties in this case were governed by any law other than the Hindu Law

(6) 19 Ind. 129; 40 C. 650; 17 C. L. J. 488; 17 C. W. N. 679.
(7) 2 M. H. C. R. 56.
(8) 41 Ind. Cas 408; 22 M. L. T. 91; 6 L.W. 184; 38 M. L. J. 207; (1917) M. W. N. 569.
(9) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. J. 17; 20 M. L. J. 49.
(10) 9 M. I. A. 195 at p. 196; 1 W. R. P. C. 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.
(11) 10 M. I. A. 511 at p. 536; 2 Sar. P. C. J. 189; 19 E. R. 1066.
(12) 44 Ind. Cas. 435.

and unless the plaintiff shows that, the Hindu Lal must apply to them.

Now the branch of the Hindu Law applicable is the *Mitakshara*. If Beni Ram died while joint with his nephew defendant No. 2 Brij Behari as a member of a joint *Mitakshara* family, the defendant No. 2 Brij Behari will succeed to the exclusion of the daughters of Beni Ram. On the other hand if Beni Ram was a separated member, his daughters would succeed.

It has, however, been urged by Mr. Manohar Lal that the daughters of Beni Ram Bhagvari Bibi and Dhan Bibi (defendant No. 1) became prostitutes and adopted Muhammadanism. Therefore, they cannot succeed. Both these grounds seem to be untenable.

Now, the Hindu Law of *Mitakshara*, as distinguished from *Dayabhag*, does not require that an unchaste or immoral daughter should not succeed Such a condition is laid down in the case of widows, but not in the case of a daughter. Catyayana says—"Let the widow succeed to her husband's wealth provided she be chaste and in default of her, let the daughters inherit if unmarried" so also Brahaspati and Manu, vide *Mitakshara*, Chapter II, section 2, pl. 2. The point has been fully discussed in *Advayappa* v. *Rudraya* (13).

Now, the second ground based upon the conversion of the daughters to Muhammadanism is not tenable in face of the statutory provision contained in the Caste Disabilities Removal Act, XXI of 1850. This Act extended the provision of section 9 of Regulation VII of 1832 which applied to Bengal throughout the territories subject to the Government of the East India Company. It says—"So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

(13) 4 B. 104 ; 4 Ind. Jur. 680; 2 Ind. Dec (N. S) 579.

The Legislature has virtually set aside the provisions of the Hindu Law which penalise the renunciation of a religion or exclusion from caste.

Mr. Manohar Lal contended that the conversion in this case took place before the death of Beni Ram and, therefore, before the succesession opened. There is no substance in this contention. The section is clear upon the point. It repeals any law or usage which inflicts upon any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion or religon or being deprived of caste. Therefore, a convert or an outcaste retains his right of inheritance whether the right occurs before or after the conversion to another religion or exclusion from caste ; vide *Khuni Lal versus Kunwar Gobinda Krishna Narain*. (14)

Reference has been made to the *Mitakshara*, Chapter II, section 10, pl. 1, 2, and 3, and to Manu, Chapter IX, 201 and 202, where he says that, among others, a Patit or degraded person shall not take any share in the paternal property and a person "addicted to vice" shall be excluded from succession. Now, by pl. 8 of section 10 of Chapter II, the above rule is made applicable to the case of females also. A man now-a-days cannot be disqualified from succession by reason of incontinence *sub nomine vice*. Therefore, a woman also cannot be so disqualified. Whatever be the rule of the Hindu Law, the operation of that rule has been excluded by the aforesaid Statute, so that no longer unchastity or exclusion from caste by reason of conversion would entail forfeiture in right of inheritance. Therefore, the contention of Mr. Manohar Lal must be overruled.

Bhagwari Bibi and Dhan Bibi (defendant No. 1) would not be excluded because of their having adopted the profession of dancing and singing or having become prostitutes, or having adopted Muhammadan religion, provided Beni Ram was separate from his nephew Brij Behari.

(14) 10 Ind. 477 ; 38 A. 356 ; 38 I. A. 87 ; 15 C. W. N 545 ; 8 A. L. J. 552 ; 13 C. L. 575 ; 18 Bom L. R. 427 ; 10 M. L. J. 25 ; (1911) 1 M. W. N. 432 ; 21 M. L. J. 645 (P. C.).

RAM PARGASH SINGH *v.* DHAN BIBI

We are not concerned in this case with the succession to property of the dancing girls Bhagwari Bibi and Dhan Bibi, and consequently I do not propose here to discuss the authorities of the Bombay and the Madras Courts relative to the succession of Naikins (professional dancing girls or prostitutes): *Java Madav Kalavant* v. *Manjunath Tai Chandu*, (15) *Kamakshi* v. *Nagarathnam*, (16) and several other similar authorities cited at the Bar. They are, however, important to show that, in spite of their having adopted the profession of dancing girls and having become prostitutes, the succession was governed by the Hindu Law, and the rule enunciated by Manu "to the nearest *sapinda* the inheritance belongs" was applied.

The question then is whether Beni Ram was joint with Brij Behari, or was separate from him.

This question was decided by the Munsif upon an appreciation of the evidence in the case. He held that Beni Ram and Brij Behari were joint members of a *Mitakshara* Hindu family and that the former died while so joint with Brij Behari. Mr. Jayaswal, however, urges that the lower Appellate Court has not validly disposed of this point.

The learned Judicial Commissioner says further it is not satisfactorily proved that defendant No. 2 was separate from Beni Ram in 1907 at the time of the latter's death. It is proved that he was a posthumus son of his father Ragho, and there is evidence that Beni and Ragho, were joint up to the time of Ragho's death at any rate. The evidence of P. W. 6 has been recorded as follows :— 'Brij Behari, defendant No. 2, Ragho and Beni were joint till the death of the latter. Beni Ram was their Karta'. This must be taken to mean up to the death of Beni Ram, as defendant No. 2 was born after the death of Ragho.

In order to understand the aforesaid finding it must be remembered that Beni Ram, Ragho and Lalji where three brothers. Brij Behari is son of Bogho. Lalji became a Muhammadan. He dropped out of the joint family and became separate. Therefore, the evidence of P. W. 6 quoted above would mean that the remaining members of the family, namely, Beni and Ragho and Ragho's son Briji Behari (defendant No. 2) continued to remain joint. Brij Behari was the posthumus son of Rhago. Therefore, the Court below says that the statement of P. W. 6 means that Beni and Brij Behari remained joint up to the death of the former in 1907. The Court, therefore, finds that Brij (defendant No. 2) continued to be the joint member of the family after Lalji ceased to be so on account of his conversion, for his name is not mentioned by P. W. 6 as a member of the joint family.

The share of the three brothers Lalji, Beni and Ragho, was 5-annas 4-pies each. Mr. Jayaswal contends that after Lalji's conversion there was a disruption of the entire joint family and all the members must be deemed to be separate unless the re-union was established, the *onus* of which was upon the defendant. This is so as is now settled by the authorities ; for instance vide *Bala Bux* v. *Rukhmabai* (17). Therefore the *onus* of proving jointness or reunion was upon the defendant. It depends upon the circumstances of each case what amount of evidence is required to discharge this *onus*. In the present case the evidence of P. W. 6 was taken as sufficient by the Court below to prove the continuity of the jointness of Ragho and Beni inspite of the separation of Lalji. The Court says that there is evidence that Beni and Ragho were joint at the time of Ragho's death. The Munsif has detailed that evidence. The learned Judicial Commissioner's finding is, therefore, based upon evidence. It is true that the learned Judicial Commissioner's statement that it is not satisfactorily proved that defendant No. 2 was separate from Beni Ram in 1907 at the time of the latter's death may resonably give rise to the contention of Mr. Jayaswal that he had misplaced the *onus*, but considering the fact that he has referred to the evidence upon which he based his conclusion that Beni Ram, Ragho and Brij Behari were members of a joint family and that Beni and Brij Behari continued to be joint up to the death of Beni Ram, the question of *onus* does not become important.

(15) 40 Ind. Cas. 78 ; 19 Bom. L. R. 320.
(16) 5 M. H. C. R. 161.

(17) 30 C. 725 ; 30 I. A. 180 ; 7 C. W. N. 642 ; 5 Bom. L. R. 469 ; 8 Sar. P. C. J. 470 (P. C.)

It is also true that when one member drops out, there is no presumption that the others reunited. It is equally true that in such a case much evidence may not be required to prove reunion or continuity of jointness as regards the rest of the members of the family.

Considering all these circumstances in the case and also the clear finding of the Munsif, we do not think that sufficient ground has been made out in the present case to remand the case to the Court below for reconsideration of the question.

It has, however, been urged that the Court below has not considered an important document bearing on the point, namely, Exhibit 2, a partition *Khasra*.

Now, Exhibit 2 has been referred to in the earlier part of the judgment of the Court below. We have looked into that document. It does not prove partition and that may be the reason that it was not relied upon by the appellant in the Court below for the purpose of proving separation and also for the Court below not referring to it while dealing with the question of jointness and separation. The contention of Mr. Jayaswal must, therefore, be overruled.

The plaintiff, according to the finding of both the Courts below, has failed to prove that Dhan Bibi and Bhagvari Bibi succeeded to the property of Beni Ram.

It may be mentioned here that in 1907 when Beni Ram died, his widow Misran Kuer was alive, and even if Beni Ram was separate she succeeded in preference to the daughters Bhagvari Bibi and Dhan Bibi. Brij Behari executed a deed whereby he gave the property to Misran Kuer with a reversion to Kewal, defendant No. 3, son of Dhan Bibi. Misran Kuer, according to the finding of the Munsif, lived till after the termination of the execution proceedings taken out by the plaintiff. Therefore, when the plaintiff took mortgage of the property from the daughters of Beni Ram, Dhan Bibi and Bhagvari Bibi, they had not inherited the property, nor had they inherited even at the time when he obtained the money decree and attached the property in dispute. Therefore, they had no title in the property on the date when the cause of action is said to have arisen to him. Bhagvari Bibi died in 1908. Therefore, she never inherited the property. Dhan Bibi did not assert her right, if any, to the property in question: rather she allowed it to be taken by her son upon the basis of the deed executed by Brij Behari (defendant No 2). Dhan Bibi does not claim her right in the property, and the plaintiff cannot force her to assert her title in order to enable him to proceed against that property. She had, if any, a limited interest which she could relinquish in favour of the next reversioner, her son. She did renounce her inchoate right, if any, by letting her son take the property and have his name registered in the Land Registration Department.

The question of collusion was not gone into in the Court below and her renunciation cannot be questioned on that ground, and until the aforesaid deed executed by Brij Behari is set aside, the plaintiff cannot get a declaration in favour of Dahan Bibi.

For all these reasons the decision of the Court below is upheld and the appeal is dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 300 OF 1923.

January 9, 1924.

Present :—Mr. Justice Moti Sagar.

SIR GANGA RAM, KT.,—DEFENDANT —PETITIONER

versus

DUNI CHAND BHANDARI—PLAINTIFF —RESPONDENT.

Master and servant—Termination of service—Notice reasonable, what is

In the absence of an express agreement or established custom to the contrary, a contract of service is terminable by reasonable notice, and there is no authority for holding that a servant hired by the month is entitled to one month's notice Ordinarily, fifteen days' notice will be sufficient in such a case.

M. E. Moola v *K. C. Bose*, 33 Ind. Cas. 981 ; 9 Bur. L. J. 63 ; 8 L. B. R. 420 ; *David* v. *Superintendent St. Antony's High School*, 63 Ind. Cas. 982 ; 13 Bur. L. T. 168, relied on.

Petition under section 25 of the Provincial Small Cause Courts Act, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 15th March, 1923, decreeing the plaintiff's claim.

Lala *Kahan Chand*, for *Mehta Amin Chand*, for the Petitioner.

Lala *Gobind Ram Khanna*, for the Respondent.

JUDGMENT.—The sole question for determination in this case is whether the plaintiff is entitled to a month's salary in lieu of notice. The plaintiff was employed as a monthly servant in the defendant's Ice Factory on a salary of Rs. 60 *per mensem*. He went on one month's leave without pay on the 4th of June 1922 and on the 29th of June 1922 he was informed that his services would not be required after the expiry of his leave. The suit was based on a specific agreement that the plaintiff would be given one month's notice before his services were dispensed with. The Trial Court found that the specific agreement had not been established but that the plaintiff was entitled to a month's salary in lieu of a month's notice. The defendant has applied for revision against this order to this Court.

I agree with the learned Judge of the Court below in holding that the express agreement has not been proved, but I am unable to agree that the plaintiff as a monthly servant was entitled to a month's notice. The ordinary rule of law is that, in the absence of any express agreement or established custom to the contrary, the contract of service is terminable by reasonable notice. In section 106 of the Transfer of Property Act 15 days is given as the term of notice required to terminate a monthly tenancy. In *M. E. Moola* v. *K. C. Bose* (1) it was held that in the case of a clerk hired by the month, 15 days' notice was sufficient. In *David* v. *Superintendent, St. Anthony's High School* (2), it was held that there was no authority for holding that a servant paid by the month was entitled to a month's notice. Following the principle laid down in these authorities, I am of opinion that a 15 days' notice would have been quite sufficient in the present case and that as no such notice was given, plaintiff was entitled to 15 days' salary in lieu thereof.

I accept the revision and in modification of the order of the Court below pass a decree in plaintiff's favour against the defendant for Rs. 36 only which also includes 3 days' salary admittedly due for the month of June 1922. Parties shall bear their own costs in this Court.

Z. K. *Revision accepted.*

(1) 33 Ind. Cas. 981 ; 9 Bur. L. T. 63 ; 8 L. B. R. 420.

(2) 63 Ind. Cas. 982 , 13 Bur. L. T. 168, relied on.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 4 OF 1924.

April 1, 1924.

Present :—Mr. Kendall, A. J. C.

RAJA MUHAMMAD MAHDI ALI KHAN—PLAINTIFF—APPELLANT

versus

TAWAKKUL KHAN—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886) ss. 32 (A), 32 (B), 127—Suit to recover arrears of rent—Alternative claim for use and occupation—Duty of Court.

Plaintiff sued to recover arrears of rent from the defendant and based his claim on a *Kabuliat* alleged to have been executed by the defendant. In addition to the *Kabuliat* he sought to prove that the defendant had been paying rent to him as a tenant. His suit was dismissed by the lower Appellate Court on the ground that he had failed to prove the *Kabuliat*;

Held that the Court was bound to adjudicate on the alternative claim of the plaintiff that the defendant was in occupation of the land as plaintiff's tenant apart from the *Kabuliat* and had been paying rent to him

Jang Bahadur Singh v. *Ehsan Ali*, 5 O. C. 222 ; *Bindeshwari Prasad Singh* v. *Bigheshwar Singh*, 30 Ind. Cas. 499 ; 2 O. L. I. 383, distinguished.

Appeal against the decree of the District Judge, Fyzabad, dated 31st October 1923,

confirming decree of the Assistant Collector, 1st Class, Sultanpur, dated the 1st May 1923.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Bisheshwar Nath Srivastawa*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, who is the Taluqdar of Hasanpur, in the District of Sultanpur, sued the defendant for arrears of rent from 1326 to 1329F., at the rate of Rs. 225-6-0 per annum, on the allegation that the defendant had been in possession of about 40 *bighas* of land as a mere tenant. The defendant-respondent set up the defence that the land in question was his *sir*, that he paid no rent, and that he is not the tenant of the plaintiff. In the course of the pleadings, the plaintiff set up a *Kabuliat*, by which he attempted to prove the defendant's tenancy. The first Court rejected the *Kabuliat*, and this decision was upheld by the lower Appellate Court, so that there is no second appeal in regard to this document. Other issues which were framed by the first Court, raised questions of whether the defendant had ever paid rent as a mere tenant to the plaintiff, how much rent, if any, was in arrears, and whether there was any contract between the parties for the payment of rent. Some evidence was produced to show that there was a fixed rate of rent for the plots in suit, though a lower one than that claimed by the plaintiff on the basis of the *Kabuliat*, but the first Court concluded that no rent had been paid by the defendant, and that the entries in the Patwari's papers were not reliable. In his grounds of appeal to the lower Appellate Court, the appellant not only appealed against the decision rejecting the *Kabuliat*, but referred to the entries in the Patwari's papers. The lower Appellate Court agreed with the first Court in rejecting the *Kabuliat*, and refused to consider the other grounds of appeal, for the reason that the appellant ought not to be allowed to alter the nature of his suit, and obtain a decree for arrears of rent for use and occupation of the plots in suit. Against this decision the present appeal lies.

The learned Judge appears to me to have taken rather too strict a view of the law. He has referred to the decisions in *Jang Bahadur Singh* v. *Ehsan Ali* (1) and *Bindeshwari Prasad Singh* v. *Bisheshwar Singh* (2). Both these decisions, by the way, are previous in date to the amendment of the Oudh Rent Act enacted in 1923. The facts in *Jang Bahadur Singh* v. *Ehsan Ali* (1) were certainly distinguishable from those in the present case and the learned Judicial Commissioner stated in his judgment: "In order that a suit for use and occupation may be maintainable, one of the conditions which must be fulfilled is that the defendant is in possession intending to occupy as a tenant." This condition was not found to exist in that particular case. In *Bindeshwari Prasad Singh* v. *Bisheshwar Singh* (2), it was held that a Court cannot take action under section 127 of the Oudh Rent Act, in case the agreement to pay rent is not proved. In the present suit, it was the appellant's case that the defendant had agreed to pay rent. He relied, in the first place, on the *Kabuliat*, but in the event of his being able to prove that the defendant has actually been in possession of the plots in suit, and has actually paid rent to him for them as a tenant, he would at any rate be able to point to an implied agreement to pay rent, and to claim arrears of rent for any years in which rent had not been paid. There is certainly a finding by the first Court that rent has not been paid. The appellant challenged that finding in his grounds of appeal, and it was open to the lower Appellate Court either to uphold or to reverse that finding. If the lower Appellate Court had reversed that finding, the result would have been that, the relations of landlord and tenant would have been found to subsist between the parties, and in this case, I do not think that the case could have been dismissed on the technical ground that the plaintiff had, in the first place, relied on the *Kabuliat*. The appellant admits that if there were a definite finding that the defendant is not a mere tenant, but has some kind of proprietary right in the plots, the suit will have to be dismissed; but he complains that there is no such definite finding, and that he does not know where he stands. It is objected on behalf of the respondent, that the plaintiff-appellant did not sue under section 127 of the Oudh Rent Act, and that if he wanted to set up that case,

(1) 5 O. C. 222.

(2) 80 Ind. Cas. 499; 2 O L. J. 883.

he should have done so at the earliest possible moment; but it appears to me that the main question between the parties has, from the very beginning, been whether the relation of landlord and tenant subsists between them. The case set up in the plaint was that the defendant was a mere tenant. The defendant denied this, and claimed to have some kind of proprietary title. The plaintiff not only set up his *Kabuliat*, but attempted to prove that rent had been paid to him by the defendant. The case based on the *Kabuliat* has definitely failed, but there is, what seems to me, to be a perfectly legitimate alternate case, namely, that the defendant was in occupation of the land with the consent of the plaintiff, and had been paying rent to him, that he is, therefore, to be treated as a tenant, and whether the actual section of the Oudh Rent Act that is to be applied to the case is section 32 (A), section 32 (B) or section 127, it should be disposed of on its merits, and not on the technical ground taken by the learned Judge. The first Court has already come to a finding, namely, that no rent has been paid by the defendant to the plaintiff, and that the defendant had not been proved to be a tenant of the plaintiff. The appeal against this finding has not been decided by the District Judge. I, therefore, order that the suit be remanded to the lower Appellate Court under O. XLIII, r. 23 of Civil Procedure Code for a decision on this point. If the learned Judge comes to the conclusion that the defendant has been paying rent to the plaintiff, and is a tenant of his, he will be able to come to a further decision as to whether a decree for arrears of rent can be given to the plaintiff. If, on the other hand, he finds that the relationship of landlord and tenant has never existed between the parties, he will be able to dispose of the appeal on the basis of that finding, and the appellant will know in what position he is in in the event of his deciding to sue for any relief other than that claimed in the present suit. The appellant will receive costs of this appeal from the respondent.

Z. K. *Suit remanded.*

PATNA HIGH COURT.

MISCELLANEOUS APPEALS NOS. 82 AND 84 OF 1923.

March 11, 1924.

Present :—Mr. Justice Adami and Sir John Bucknill, Kt.

MISCELLANEOUS APPEAL NO. 82 OF 1923.

Musammat BHAGWANTA KOER AND ANOTHER—APPELLANTS

versus

Dewan ZAMIR AHMAD KHAN AND OTHERS—RESPONDENTS.

MISCELLANEOUS APPEAL NO. 84 OF 1923.

KESHORI RAMAN PRASAD AND ANOTHER—APPELLANTS

versus

ZAMIR AHMAD KHAN—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XXI, r. 16, O. XLV, r 15, whether mandatory—Assignment of decree—Notice—Judgment-debtor present in Court, effect of—Transmission of order in Council to lower Courts, application for, failure to make, effect of—Limitation Act (IX of 1908) Sch. I, Arts. 182 (5), 183—Mortgage suit Preliminary decree passed by Privy Council—Final decree by Court in India—Execution of decree—Limitation applicable—Dismissal of application—Continuation—Step-in-aid of application—Limitation, commencement of.

Under Article 182 (5) of Schedule I to the Limitation Act, time begins to run from the date when an application to take a step-in-aid of execution is made to the Court and not from the date on which the application is considered and disposed of by the Court. [p. 768, col. 2.]

Raj Behari Chakravarti v. *Kalibar Gupta*, 8 Ind. Cas. 336; 10 C. L. J. 479, *Mochai Mandal* v. *Meseruddin Mollah*, 9 Ind. Cas. 213; 13 C. L. J. 26, relied on.

Where an application for execution is struck off without any default on the part of the decree-holder, a subsequent application for execution must be treated as a continuation of the previous application and no question of limitation can arise. [p. 768, col. 2.]

The provisions of O. XXI, r. 16 of the Civil Procedure Code are of a mandatory character and noncompliance with them renders all proceedings in execution void. [p. 770, col. 1.]

Hussum Goolam Hussein v. *Dayabhai Amarsi*, 12 Ind. Cas. 547; 36 B. 58; 13 Bom. L. R. 978; *Gulsari*

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Lal v. *Daya Ram*, 9 A. 46 ; A. W. N. (1886) 287 ; 5 Ind. Dec. (N. S.) 461 ; *Natam Das* v *Lachman Singh*, 63 Ind. Cas. 884 ; 2 L. 230; 3 L. L. J. 431, relied on.

Where, however, it is shown that the judgment-debtors had notice of the application by being present when the petition for substitution was being considered by the Court, the mere fact that a written notice was not served on them will not nullify the proceedings. [p. 770, col. 1]

An application under O. XXI r. 16 of the Civil Procedure Code made during the pendency of execution proceedings is not an application for fresh execution but an application for the continuation of the pending execution case. [p. 769, col. 1.]

O. XXI, r. 16 of the Civil Procedure Code requires notice of the application for execution, and not of the assignment, to be given to the transferor and the judgment-debtor, and, therefore, where the assignee applies during the pendency of the execution case to continue it, he does not apply for fresh execution and no notice under the rule is necessary. [p. 769, col. 1.]

Where a preliminary decree in a mortgage-suit is passed by His Majesty in Council and a final decree is thereafter passed by the Courts in India, the decree to be executed is the order of His Majesty in Council and the execution of it is governed by Article 183 and not by Article 182 of schedule I to the Limitation Act.

Luchman Persad Singh v. *Kishen Persad Singh*, 8 C. 218 ; 4 Bom. L. R. 261 ; 10 C. L. R. 425 ; 1 Ind. Dec. (N. S.) 140 ; *Futteh Narain* v *Chandrabati*, 20 C. 581 ; 10 Ind. Dec. (N.S.) 373 ; *Tribukram Deo Narayan Singh* v. *Badri Misser*, 36 Ind. Cas. 633 ; 20 C. W. N. 1051 ; 1 P. L. J. 385 ; 2 P. L. W. 361, relied on.

Golab Kuer v. *Mohammad Zaffar Hussan*, 62 Ind. Cas. 30 ; 2 P. L. T. 619 ; 6 P. L. J. 358, followed.

The provisions of r. 15 of O. XLV of the Civil Procedure Code are mandatory and failure to comply with them renders an application for execution liable to dismissal. [p. 769, col. 2.]

Tribukram Deo Narayan Singh v. *Badri Misser*, 36 Ind. Cas. 633 ; 20 C. W. N. 1051 ; 1 P. L. J. 385 ; 2 P. L. W. 361, relied on.

Appeals from an order of the District Judge, Shahabad, dated the 19th February, 1923.

Messrs. *S. M. Mullick*, *Sambhu Saran*, and *Kaliaspati*, for the Appellants.

Messrs. *Naresh Ch. Sinha* and *D. N. Varma*, for the Respondents.

JUDGMENT.

Adami, J.—These appeals are directed against an order passed in execution proceedings by the District Judge of Shahabad disallowing certain objections raised by the judgment-debtors, the present appellants.

It appears that a decree was obtained against the appellants in a mortgage-suit on the 23rd October 1903. There was an appeal to this Court which was decided in 1906, and then an appeal to their Lordships of the Privy Council which was decided on the 26th November 1912. The final decree for the sale of the mortgaged properties following the decree of the Privy Council was passed on the 5th February 1916.

The original decree-holders, Lala Shamlanand Sahai, Babu Raghubir Saran and Babu Ganga Saran, each had a one-third interest in the decree. Execution of the decree was applied for on the 11th March 1916 by these decree-holders, and from that date onwards the proceedings followed the usual slow protracted course, every effort being made to delay the inevitable sale, till the 7th June 1919, when Lala Shamlanand Sahai filed a petition to the effect that he had sold his one-third share in the decree to Zamir Ahmad Khan, Neamat Khan, Mehdi Hussain Khan, Sayeed Khan and Babu Muhammad Khan, by a sale-deed dated the 5th June 1919, and prayed that these gentlemen should be substituted as decree-holders in his place. Another petition for substitution was made in respect of the one-third share originally belonging to Babu Ganga Saran, which had been sold to Zamir Ahmad Khan and others. Babu Raghubir Saran had already sold his share to Thakur Adit Prasad, and the latter had re-sold it to Zamir Ahmad Khan and others. On the 7th June 1919, the purchasers, Zamir Ahmad Khan and the other gentlemen named above together with Sadey Khan filed a petition to the effect that they had purchased the share of Lala Shyamlanand Sahai, and also the share of Ganga Saran which Ramnath Upadhya had previously purchased and the share of Babu Raghubir Saran which Thakur Adit Prasad had previously purchased, and had thus purchased the entire decree They prayed that they might be substituted as representatives of the decree holders and that execution proceedings might be duly taken.

On the above petitions order was passed that they should be put up on the date fixed, that is to say, the 14th June. On the 14th

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June order was passed: "Let the names of the purchasers be substituted for the original decree-holders. This execution proceeding will be struck off after making the purchasers parties, so that they may institute fresh proceedings in execution."

The assignees of the decree did not, however, make any fresh application for proceedings in execution until the 13th June, 1922, and when this application was made the present appellants, who are subsequent mortgagees of the properties, raised the objections, (1) that the assignees of the decrees who were seeking execution were mere *farzidars* of the judgment-debtors; (2) that the application was made more than three years after the last step-in-aid of execution was taken on the 7th June 1919, and was thus barred under Article 182 of the Schedule to the Limitation Act; (3) that if Article 183 applied, the proceedings were bad owing to non-compliance with the provisions of r. 15 of O. XLV of the Civil Procedure Code, and (4) that failure to issue the notices required by r. 16 of O. XXI vitiated the proceedings.

The learned District Judge found that the objectors had failed to show that the purchasers of the decree were *farzidars* of the judgment-debtors; (2) that the date from which time began to run under Article 182 was the 14th June 1919 and, therefore, the application on the 13th June 1922 was not barred, but that (3) Article 183 applied since the final decree was merely a ministerial act and the execution was really the enforcement of the order of His Majesty in Council, so no question of limitation arose in the case. He held that the objection with regard to non-compliance with rule 15 of Order XLV could not be now raised since no such objection had been made at the first application for execution, (4) with regard to the objection as to absence of notices under r. 16 of O. XXI the learned District Judge pointed out that the order for substitution was passed in the presence of the transferors and this objection not having been specifically taken in the pleadings no *onus* lay on the applicants for execution to show that the order was passed in the presence of the judgment debtors. Furthermore, the object of r. 16 of O. XXI was being carried out in the hearing and consideration of the objections before the Court. The District Judge, therefore, allowed the objections and it is against his order that this appeal has been made, the same legal objections being raised in this Court.

The finding of the learned District Judge that, if Article 182 of the Schedule to the Limitation Act applies, it must be held that the last step-in-aid of execution in this case was taken on June 14th 1919, and not on June 7th 1919, is, I think, wrong. Clause (5) to Article 182 states definitely that time is to run from the date of applying in accordance with law to the proper Court to take some step-in-aid of execution. The application was made on June 7th, though the order for substitution was made on June 14th. It has been laid down in the case of *Raj Behari Chakravarti* v. *Kalekar Gupta* (1), and in *Mochai Mundal* v. *Mesurudeen Mollah* (2), that in cases of this kind time runs from the date when an application is presented to the Court and not from the date on which the applications is considered and disposed of by the Court. Mr. Sushil Madhab Mullick's contention for the appellants on this point must be upheld; but the point is one of purely academic interest in this case, and cannot affect the decision of this appeal as I will proceed to show.

In the first place, I may note that, even if it were held that Article 182 applied in the present case and not Article 183, it would seem that execution proceedings to be taken on the application of June 13th, 1922, would be merely a continuation of the proceedings which resulted in the order of June 14th, 1919, and so would not be barred even if Article 182 applied. When the petitions for substitution of the transferees were filed on June 7th, 1919, and were granted on June 14th there was no reason why the execution should not have proceeded with the transferees substituted for the decree-holders; there was no necessity to strike off the execution proceedings. The proceedings were struck off without any default on the part of the decree-holders or their transferees. Under the circumstances, I am of opinion that the subsequent proceeding should be held to be in continuation of the previous one and the question of limitation

(1) 3 Ind. Cas. 886; 10 C. L. J. 479.
(2) 9 Ind. Cas. 213; 13 C. L. J. 26.

will not arise. In this opinion I am supported by the decision of this Court in the case of *Golab Kuer* v. *Mohammad Zaffar Hassan* (3), to which I was a party. There it was held that an application under O. XXI, r. 16 made during the pendency of execution proceedings was not an application for fresh execution but an application for the continuation of the pending execution case. Das, J, pointed out that O. XXI, r. 16 required notice of the application for execution, and not of the assignment, to be given to the transferor and judgment-debtor, and, therefore, when the assignee applies during the pendency of the execution case to continue it, he does not apply for fresh execution and no notice is required.

In the second place, the question is whether Article 182 applies or, as held by the District Judge, Article 183. The appellants have not placed before us the order of His Majesty in Council passed on appeal in 1912, so that we do not know its precise terms. We only know from the order of the District Judge that the final decree was passed by the District Judge in 1916 in accordance with the order of the Privy Council. The preliminary decree after the decision of their Lordships of the Privy Council was an order of His Majesty in Council, and, as pointed out by the learned District Judge, the preparation of the final decree was purely a ministerial act to enable the order of His Majesty in Council to be enforced. I do not think that it can be contended that the execution proceedings were not taken in order to enforce the order of His Majesty in Council. After a consideration of the decisions of the Calcutta High Court in *Lachmun Prasad Singh* v. *Kishun Persad Singh* (4), *Futteh Narain Chowdhury* v. *Chunchabati Chowdhrain* (5), and of this Court in *Tribukram Deo Narayan Singh* v. *Badri Missir* (6), there is no doubt left in my mind. It may be noted that the original decree was obtained in the District Judge's Court in a suit under the Transfer of Property Act.

Under Article 183 twelve years' limitation in this case would begin to run from the date of the order of His Majesty in Council; that is to say, from November 26th, 1912; so the application for execution which is now the subject of this appeal would be within time.

But Mr. Sushil Madhab Mullick has argued that the procedure laid down in r. 45 of O. XLV of the Civil Procedure Code has not been complied with; that is to say, no petition under that rule was filed before this Court to unable it to transmit the order of His Majesty in Council to the Court of the District Judge for execution, and that the provisions of r. 15, O. XLV, being mandatory, the present application for execution must be dismissed.

The contention that the provisions of r. 15 are mandatory, and failure to comply with them renders an application for execution liable to dismissal is not open to question. I need only refer to the case of *Tribukram Deo Narayan Singh* v. *Badri Missir* (6), cited above, but it is to be noted that in the present case application was made for execution on March 11th, 1916 and execution was ordered. No objection on the ground that the provisions of r. 15 of O. XLV had not been complied with was made then, nor at any time until the execution proceedings were struck off on June 14th, 1919, though countless objections on other grounds were constantly being put forward. We have no papers before us to show whether, in fact, a petition was filed and the procedure required by r. 15 of O. XLV was followed; all we know is that the order of His Majesty in Council must have been transmitted to the District Judge, for he proceeded to put it into execution.

I agree with the learned District Judge that the objection, first made at this late stage cannot be allowed to succeed; it ought to have been taken at the first application for execution which was made in 1916.

Mr. Sushil Madhab Mullick's third contention is that the application for execution ought to be dismissed because notices under O. XXI, r. 16 were not issued to the transferors and judgment-debtors, the provisions of that rule being mandatory. The decisions in *Hassun Goolam Hussein* v. *Dayabhai* (7), *Gulzari Lal* v. *Daya Ram* (8), and *Nolan Das*

(3) 62 Ind. Cas. 30; 2 P. L. T. 619; 6 P. L. J. 858.
(4) 8 C. 218; 4 Bom. L. R. 261; 10 C. L. R. 425; 4 Ind. Dec. (N.S.) 140.
(5) 20 C. 551; 10 Ind. Dec. (N.S.) 378.
(6) 36 Ind. Cas. 688; 20 C. W. N. 1051; 1 P. L. J. 885; P. L. W. 861.
(7) 12 Ind. Cas. 547; 36 B. 58; 13 Bom. L. R. 978.
(8) 9 A. 46; A. W. N. (1886) 287; 5 Ind. Dec (N. S.) 461.

v. *Luchman Singh* (9), are authorities for the proposition that the provisions of the rule are of a mandatory character and that non-compliance with them renders all proceedings in execution void. In the present case it is evident that the general necessity for such notice was known to the applicants for execution for in their application they stated: "The above purchasers were substituted for the original decree-holders in the previous execution case on 14th June, 1919 in the presence of all the parties. Hence, notice under O. XXI, r. 16, Civil Procedure Code, is not necessary".

That the transferors had notice cannot be gainsaid; they themselves filed petitions for substitution of the names of the purchasers. The judgment-debtors, too, were before the Court and must have had notice. The District Judge points out that the objection regarding O. XXI, r. 16 had not been specifically taken in the pleadings, and, therefore, there was no *onus* upon the applicants to show that the order of substitution was passed in the presence of judgment-debtors. It cannot be suggested that the judgment-debtors had no knowledge of the substitution made in the previous execution proceedings before the fresh application was made. In any case, the object of r. 16, namely, to give the judgment-debtors an opportunity to attack the substitution of assignees of the decree, has been fully met, for the present appellants put in their objection and it was considered before any further steps were taken towards the execution of the decree. If it is shown that the judgment-debtors had notice by being present when the petitions for substitution were being considered by the Court, the fact that written notice was not served on them will not nullify the proceedings.

To conclude the matter I may again refer to the decision of this Court in the case of *Golab Kuer* v. *Mohammad Jaffar Hasan* (3), where it was held that it is not notice of the assignment but notice of the application for execution of the decree which is required by the proviso to rule 16. In this case there is no donbt that notice of the fresh application was given to the appellants for they appeared and objected. Therefore, I cannot uphold the contention of Mr. Mullick.

(9) 68 Ind. Cas. 894; 2 L. 28; 3 L. J. 434.

On behalf of the judgment-debtors Nos. 12 and 13 Mr. Kailasapati has urged the same legal objections as were raised by Mr. Mullick and with which I have dealt, but he has a further objection with regard to the District Judge's finding on the question whether the respondents, purchasers of the decree, were *farzidars* of the judgment-debtors. He complains that his clients were not allowed time to secure the presence of some of their witnesses with regard to this question.

It appears from the order sheet that on July 22nd, 1922, these two judgment-debtors asked for time to file their objection, and obtained time till August 11th when their objection was filed. On October 25th the parties were directed to come ready with their witnesses on December 1st. On that date the present respondents were ready but an objector asked for time which was given, but it was ordered that no further adjournment costs would be allowed. On January 5th, 1923 the objectors filed lists of witnesses, who were to be summoned on deposit of diet expenses. The deposit was not made until January 25th when summonses were ordered to issue for February 16th. On the 16th February the objector's witnesses did not appear and the Court rejected their petition for more time and proceeded to hear the case. The petition for time on the 16th February stated that, in spite of service of summons, the witnesses had not come, and the petitioners heard that some witnesses were ill while others had gone to celebrate marriages. In my opinion the District Judge acted rightly in refusing further time; he had previously given warning to the objectors, and no good or sufficient reason was given for the absence of the witnesses. The original decree was passed in 1903 and the order on appeal to their Lordships of the Privy Council in 1912; it was plainly the duty of the Court to prevent the further protraction of the execution proceedings.

As a result of my findings on the points put forward by the appellants, the appeals must be dismissed with costs.

Bucknill, J.—I agree.

Z. K. *Appeals dismissed.*

ARJAN DAS v. NANAK CHAND

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 597 OF 1922.

January 9, 1924.

Present :—Mr. Justice Moti Sagar.

ARJAN DAS AND OTHERS—PLAINTIFFS —APPELLANTS

versus

NANAK CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 177—Amending Act XXVI of 1920—Death of defendant—Application to bring legal representatives on record—Limitation.

The words " six months " opposite to Art. 177 in Sch. I to the Limitation Act have not been altered by anything contained in Act XXVI of 1920 and the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still six months.

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

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Gurdaspur, dated the 4th November, 1921, rejecting the application for bringing the heirs of the deceased Bija Ram on the record as defendants in his place.

Lala *Mehr Chand Mahajan*, for the Appellants.

Nemo, for the Respondent.

JUDGMENT.—On the 17th of June, 1921 plaintiffs obtained an *ex-parte* decree for Rs. 6,940-against Nanak Chand-Bija Ram from the Court of the Senior Subordinate Judge at Gurdaspur. On the 30th of July 1921 the decree was put into execution and Bija Ram's property was attached. Thereupon, on the 30th of July 1921, Lakhu, a son of Bija Ram, made an application to the executing Court for the release of the attachment on the ground that Bija Ram had died on the 4th of April 1921, and that the decree against a dead person was a nullity. The plaintiffs denied that Bija Ram had died on the 4th of April 1921, as on the 21st of May 1921 his Counsel had appeared in the case and had not brought to the notice of the Court that his client was dead. The Court framed an issue as to the date of the death of Bija Ram and adjourned the case for the evidence of the parties. On the 20th October 1921, the decree-holders stated that they had no objection to the *ex parte* decree being set aside and the case being proceeded with against the heirs of Bija Ram. They also made an application on that date that the three sons of Bija Ram be brought on the record as his legal representatives. On the 4th of November 1921, the Court passed an order to the effect that as no application to implead the legal representatives of Bija Ram had been made within three months of the date of his death, the suit had abated as against them and that the application of the 20th of October 1921 was barred by limitation. The decree was allowed to stand against Nanak Chand alone and the application for bringing the heirs of the deceased Bija Ram on the record as his legal representatives was dismissed.

Against this decision the plaintiffs have come up in appeal to this Court and it has been urged on their behalf that Act XXVI of 1920, which has reduced the period of limitation from six months to three months in the case of an application for bringing the heirs of a deceased plaintiff on the record, does not apply to the case of defendants and that the learned Judge of the Court below has erred in holding otherwise. There is no doubt that this contention is correct and that Article 177 of the Indian Limitation Act, which relates to the case of a defendant has been left entirely untouched by the Amending Act of 1920. This question is now concluded by the case of *Gobind Das* v. *Rup Kishen*, (1) in which it has been held that the words " six months " opposite Article 177 in the Indian Limitation Act have not been altered by anything contained in the Amending Act of 1920 and that the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still six months. There is, however, nothing on the record to show when Bija Ram died. The only application to bring his legal representatives on the record is dated 20th October, 1921 and if

(1) 77 Ind. Cas. 409 ; 6 L. L. J. 25 ; (1924) A. I. R. (L.) 65 ; 4 L. 367.

SAVITRI *v.* MADHORAO

Bija Ram died on the 4th of April 1921, as alleged by his sons, even this application would be barred by limitation. The learned Vakil for the appellants urges that Bija Ram really died on some date in the month of May 1921, and that even if he died on the 4th of April, as alleged by his sons, the plaintiffs had sufficient cause for not making the application in time and that the delay ought to have been excused under section 5 of the Indian Limitation Act. There is neither any evidence nor any finding by the learned Judge of the Court below on any of these points, and it is, therefore, necessary that the case should go back for a determination of these questions.

I accept the appeal and return the case to the learned District Judge for a fresh decision in accordance with law after parties have been allowed full opportunity to produce evidence on the two points above-mentioned. Costs shall abide the result.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 87 OF 1923.

January 29, 1924.

Present :—Mr. Hallifax, A. J. C.

SAVITRI—PLAINTIFF—APPELLANT

versus

MADHORAO—DEFENDANT—RESPONDENT.

Transfer of Property Act (*IV of* 1882) *s.* 84—*Redemption, suit for—Deposit, effect of—Mortgagee, liability of, to account for profits—Separate suit, whether lies—Civil Procedure* Code (*Act V of* 1908), *O. XXIII, r.* 1—*Withdrawal of suit—Leave to bring fresh suit, whether must be given expressly.*

Where in a redemption suit it is found that the mortgagor had made a valid deposit of the amount due under the mortgage which was not accepted by the mortgagee, the Court should take an account of the profits recovered by the mortgagee from the mortgaged property during the period from the date of the deposit to at least the filing of the redemption suit, and should reduce the amount payable on redemption by the amount of those profits. No separate suit would lie for the recovery of such profits.

There is nothing in r. 1 of O. XXIII of the Civil Procedure Code requiring that leave to bring a fresh suit should be given expressly. It may be given impliedly without being recorded.

Kashi Pershad v. *Bojrang Prasad*, 30 A. 36 ; 4 A. L. J. 763 ; A. W. N. (1907) ; 281 ; *Ram Din* v. *Bhup Singh*, 30 A. 225 ; 5 A. L. J. 192 ; A. W. N. (1908) 96, relied on.

Appeal against the decree of the Additional District Judge, Nagpur, dated 23rd November, 1923 in Civil Appeal No. 88 of 1922.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *D. P. Tiwari*, for the Respondent.

JUDGMENT—The appellants, of whom one is now dead, sued for the mesne profits of certain fields for the years 1328, 1329 and 1330 *Fasli*, that is, from June 1918 to June 1921. In the petition of appeal mention is also made of a claim for the profits for the year 1331 *Fasli*. That is admittedly a mistake as the claim for that year was not made in the plaint, though it might have been made, as the plaintiffs did not regain possession of their property till the 24th of January 1922. The land was held by the defendants under a mortgage for Rs. 500 of which one of the terms was that they should take the whole of the profits in lieu of interest. It appears that on the 13th of December 1917 the mortgagors made a tender of the whole amount due on the mortgage but this was refused. On the 24th of July 1920 they deposited the same amount in Court under section 83 of the Transfer of Property Act. This was also refused as insufficient and on the 21st of December 1920 they filed a suit for redemption. The tender made in 1917 was pleaded in that suit but the matter was allowed to drop out of sight, and it was held that the amount deposited in 1920 was the full amount then due. That is a negation of the plea that a tender of the full amount was made in 1917 and that plea cannot be put forward again now.

It appears to have been held by both Courts in that case that the deposit made in 1920 ended the mortgagee's right to possession and stopped the running of interest. None the less, the amount realized by the mortgagees after the date of the deposit was not taken in

reduction of the amount due on the mortgage. The decree, which is dated the 26th of February 1921, declares that the amount due on the mortgage on that day is about Rs. 50 less than the Rs. 500 deposited and orders sale of the property on the 26th of August, 1921 in default of payment of that sum on or before that day.

It is not possible to treat this redemption suit as one for ejectment as was done in *Paramsukh* v. *Yadoji* (1). In form and substance and all essentials it was a suit for redemption, even in the decree with its totally unnecessary period of six months. It is beyond doubt, as was held in *Kashi Pershad* v. *Bajrang Prasad* (2), and *Ram Din* v. *Bhup Singh* (3), that the Court could and should have taken an account of the profits recovered by the mortgagees from the property during the period after the deposit up to at least the filing of the redemption suit, and should have reduced the price of redemption by the amount of those profits. It follows that no separate suit would lie ordinarily for the recovery of that amount.

In this case, however, there are circumstances which make such a suit tenable. From the record of the redemption suit it appears that the plaintiffs claimed that the mortgage was to be redeemed on the withdrawal by the mortgees of the Rs. 500 deposited by them and did not claim any reduction of the amount on account of the profits realized by the mortgagees since the date of the deposit. The last paragrah of the plaint, after a statement of the relief sought, is as follows: " Permission to bring a suit against the defendant for damages may be given." The mortgagees in their pleadings said nothing about those profits, as they claimed that the price of redemption was a sum far exceeding them and the amount deposited. No issue was framed on the point and the Court left the profits, or " damages," as the plaint calls them, entirely out of sight and consideration.

It can in these circumstances fairly be held that the Court impliedly gave the plaintiffs permission under r. 1 of O. XXIII to abandon that part of their claim with liberty to institute a fresh suit in respect of it. There is nothing in that rule demanding that the permission should be given expressly, and the inference that it was given without being recorded is in this case inevitable. For these reasons I hold that this suit can be maintained, but that it can succeed only in respect of the profits of the year 1330 *Fasli*, that is, for the period subsequent to the date of the deposit, which was the 24th of July 1920.

The amount of profit realized by the respondents has not been found in either of the Courts below, though the inconvenience and impropriety of leaving such questions undecided in appealable cases have often been pointed out. The question, therefore, falls for decision here under section 103 of the Civil Procedure Code, though every one connected with the case seems to have been so immersed in abstruse questions, of law that did not arise that the material on which it has to be decided is scanty. In the plaint it is stated that the income from the land was Rs. 125 in each of the years in suit. The area is just over 34 acres and the rent is Rs. 45 to which figure it was raised at the last Settlement from Rs. 25. The defendants made the usual ridiculous statement that the profit they got from the land, after deducting all expenditure, except the rent, was Rs 50 each year, leaving a net profit of five rupees. Such a statement only defeats its own object by its own absurdity.

The third witness for the defendants seems to say that he is holding the land now at Rs. 50 per annum but that is a low rate as it has been left fallow for two or three years, and in the year in question it would have fetched Rs. 100 or Rs. 125 or Rs. 150. The defendants, in accordance with the strange practice that has grown up, gave no evidence at all. After the plaintiffs had given evidence tending to show *prima facie* that the letting value was somewhere about Rs. 125, it was for the defendants to show that it was less. As they have not even attempted to do so the finding must be that it was Rs. 125. This is further supported by the fact that the defendants were content and even anxious to keep the land in lieu of interest on Rs. 500 for as long as possible. At the very ordinary rate of 2 per cent. per mensem that interest would be Rs. 120 per annum.

(1) 46 Ind. Cas. 743; 15 N. L. R. 101.
(2) 30 A. 96; 4 A. L. J. 763; A. W. N. (1907) 281.
(3) 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96.

KISHUNDEO *v.* JAGLAL SAHU

The decree of the lower Appellate Court will be set aside. In place of it a decree will issue ordering the defendants to pay to the plaintiffs the sum of Rs. 125 together with interest thereon at 1 per cent. per mensem from the 1st of June 1920 till the full amount is paid. The rest of the claim has failed only through technical defects in the conduct of the case. The defendants will, therefore, pay all the plaintiffs' costs and their own in all three Courts.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 45 OF 1923.

November 16, 1923.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Foster.

KISHUNDEO SINGH AND OTHERS—OPPOSITE PARTY—APPELLANTS

versus

JAGLAL SAHU—PETITIONER—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 68—Mortgage suit—Money decree—Construction of decree—Judgment and pleadings, whether can be referred to.

One of the reliefs claimed in a mortgage suit asked for a direction to make the amount due under the mortgage-bond a charge upon the surplus sale-proceeds of one of the mortgaged properties which had been sold. Toward the end of the paragraph it was stated that the balance of the decretal amount may be ordered to be realised from the property and the person of the defendant or defendants who may be liable. The Court refused a mortgage decree and passed a decree under s. 68 of the Transfer of Property Act in the following terms :—"The suit for Rs. 5,877-10-0 with proportionate costs be decreed in terms of relief 5 of the plaint. He is further declared to have a charge on the surplus sale-proceeds which is in deposit in the Collectorate. I allow interest on the sum decreed at Rs. 6 per cent. per annum from the date of the decree till realisation of the same."

Held, that only that portion of the relief No. 5 of the plaint was granted by the decree which related to the creation of a charge on the surplus sale-proceeds with respect to the amount due under the mortgage-bond, and that the decree did not by implication include a direction that the balance of the decretal amount could be recovered from the persons and properties of the defendants who were purchasers of the mortgaged property and were not expressly made personally liable under the decree.

Where a decree is clear in its terms and is not in any way ambiguous, it does not require to be interpreted in the light of the pleadings and the judgment.

Appeal from an order of the Subordinate Judge, 1st Court, Patna, dated the 3rd February 1923.

Mr. *Sundar Lal*, for the Appellants.

Mr. *L. M. Ganguli*, for the Respondent.

Jwala Prasad, J.—The only question that arises in this appeal is the construction of the decree passed by the Subordinate Judge of Patna in Suit No. 68 of 1920. The decree-holders, who are appellants before us, in execution of that decree sought to proceed against defendants Nos. 1 to 3 praying for attachment and sale of their properties and for their arrest. Defendant No. 2, Jaglal Sahu, objected to the execution on the ground that in terms thereof he or his properties could not be proceeded against. Jaglal was a purchaser from defendant No. 3, he having purchased the property from one who was an auction-purchaser at a revenue-sale of the mortgaged properties Deokali. The decree-holder brought this suit to recover the money due under an usufructuary mortgage-bond under section 68 of the Transfer of Property Act and asked for a mortgage-decree. He also in the alternative prayed for a money-decree upon the ground that he was dispossessed of the properties given to him under the *zerpeshgi* deed of the 5th April, 1898. Deokali, one of the mortgaged properties, was sold for arrears of cesses and Government revenue and purchased by Deonandan, defendant No. 3, who in his turn sold it to Jaglal defendant No. 2. Bajidpur the other mortgaged property was sold to defendant No. 4 by the Receiver appointed in an insolvency proceeding by the Calcutta High Court with respect to the properties of Khalilur Rahman, son of defendant No. 1, the mortgagor.

The suit was resisted by defendant Nos. 2 and 4. The Court refused to grant a mort-

gage-decree but held that the mortgagee-decree-holder was entitled to have a charge upon the surplus sale proceeds in the hands of the Collector under the revenue-sale in respect of the money due under the *zerpeshgi* deed. In the result, the Court gave a money decree to the mortgagee-decree-holder. That decree apparently was under section 68 of the Transfer of Property Act as is expressly mentioned by the Court in its judgment. The decree, therefore, could not be against defendants Nos. 2 and 4 who were only purchasers of the mortgaged properties. it could only be passed against the mortgagor upon his personal covenant to pay the mortgage-money. Defendants Nos. 2 and 4 never entered into any agreement or contract to personally pay the mortgage-debt to the mortgagee. There is no direction in the decree itself making the respondent (defendant No. 2) personally liable for the decree-debt. The learned Vakil for the appellant wants me to read into the decree the words which are not there and this he wants to do in the light of relief No. 5 in the plaint quoted in the recital portion of the decree. In that paragraph 5 the appellant asked for a direction to make the amount due under the mortgage bond a charge upon the surplus sale proceeds of *Mauza* Deokali and for attachment of the same by means of an injunction. Towards the end the paragraph he states that "the balance of the decretal amount may be ordered to be realised from the person and the property of the defendants or defendant who may be liable. The decree states as follows. "It is ordered and decreed that a modified decree be passed for Rs. 5,877-10-0 with proportionate costs as prayed for in para 5 of the plaint and that the balance left after the payment of the Government Revenue out of the proceeds of the sale, by the Collectorate of a portion of the *Ijara* properties lying in deposit under *Chalans* Nos. 251 and 9 dated the 26th March 1919 and 22nd April 1919, respectively, be made liable for the satisfaction of the decree and that the interest on the decretal amount be charged at the rate of 6 per cent per annum from the date of decree till the date of realisation, decretal amount Rs. 5,877-10-0 and that the sum of Rs. 651-8-0 be paid by the defendants to the plaintiffs on account of the costs of this suit, with interest thereon at the rate of 6 per cent per annum from this date to the date of realisation."

The learned Vakil contends that as mention is made in the decree to the relief in para. 5 quoted above the true interpretation of the decree is that the concluding prayer of that paragraph asking for an order to realise the decretal amount from the person and property of the defendants must be held to have been granted. It appears that the reference to paragraph 5 is in relation to the prayer about the direction of the Court for making the decretal amount a charge upon the surplus sale proceeds of *Mauza* Deokali It in no way refers to the concluding portion of paragraph 5, for in that case it would have specified which of the defendants were personally liable for the decree for the prayer of the plaintiffs was that the decree be passed against the defendants or such of them as may be liable. The Court did not apparently grant this prayer for a personal decree against the defendants. It is conspicuous that the direction portion of the decree with respect to the amount of Rs 5,877 does not make any mention of the defendants. This ommission can only mean that the prayer for the personal liability of the defendants was disallowed and unless there was express direction making the defendants personally liable the decree cannot be executed against them or their property. This interpretation of the decree is in accordance with the judgment. It has already been shown that the Court in its decision held that the plaintiffs were entitled only to a money decree under section 68 of the Transfer of Property Act. The order portion of the decree runs as follows:

> "The suit for Rs. 5,88-10-0 with proportionate costs be decreed in terms of relief 5 of the plaint. He is further declared to have a charge on the surplus sale proceeds which is in deposit in the Collectorate. I allow interest on the sum decreed at Rs. 6 per cent per annum from the date of the decree till realisation of the same."

Therefore, only that portion of the relief No. 5 of the plaint was granted which related to the creation of a charge on the surplus sale proceeds with respect to the amount due under the mortgage-bond. No doubt, defendant

No 1 being the executant of the bond and the decree having been passed under section 68 must be deemed to have been made personally liable under the decree.

Defendants Nos. 2 to 4 could not under the law be personally made liable and unless there was express direction in the decree it cannot be construed by reference to relief No. 5 of the plaint on the judgment as having made those defendants personally liable. Therefore, the view taken by the Court below seems to be correct. No doubt, the defendants were made liable for the costs of Rs 651-8-0 under the express direction of the decree. Mr. Ganguli on behalf of the respondent contends that the direction in the decree about costs read with the judgment and the pleadings would show that all the defendants could not be made liable for the costs. He cites *Banjnath Sahai v. Gajadhar Prasad* (1) in order to interpret the decree in the light of the pleadings and the judgment. That case does not in the least help him. The decree here is clear in its terms. It is not in any way ambiguous; it makes the defendants (in the plural) liable for Rs. 651-8-specifically mentioned. Therefore, the order by the Court below is modified to this extent that all the defendants are liable for the costs mentioned in the decree of Rs. 651 8-0 and for this the appellant is entitled to proceed against the personal properties of all the defendants.

The appeal is dismissed. In the circumstances of the case, there will be no order as to costs.

Foster. J.—I agree.

Appeal dismissed.

(1) 58 Ind. Cas. 276; 1 P. L. T 471.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 46 of 1924.

March 12, 1924.

Present :—Wazir Hasan, A. J. C.

SURJI NARAIN MISRA—PLAINTIFF —APPELLANT.

versus

ULAND SINGH, DEAD, AND ON HIS DEATH, BASUDEO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 47, 49, O. XXI r. 2—Sale of decree—Execution by purchaser—Plea that decree was satisfied before sale—Certification, absence of, effect of—Failure to certify, whether amounts to fraud.

Where a decree is sold in execution of another decree and the purchaser seeks to execute it against the judgment-debtor, it is open to the latter to plead that the decree had been satisfied by him before it was sold, although the satisfaction was not certified in accordance with the provisions of r. 2 of O. XXI of the Civil Procedure Code; sub-r. (3) of r. 2 of the order is no bar to such a plea which must be enquired into by the Court under s. 47 of the Code.

Trimbuck Ramkrishna Ranade v. *Hari Laxman Ranade*, 7 Ind. Cas. 910; 34 B. 575; 12 B. L. R. 686; relied on.

The mere omission on the part of a decree-holder to certify satisfaction of the decree does not amount to fraud.

Appeal against the order of the Additional Subordinate Judge, Fyzabad, dated the 18th July 1923, confirming the order of the Munsif, Fyzabad, dated the 16th December 1922.

Messrs. *Niamatullah*, *Ali Muhammad* and *E. R. Kidwai*, for the Appellant.

Mr. *Haidar Husain*, for the Respondent No. 4.

JUDGMENT.—On the 12th March 1920, one Garuludhwaja had obtained a simple money decree against Janardan. Subsequently, Janardan obtained a similar decree against Rudra Prasad and others on the 15th December 1921. The former decree was put in execution by attachment of the latter on the

SURJI NARAIN MISRA *v.* ULAND SINGH

6th January 1922. In pursuance of the execution proceeding mentioned above, injunction was issued to Rudra Prasad but no service of that injunction was effected on him. A similar injunction was issued to Janardan and it was personally served on him. Finally, the latter decree was put up for sale and was purchased by Suraj Narain on the 20th April 1922. Suraj Narain is the son of Janardan already mentioned. On the 26th October 1922, Suraj Narain filed an application purporting to be under O. XXI, r. 16, of the Code of Civil Procedure. He claims that he is the transferee by operation of law of the decree, dated the 15th December 1921, in virtue of the purchase made by him at the auction-sale and prays for execution of that decree against the judgment-debtors, Rudra Prasad and others. Notice of Suraj Narain's application was given by the Court, amongst others, to Rudra Prasad. On the 25th November 1922, Rudra Prasad filed objections to the execution sought for by Suraj Narain. His main ground is, that the decree of the 15th December 1921 became void by reason of the fact that it had been fully satisfied on the 25th March 1922 and consequently there was nothing left for Suraj Narain to purchase. In support of his objection Rudra Prasad filed a receipt executed by Janardan on the 25th March 1922. Both Courts have found the receipt to be a genuine document and they have further found that it was executed for consideration and has the effect of satisfying the decree of the 15th December 1921 in its entirety. On this finding Suraj Narain's application has been rejected. This is an appeal by Suraj Narain against the last mentioned order of rejection.

The sole ground on which the appeal was supported at the hearing is, that the plea of payment made on the 25th March 1922 in satisfaction of the decree of the 15th December 1921 should not have been admitted by the Courts below, the plea being barred by limitation provided by Article 174 of Schedule I of the Indian Limitation Act, 1908, and consequently the Court being precluded from recognising the payment by sub-r. (3) of r. 2 of O. XXI of the Code of Civil Procedure. The lower Appellate Court has rejected this argument for the reason that the decree-holder, Janardan, had committed a fraud on the judgment-debtor, Rudra Prasad, by not certifying the payment in question to the Court within the time allowed by law.

Sub-r. (3) of r. 2 of O. XXI mentioned above is as follows :—"A payment or adjustment, which has not been " certified or recorded as aforesaid, shall not be recognised by any Court executing the decree." The view taken by the learned Additional Subordinate Judge, assessed at its highest value, comes to this, that the mere omission to certify on the part of the decree-holder amounts to a fraud and, therefore, sub-r. (3) quoted above is no bar to the recognition of the payment even when it is not certified within limitation and in accordance with sub-r. (1) of the same rule. If this view is correct, it has the result of obliterating the rule altogether. The rule is intended to exclude recognition of any payment or adjustment of a decree out of Court if there has been an omission to certify the payment or adjustment to the Court and if all such omissions are tantamount to a fraud sub-r.(3) would cease to have any effect whatsoever. To me it seems that the true interpretation of sub-r. (3) was made, if I may say so, by Heaton, J., in the case *Trimbak Ramkrishna Ranade* v. *Hari Laxman Ranade* (1). Rule 2 of O. XXI stands in place of section 258 of the repealed Code. After quoting the final clause of that section, with which corresponds sub-r. (3) quoted above, the learned Judge observed as follows :—

"The purpose of section 258 is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise: in this sense, that it at the outset assumes that what is not recorded as paid or adjusted, still remains unpaid or unadjusted. But it is still open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due, having been paid or adjusted : and it is still incumbent on the Court to go into the matter, if a contest on the point is raised. To state the result briefly,

(1) 7 Ind. Cas. 940 ; 34 B. 575 ; 12 Bom. L. R. 686.

the final clause of section 258 raises a presumption, but does not limit the jurisdiction of the Court. This result appears to me to be inevitable if section 258 be read not by itself as an isolated enactment containing a complete statement of the law on the matter it deals with, but as a part of a whole and with reference to its place in the scheme of the Code and its relation to other parts of the scheme."

This interpretation obviates the necessity of resorting to the fiction of a fraud. By sub-r. (3) the Court is not deprived of its jurisdiction to try the plea of payment raised in a case like the present which plea could be entertained and adjudicated upon in execution proceedings falling under section 47 of the Code of Civil Procedure. It precludes, in the first instance, recognition of a payment or adjustment which has not been certified or recorded in accordance with the provisions of sub-rr. (1) and (2) of r. 2. Those provisions lay down a special procedure to be adopted by the Court for the purpose of recording the payment or adjustment made out of Court. The plea of payment in the present case does not fall to be determined by those provisions. Neither the decree-holder is moving the Court to adopt the procedure provided by sub-r. (1) nor is the judgment-debtor informing the Court of the payment for the purpose of invoking the procedure laid down in sub-r. (2.) The plea is a simple one and relates to the satisfaction of the decree which is sought to be executed and specifically falls within sub-section (1) of section 47 of the Code of Civil Procedure. That section says: "All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the.....satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." The appellant, Suraj Narain, claims to be the transferee of the decree. Under section 49 of the Code of Civil Procedure he "shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder." That the judgment-debtor has equity on his side when he pleads that he shall not be made to pay twice over cannot be doubted.

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

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2435 OF 1920.

January 7, 1920.

Present.—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

Musammat CHAMBELI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BISHNA—PLAINTIFF—RESPONDENT.

Custom—Succession—Cognates, rights of, as against stranger—Son of predeceased daughter, position of.

The general principle of customary law is that in the absence of all agnates of a childless proprietor any cognate, however distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village or a stranger.

Rehman v. *Karim Bakhsh*, 30 Ind. Cas. 113 ; 28 P. R. 1917, followed.

Custom does not exclude a daughter's son from inheritance on the ground of his mother having predeceased her father or grandfather.

Gobinda v. *Nandu*, 74 Ind. Cas. 644 ; (1922) A. I. R. (L.) 217, followed.

Second appeal from the decree of the District Judge, Ambala, dated the 29th June 1920, reversing that of the Junior Subordinate Judge, Ambala, dated the 5th February 1920, and decreeing the plaintiff's suit.

Mr. *Manohar Lal*, for the Appellants.

Lala *Hargopal*, for Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The following facts will disclose the nature of the question to be tried in this second appeal. One Dhanwant was the owner of certain culturable land, house property and certain mortgaged land. He having died *Musammat* Badami, his widow,

succeeded in obtaining possession of the property. This lady executed a number of Wills in favour of certain persons. The plaintiff in this case is one Bishna, son of *Musammat* Bholi, a daughter of the said Dhanant, by his wife *Musammat* Giani. A Will was executed by *Musammat* Badami in his favour also. The last Will was executed in favour of the defendant. *Musammat* Bholi admittedly had predeceased *Musammat* Badami. On the death of *Musammat* Badami the property was mutated in the name of the defendant on the strength of the Will in his favour. The plaintiff preferred an appeal against the mutation order; but his appeal was rejected. Thereupon he instituted the present suit and in paragraph 5 of the plaint he based his claim on the Will, custom and law. The defendant resisted the suit mainly on the ground that the plaintiff was not the grandson *i.e.*, the daughter's son, of Dhanwant and that, therefore, he had no *locus standi* to maintain the suit. He alleged that under the last Will of *Musammat* Badami he was entitled to succeed to the land and that the property had rightly been mutated in his name. The trial Court found that the Will in favour of the defendant was executed at a time when the lady had not a disposing mind. It came to the conclusion that the defendant was a mere stranger. On the question whether the plaintiff was or was not Dhanwant's daughter's son the Court expressed no opinion because it came to the conclusion that, even if he was a daughter's son, he was not entitled to succeed to the property of Dhanwant under the Customary Law. Taking this view, the Court dismissed the suit.

The plaintiff appealed. The lower Appellate Court has agreed with the finding of the trial Court on the question of the efficacy of the Will in favour of the defendant. On the question of the plaintiff's title to maintain the suit it has differed from the trial Court and has held that even if the plaintiff was not able to establish a custom giving him a right to question the alienation he being an heir under the Hindu Law was entitled to maintain the suit. The lower Appellate Court, therefore, granted a decree in favour of the plaintiff.

The defendant has come up in second appeal to this Court, and it has been contended on his behalf by his learned Counsel Mr. Manohar Lal that the learned Judge of the Court below was not right in allowing the plaintiff to fall back upon the personal law under the circumstances of this case. His argument is that, in the first place, the plaintiff did not base his right to maintain the suit on the Hindu Law, and, secondly, that as a daughter's son is not mentioned as an heir in Rattigan's book on Customary Law the plaintiff has got no *locus standi* to maintain the suit. Mr. Hargopal for the plaintiff-respondent has relied upon two decisions of this Court which completely answer the argument put forward by Mr. Manahor Lal. In the case of *Rehman* v. *Karim Bakhsh* (1) it was held that the general principle of Customary Law is that in the absence of all agnates of a childless proprietor any cognate, however distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village." Now in this case the defendant is an utter stranger. The plaintiff being the daughter's son of Dhanwant, according to this ruling is entitled to eject him from the land.

In the case of *Gobinda* v. *Nandu* (2), recently decided by a Division Bench of this Court, the following relevant passage occurs at page 218:—

> " Mr. Tek Chand admits that he cannot cite a single case to support his contention, and that the aforesaid remark runs counter to the principle of the Hindu Law on the subject. Whatever the exact meaning of the remark may be, we consider that there is no reason for holding that custom excludes a daughter's son from inheritance on the ground of his mother having predeceased her father or grandmother."

This remark applies with equal force to the facts of the present case. Thus both under the Customary Law and under the personal law the plaintiff was entitled to maintain the suit as against the defendant who has been found to be a mere trespasser.

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

Z. K.

Appeal dismissed.

(1) 39 Ind. Cas. 113; 28 P. R. 1917.
(2) 74 Ind. Cas 644; (1922) A. I. R. (L.) 217.

ABDUL HUSAIN *v.* MEGHRAJ

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 15 OF 1923.

January 19, 1924.

Present :—Mr. Baker, J.C.

Kazi ABDUL HUSAIN AND OTHERS—PLINTIFFS—APPELLANTS

versus

MEGHRAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 5—Guardian ad litem, *appointment of, whether lapses—Land tenures*—Ubari *Tenure, incidents of—Impartibility—Presumption—Burden of proof.*

When a guardian *ad litem* has once been appointed his appointment enures for the whole of *lis* in the course of which it has been made unless and until it is revoked by the Court. [p. 780, col. 2.]

Kisni v. *Ghulaji Teli*, 1 N. L. R. 128, followed.

The *Ubari* tenure has nothing to do with the proprietorship in the lands, but is merely the right to hold the village on payment of a quit-rent to Government, that is, on payment of less revenue than that ordinarily payable. [p. 781, col. 1.]

The ordinary presumption is that a village is partible and alienable, and the burden is on the person who sets up impartibility, which must be strictly proved. [p. 781, col. 2.]

Krishnaji Rao v. *Nilkanth*, 69 Ind. Cas. 800 ; 18 N. L. R. 163 ; 5 N. L. J. 25 ; (1922) A. I. R. (N.) 52, followed. *Jaafar Mohiuddin Sahib* v. *Aji Mohiuddin Sahib*, 2 M. H. C. R. 19 ; *Neti Anjaneyalu* v. *Sri Venugopal Rice Mill Ltd.*, 70 Ind. Cas. 466 ; 45 M. 620 ; 15 L. W. 513 ; 42 M. L. J. 477 ; 30 M. L. T. 255 ; (1922) M. W. N. 307; (1922) A. I. R. (M.) 197, distinguished.

Appeal against the decree of the District Judge, Nimar, dated 25th September 1922, in Civil Appeal No. 86 of 1922.

Mr. *Fida Hussain*, for the Appellants.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The plaintiffs sued for a declaration that the village of Reta was liable to be partitioned in execution of their mortgage decree.

The defendants contended that the village was impartible being assigned to the office of *Kazi*.

Both the Courts below have decided against them. Defendants make this second appeal. A preliminary objection is taken on behalf of respondents that the appeal by appellant No. 3 Ibrahim, who is a lunatic, has not been properly filed. In the Courts below, he was represented by the Naib Nazir whereas in the present appeal he is represented by his brother, appellant No. 1. It has been held in *Musammat Kisni* v. *Ghulaji Teli* (1) that when a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made unless and until it is revoked by the Court. This case is based on rulings of the Allahabad and Madras High Courts. There is nothing on record to show that the appointment of the Naib Nazir as guardian *ad litem* of the lunatic has been revoked, and therefore the appellant No. 1 had no right to represent the appellant No. 3 or to file an appeal on his behalf.

I am of opinion that this contention is correct and the appeal of appellant No 3 must be rejected as he is not properly represented.

Three points have been raised by the appellants in this appeal. First, that the village has been attached to the office of *Kazi* and is, therefore, impartible. Second, that the suit is barred by section 42 of the Specific Relief Act. Third, that the suit is barred by limitation. I deal with these points *seriatim*.

The village is held on the *Ubari* tenure, which is defined in the C. P. Settlement Code, introduction pp. v and vi. The paragraph in question goes against the appellants' contention that the village is impartible, for it begins by saying that the third class of proprietary villages ..those originally held by revenue grantees (*Muafidars*)...call for but little notice, as the wholesale grant of proprietary rights left their holders in no higher position than that of ordinary *Mulguzars*, apart from the Revenue concession enjoyed by them. * * * * The least privileged grants are those known as "*Maktas*" which are held on payment of quit-rent, fixed in perpetuity but of substantial amount, exceeding in some cases the revenue now ordinarily assessable. The concession in such cases is exemption from

(1) 1 N. L. R. 128.

enhancement. When it amounts to a release or assignment of revenue the tenure is known as "*Ubari*" in the North and as "*Mokasa*" in the South. Generally speaking, the grants of revenue are * * permanent and inalienable. But conferral of the *Malguzari* rights made the proprietorship of the assignee in the village lands—apart from their revenue—transferable at his will, etc." This passage makes it quite clear, in my opinion, that the *Ubari* tenure has nothing to do with proprietorship in the lands, but is merely the right to hold the village on payment of a quit-rent to Government, that is, on payment of less revenue than what would ordinarily be payable.

In this respect the tenure resembles that of *Inamdars* in the Bombay Presidency who are regarded as alienees of the Royal share of the revenue. Whether they are also proprietors of the soil is quite a different question. Ordinarily, in Bombay, where a different system of land tenure prevails, they are presumed not to be so. In the Central Provinces the contrary presumption would prevail, but the essential point is that the payment of a reduced revenue to Government does not help at all in deciding whether the village is impartible. The defendants may be given a remission of revenue because they are *Kazis*, but whether they were granted the soil of the village for the same reason, is a question depending on the terms of the original grant.

This distinction is brought out in Exhibit 1 D-3, the order of the Chief Commissioner in an appeal regarding the partition of this village. Mr. (afterwards Sir Denzil) Ibbetson pointed out that "the property in the village and the *Ubari* right are two very different rights. Government are not concerned with the right to partition. It certainly is extremely probable that the original grant of the proprietary right was made together with and on the same terms as the assignment of revenue. But that was 180 years ago, and if that argument is to be pressed, the present *Kazi* would be sole owner of the village, whereas it appears that his relations have all along been and are now recorded as co-sharers with him, that is, in possession of joint shares of the property. * * * If the property in the village is held on condition of performing the duties of *Kazi*, there are no co-sharers. If not, there is no apparent reason to hold that it is impartible. The question is one for a Civil Court and not for a Revenue Officer to decide."

With these observations in support of my view I have no hesitation in holding that the *Ubari* tenure is distinct from the proprietary rights in the village and that, as the ordinary presumption is that a village is partible and alienable, the burden is on the defendants to prove that this village forms an exception to the ordinary rule. This is the view taken in *Krishnaji Rao* v. *Nilkanth* (2) where it is held that the custom of impartibility must be strictly proved.

The defendants have not adduced any evidence in the form of *Sanads* or otherwise to prove that the village is impartible.

Exhibit 1 D-2 which is an order of the Settlement Officer refers only to the exemption from payment of land revenue.

The cases quoted by the learned pleader for appellants, *Jafar Mohiuddin Sahib* v. *Aji Mohiuddin Sahib* (3) and *Neti Anjaneyulu* v. *Sri Venugopal Rice Mill, Ltd*, (4), are cases where the land was found to be on service tenure. In such a case the presumption is that the village would be entered in the name of the person actually holding the office and performing the services, whereas in the present case the names of the sharers are entered in column 11 of the *Muafi* Register (Exh. 1 D-1) and some of them applied for partition. The very mortgage on which these suits are based was executed by the three brothers. All this shows that the village was regarded as the property of all and not as impartible.

In these circumstances, I agree with the finding of the Courts below that the village is not proved to be impartible.

It is contended that suit is barred by section 42 of the Specific Relief Act because the plaintiffs failed to ask for possession. It is contended that if they cannot seek possession under the decree of this Court, they should have sought it in this suit.

(2) 69 Ind. Cas. 800 ; 18 N. L. R. 163 ; 5 N. L. J. 25 ; (1922) A. I. R. (N.) 52.
(3) 2 M. H. C. R. 19.
(4) 70 Ind. Cas. 466 ; 45 M. 620 ; 15 L. W. 513; 42 M. L. J. 177 ; 30 M. L. T. 255 ; (1922) M. W. N. 307 ; (1922) A. I. R. (M.) 197.

SHAM DAS *v.* CHARN DAS

The decree of this Court (Exh. P-6) states that the plaintiffs are entitled to possession of a 10-annas 8-pies share of the mortgaged property and may obtain *khas* possession thereof after carrying out proper proceedings for partitioning the same from the 1|3rd share of Sharafudin. When the plaintiffs applied to the Civil Court to execute this decree they were referred to the Collector, and on the objection as to the impartibility of the estate being raised the Collector directed the parties to get the question of the divisibility of the share decided by the Civil Court. Thus, the only relief which the plaintiffs could claim from the Civil Court was a declaration that the village was divisible. The Court could not grant possession, which was a matter solely within the competence of the Collector, by making an imperfect partition under the provisions of sections 162 *et seq* of the Land Revenue Act. The suit is not, therefore, barred by section 42 of the Specific Relief Act.

As to its being barred by limitation it is contended that the limitation for a suit for a declaration is 6 years under Article 120, Limitation Act, and that the cause of action arose when the Court refused execution on 8th August 1919. The Court, however, referred the plaintiffs to the Collector. If the Collector had made the partition, then the plaintiffs would have had no cause of action. It is only when the Collector refused to make the partition and order the parties to get the question of liability to division settled by the Court (under section 169 of the Land Revenue Act) that the cause of action arose. This was in 1921, so the suit cannot be barred by limitation.

The appeal consequently fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 996 OF 1923.

February 4, 1924.

Present :—Mr. Justice Broadway and Mr. Justice Campbell.

SHAM DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Mahant CHARN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-Fees (Act VII of 1870), Sch. II, Art. 17 (3)—Suit for declaration that mortgage shall not bind mortgaged property, nature of—Court-fee payable.

A suit by a co-parcener in a joint Hindu family for a declaration that a mortgage of joint family property effected by another co-parcener shall not be binding on the property mortgaged is not a suit for the cancellation of the mortgage but a mere suit for a declaration falling under Article 17 (3) of Schedule II to the Court-Fees Act, and does not require an *ad valorem* stamp.

First appeal from the order of the Senior Subordinate Judge, Lahore, dated the 26th February 1923, rejecting the plaint on plaintiff's refusal to pay Court-fee on Rs. 8,500 as ordered on the 25th January 1923.

Bakhshi *Tek Chand*, for the Appellants.

Nemo, for the Respondents.

JUDGMENT.—In this case the plaintiff sought to obtain a declaration to the effect that certain mortgages were without consideration and not binding on the property mortgaged. He alleged that he and the defendants, who made the alienations, were members of a joint Hindu family governed by the *Mitakshara* Law. The value for purposes of jurisdiction was fixed at Rs. 8,500 and a Court-fee stamp of Rs. 10 was affixed, the plaintiff contending that the suit was governed by Article 17 (3) of the second Schedule to the Court-Fees Act. The trial Court, on the authority of *Nanak Chand* v. *Jiwan Mal* (1), held that, inasmuch as the declaration sought involved a cancellation of the mortgage-deeds, the plaint was not properly stamped and holding that the stamp should be *ad valorem* on

(1) 25 Ind. Cas. 485; 35 P. R. 1914 ; 237 P. L. R. 1914.

the amount fixed for purposes of jurisdiction, returned the plaint on the 25th of January 1923 in order that it might be properly stamped and returned by the 26th of February 1923. On the latter date, the plaintiff stated that he was unable to pay the Court-fee and the plaint was rejected.

The plaintiff has now appealed to this Court through Mr. Tek Chand, and it has been contended that the order of the Court below rejecting the plaint is not warranted, firstly, on the ground that the declaration sought for did not necessarily entail the cancellation of the mortgage-deeds and that, therefore, the stamp affixed, namely, Rs. 10, was sufficient, and, secondly, that the Court below was not justified in fixing the value for the consequential relief at Rs. 8,500 but should have allowed the plaintiff to fix his own value on the further relief sought. A reference to *Nanak Chand* v. *Jiwan Mal* (1) shows that it is not an authority for the proposition enunciated by the trial Court. In our opinion Mr. Tek Chand's contention is correct and a declaratory decree, such as is prayed, would not entail the cancellation of the mortgage-deeds in their entirety. The mortgagees would still be entitled to sue on them as bonds for the moneys secured thereunder. Mr. Tek Chand referred us to 53 P. R. 1901, and contended that the relief he sought in this case was precisely the same as that sought by the plaintiff in that case and declared his willingness to amend the present plaint so as to make his clients intentions perfectly clear to the effect that it was his rights in the property that it was desired to safeguard. This Mr. Tek Chand undertakes to do. In this view of the case, it is not necessary to discuss the second point raised. The appeal is accepted, the order rejecting the plaint is set aside, and the case remanded to the Court below for disposal in accordance with law. We make no order as to costs. The stamp on the memorandum of appeal will be refunded.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 53 OF 1923.

January 24, 1924.

Present :—Justice Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

MAHARAJADHIRAJ OF DARBHANGA—PETITIONER

versus

COMMISSIONER OF INCOME TAX—OPPOSITE PARTY.

Income Tax Act (XI of 1922) ss. 2, 4, 58—Super tax—Liability to pay tax on dividends which have already paid it—Agricultural income—Income arising from markets, fisheries, moorings and ferries—Bengal Permanent Settlement Regulation (I of 1793) Art. VI, effect of—Exemption from all future taxes whether granted—Exemption whether revoked by Income Tax Act.

Under section 58 of the Income Tax Act of 1922 the intention of the Legislature is to charge super-tax upon the income of companies as well as upon the income of individual share-holders including in the income of the latter the dividends received from the company although they had already been charged to super-tax at the flat rate of one anna in the rupee. [p. 785, col. 1.]

Income derived from markets, fisheries, moorings or ferries cannot be regarded as agricultural income within the meaning of s. 4 (3) (VIII) of the Income Tax Act of 1922, and is not as such exempt from Income tax. [p. 786, col. 1.]

Per Dawson Miller, C. J. (*Mullick J.* dissenting) :—The Legislature has power to vary or modify the bargain entered into between the Government and the proprietors by the Permanent Settlement, but this can only be done by clear and specific language in a Statute and not by general implication.

By the Permanent Settlement it was the revenue or rent payable to Government as the paramount landlord that was fixed in perpetuity, and the imposition of the Income Tax on income derived by a landlord from markets, fisheries, moorings and ferries, which had already been taken into account in fixing the permanent *jama*, would amount to an increase in the revenue in contravention of Art. VI of the Bengal Permanent Settlement Regulation of 1793.

The words of s. 4 (1) of the Income Tax Act of 1922, do not amount to a legal and effective abrogation of the exemption contained in Art. VI of the Bengal Permanent Settlement Regulation of 1793.

Associated Newspapers Ltd. v. *City of London Corporation*, (1916) 2 A. C. 429 ; 85 L. J. K. B. 1786 ; 113 L. T. 419 ; 80 J. P. 393 ; 14 S. G. R. 1027 ; 60 S. J. 694 ; 32 T. L. R. 700, relied on.

MAHARAJADHIRAJ OF DARBHANGA *v.* COMMISSIONER OF INCOME TAX

Per Mullick, J.:—No unlimited exemption from future taxation was granted by Art. VI of the Bengal Permanent Settlement Regulation of 1793. The exemption granted by the Regulation was limited to the particular objects of the Settlement, namely, use and occupation of the settled area, and the *jama* fixed for ever was the consideration for such use and occupation. The Crown did not in any way surrender its other rights on behalf of the general community. [p. 793, col. 1.]

If this view is not correct, the language of the Bengal Permanent Settlement is at least ambiguous and does not clearly and distinctly give any exemption from all future taxes and rates. The meaning of the Legislature being doubtful, contemporary exposition can validly be resorted to for purposes of interpretation and the uniform view of the Legislature and its servants has been that the Regulation did not intend to surrender all future rights of taxation in respect of the profits of the estates thereby affected. [p. 793, col. 2.]

If the language of the Regulation is not ambiguous and if it clearly indicates an intention to surrender all such future rights of taxation, then the language of the Income Tax Act is sufficient to revoke the exemption. [p. 793, col. 2.]

Appeal against the order of the Income Tax Commissioner, Darbhanga, dated the 23rd November 1920

Mr. *K. P. Jayaswal* and *M. Prasad*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.

Dawson Miller, C. J.—Three questions arise for determination in this reference :—

(1) The first question is whether the petitioner is liable for additional Income Tax for the year 1920-21 upon a re-assessment made after the expiration of the next following year, that is, after the end of March 1922. The additional sum claimed under the reassessment is a large one amounting to Rs. 1,34,769-4-0 in respect of Income Tax and super-tax. It appears that the assessment for the year in question was made on the 23rd November 1920 based upon a return of the income of the previous year as provided by sections 17 and 18 of the Income Tax Act, 1918, then in force. When the return of the actual income for the year of assessment was received in 1921 for the purpose of provisionally assessing the income for 1921-22 an adjustment of the assessment for the year 1920-21 was made as provided by section 19 of the Act. On the 28th March 1922 it having been discovered that certain items of income had escaped assessment for the year 1920-21 a further assessment was made on those items under the provisions of section 25 of the Act of 1918 and the demand in respect of that year appears to have been finally closed. Thus far, no question arises but in pursuance of a demand made in 1922 that the assessee should file a fresh return of the actual income for the year 1920-21 a fresh return was filed and on the 27th January 1923 a fresh assessment based on the actual income of 1920-21 was made. This showed an additional amount payable beyond that already assessed and paid. From the letter of demand and the revised assessment form enclosed therewith it appears that the assessment is made in respect of Income Tax payable for the year 1920-21. As this re-assessment was not made until more than a year had elapsed after the expiration of the year of assessment the assessee contended that he was not liable to any further tax than that already demanded for the year in question. He based his contention upon the provisions contained in section 25 of the Income Tax Act of 1918. In my opinion this contention is well-founded, but it is unnecessary to pursue the matter further as the learned Government Advocate admits that for the year 1920-21 the additional amount demanded is not recoverable and that the demand although purporting to be in respect of the tax payable for that year is really a demand for a subsequent year based upon the income of that year. It is clear that some confusion has arisen from the form in which the demand was made. It is sufficient to say that for the financial year 1920-21 the tax payable does not include the additional sum demanded

(2) The second question is whether in computing the amount on which super-tax is payble by an individual or Hindu undivided family under the Income Tax Act of 1922 the amount received as dividends from a registered company should be deducted, or, if not, whether credit should be given for the super-tax already paid on those dividends by the company. It is contended that as the company itself pays super-tax upon its income before distributing dividends no further super-tax on such dividends should be payable by the share-holder or at least that credit should

be given to him for the amount of super-tax paid by the Company proportionate to the amount of his dividends. Under the third Schedule of the Act super-tax is payable upon income received in excess of Rs. 50,000. In the case of every Company the rate payable is 1-anna in the rupee whatever the amount of excess over Rs. 50,000 may be. In the case of individuals and Hindu undivided families the amount of tax increases from 1-anna to 6-annas in the rupee according to the increase over Rs. 50,000. There is nothing in the Act from which it can be inferred that in computing the taxable income of individuals or Hindu undivided families for purpose of super-tax dividends upon which super-tax has been paid by the Company should be deducted. The super tax payable by a Company is a comparatively small tax charged at a flat rate of 1-anna in the rupee. The super-tax payable by the individual is on a sliding scale increasing in proportion to the increase of income and is separately charged. In each case super-tax is levied on the total income under sections 55 and 56 of the Act. By section 16, in computing the total income, the dividends payable to an assessee and a share-holder in a Company are included. But although by section 14, where the profits of the Company itself have been assessed to income-tax, the share-holder is exempt from paying a second income tax upon the amount of dividends received by him and already taxed as the income of the Company, no such exemption is provided in the case of super-tax. On the contrary, section 58 which applies the other provisions of the Act, as far as may be, to the assessment of super-tax expressly excludes the operation of section 14. It is clear, therefore, that the intention of the Legislature was to charge super-tax upon the income of Companies as well as upon the income of individual share-holders including in the income of the latter the dividends received from the Company although they had already been charged to super-tax at the flat rate of 1-anna. It was contended that the Company was the agent of the assessee for the purpose of paying tax and that credit should be given for the amount paid by the Company on the dividends received but although this may be true in the case of income tax it is clear by the sections already referred to that super-tax must be separately paid on the profits of a Company by the Company itself at the smaller rate and by the share holder on the dividends received by him out of those profits as part of his income, the rate payable by him being on a sliding scale according to the amount of his total income. It follows that no exemption can be claimed by the assessee from the payment of super-tax in respect to the dividends received by him.

(3) The third question is whether income derived from *jalkar* (fisheries), *hat* (markets) and *ghatlagi* (moorings and ferries) is liable to tax.

The assessee contends, first, that income derived from these sources is agricultural income and, therefore, exempt under section 4, sub-section (3), clause (viii) of the Income Tax Act of 1922, and, secondly, that such income is exempt from assessment to income tax by the terms of the Settlement under which he derives his title and the Regulations relating thereto.

As to the first contention ; there appears to be no foundation for the view that income derived from markets or moorings or ferries can be regarded as agricultural income and the only argument addressed to us in support of this part of the case is that these things are in some way connected with the land. It was urged, however, that fisheries were, or might be in certain cases, as where the fishing is from tanks, so intimately connected with the pursuit of agriculture that they should be included under that designation. The popular conception of agriculture, even if it should include the rearing of live stock and poultry fed on the produce of the land and requiring in certain cases cultivation of the land for grazing purposes, or otherwise, seems hardly wide enough to include the rearing of fish in rivers or tanks. Agricultural income is defined in clause (2) of the Income Tax Acts of 1918 and 1922. The definition includes rent or revenue derived from land used for agricultural purposes as well as income derived from agriculture and from the sale of agricultural produce. The definition does not carry the case any further. The question is whether the rent paid for the fishing rights, or for the markets, ferries, or moorings is income derived from agriculture.

In my opinion it is not. The fact that the Bengal Tenancy Act, by section 193, applies the procedure provided by the Act for the recovery of arrears of rent to suits for recovery of anything payable in respect of fishery rights and the like is of no assistance to the petitioner. It rather emphasises than otherwise the difference between revenue derived from land let for agricultural purposes and that derived from fisheries and the other sources of income mentioned in the section. Nor does it seem reasonable to hold that income derived from fishing over land covered by water and which is not used for any agricultural purpose is income derived from agriculture. Fish are not the produce of the land. Their natural element is the water and their cultivation and welfare depend in no sense upon agriculture. It may be that in certain cases the *jalkar* rights include the right to cultivate the soil of the tank when dry but the facts of this case do not show that the income sought to be exempted from tax was other than that derived from the right to catch fish. In my opinion the question whether income derived from *jalkar, hats* and *ghatlagi* is agricultural income and so exempt from income tax should be answered in the negative.

The second contention arising upon this part of the case is that exemption can be claimed for income derived from the above sources by reason of the terms of the Settlement under which the property is held coupled with the provisions of the Bengal Permanent Settlement Regulations. The argument is that the Settlement covered the rights of *jalkar* and *hat* and that *ghatlagi* is included as an incident of the *jalkar* rights, and that the revenue permanently fixed for ever at the date of the Settlement covered the whole liability to Government in respect of these rights as provided in Regulation I of 1793. It is conceded that the Legislature has power to vary or modify the bargain entered into between the Government and the proprietors by the Permanent Settlement, but it is contended that this can only be done by clear and specific language in a Statute and not by general implication, a test which the Income Tax Act does not satisfy. There can be no doubt that the Permanent Settlement exempted the proprietors for all time from enhancement of the revenue fixed in respect of the settled lands and three questions arise for consideration ; (1) does the Settlement made with the predecessor of the assessee cover the *jalkar* and other rights; (2) does the imposition of income tax on the income derived from these sources vary the terms of the Permanent Settlement, and (3) if so is the Income Tax Act sufficiently specific and unambiguous to indicate without reasonable doubt that it was the intention of the Legislature to vary the bargain made at the time of the Permanent Settlement.

If the first of these questions should be answered in the negative, the assessee will be liable, as the other two questions do not in that event arise. On this point the Commissioner has found as a fact that the documents produced in support of the assessee's contention contain no evidence that the items under consideration were included in the assets when the *jama* was assessed and permanently fixed at the date of the Settlement. If this finding is accepted there is an end to the matter. The *sanad* under which the assessee holds has not been produced but copies of an application made by Raja Madho Singh Bahadoor for Permanent Settlement of Pargana Hati, etc., dated the 7th April 1800 and an *amaldastak* of the same date have been put in evidence. If the Settlement was in accordance with the application it would appear from the schedule attached to each of these documents that rents arising from *hat* and *jalkar* were included in the assets upon which the *jama* was assessed. It is not clear, however, whether these documents cover the whole of the estate now held by the assessee in respect to which the tax has been levied and if we should be of opinion that the imposition of income tax in respect to the items under consideration is contrary to the terms of the Settlement and that the income tax does not sufficiently clearly purport to modify the Settlement Regulation it would be necessary, I think, to refer the case back to the Commissioner to take further evidence and arrive at a definite finding upon the question whether these sources of income were included in the assets upon which the revenue was settled in 1800. It is not very clear why the Commissioner arrived at his finding but I gather that he was of opinion that the documents produced

were not conclusive evidence of the terms of the Settlement. I think, however, they raise a presumption in favour of the assessee as the applications for Settlement made by the proprietors at the time in question were, as a rule, a counterpart of the actual Settlement made and were part of a single transaction completed at the same time, just as a *kabuliyat* is a counterpart of a *patta*. There is no explanation forthcoming why the *sanad* or *sanads* under which the assessee holds have not been produced, but I consider it would be highly unsatisfactory in a case of this nature raising important questions of principle to determine the matter by a reference to the *onus* of proof when the real facts are probably capable of ascertainment. I propose, therefore, to consider, first, the other two points which arise on this part of the case. By the Permanent Settlement it was the revenue or rent payable to Goverment as the paramount landlord that was fixed in perpetuity. It is argued that the effect of the imposition of income tax is not to increase the revenue or rent so payable, but it is clear, I think, that the imposition of such a tax is in fact to increase the revenue under another name. The *jama* permanently fixed at the date of the Settlement was calculated upon a percentage of the rents and profits at that time derived from the ownership of the land. Income tax is based upon the same rents and profits as they now exist, and it is impossible, in my opinion, to escape from the conclusion that a tax, under whatever name, upon the same sources of income would increase the duty payable under the name of revenue and which, by the Permanent Settlement, it was agreed should then be fixed for ever. By Article VI of the Regulation it was a part of the bargain that the proprietors " will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs of successors, by the present or any future Government, for an augmentation in the public assessment in consequence of the improvement of their respective estates." An argument was addressed to us based upon the Cess Acts which, beginning in 1871, and still continuing, imposed a tax for the maintenance of roads and public works upon all holders of estates or tenures assessed upon the annual value of their lands even when those lands are also assessed to revenue. It was urged that the right to collect such taxes had never been disputed; but whether the Cess Acts do or do not constitute a breach of the bargain entered into with the proprietors by Lord Cornwallis in 1793 and the question has given rise to much controversy in the past—the Cess Acts themselves leave no room for doubt that it was the intention of the Legislature to impose the cess upon revenue-paying lands thereby expressly exercising that power which it admittedly possesses, and no valid argument can be based upon the analogy of those enactments. I consider that the Income Tax Act, if and in so far as it charges income derived from property included in the original Settlement with the proprietor and assessed to revenue, varies the terms of Regulation I of 1793.

The last point which arises on this part of the case is whether the Income Tax Act of 1922 is explicit enough in its terms to repeal the exemption created by the Permanent Settlement Regulation, for it must be conceded that such repeal cannot be effected merely by words of general import or by implication (Maxwell, 6th Ed., Chap. VII, Sec. 3). The Madras High Court in the case of the *Secretary to the Chief Commissioner of Income tax, Madras* v. *The Zamindar of Singampatti* (1), had to consider the effect of the Income Tax Act, 1918, upon the Madras Regulation XXV of 1802. The Madras Regulation is certainly no more comprehensive or emphatic than the Bengal Regulation of 1793 which declares that "no alteration will be made in the assessment which they (the proprietors) have engaged to pay but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever." The Income Tax Act of 1922 now under consideration is substantially similar in terms to that of 1918 for this purpose. It provides by section 4 (1), "save as hereinafter provided this Act shall apply to all income, profits or gain, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India." By section 6, the six heads of income chargeable to income tax include (iii) property and (vi) other sources. The exceptions to which the Act shall not apply are set out in section 4 (3). These include agricultural income but there is

no general exception of income derived from revenue paying estates settled under the Regulations. The words imposing the tax are no doubt wide enough to cover the income now under discussion but there is no express modification or repeal of the exemption already existing under the Regulation. The Madras High Court in the case above-mentioned held that it was impossible to treat as a legal and effective abrogation of the exemption the words of section 3 of the Income Tax Act, 1918, which as stated are of similar import to those of the later Act. I see no reason to take a different view from that held by the Madras High Court. Moreover, it appears to me to find support from the judgment of the House of Lords in the *Associated Newspappers Limited* v. *The City of London Corporation* (2). In that case by the Statute VII, Geo. III, Ch. 37, certain land in the City of London reclaimed from the Thames was declared to vest in the owners free from all taxes and assessments whatsoever. About 80 years later, in 1848, the City of London Sewers Act was passed imposing a new rate upon every occupier of a house or building within or partly within the City of London "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable in respect thereof by reason of such house or building being situate in any precinct or extra parochial place or otherwise." The House of Lords held that these words did not take away the express exemption granted by the earlier Statute.

An argument was based upon the exemption of agricultural income from the operation of the Act. This express exemption does not, in my opinion, necessarily lead to the conclusion that all other kinds of income derived from permanently settled lands were to be deprived of the benefit of the Permanent Settlement. The Act applies to the whole of British India and not only to the permanently settled area. It was apparently the policy of the Legislature, as appears from the definition of agricultural income in section 2, to exempt agricultural income derived from all lands paying either revenue or a local rate to Government and whether permanently settled or not, and, apart from any clear expression of intention to vary the Permanent Settlement, I do not think it would be legitimate to draw an inference from the general language of the section, that what was not excluded was included even if previously exempt by the Regulation. Nor do I consider that in determining the question now before us any assistance can be derived from considering such enactments as Drainage and Embankment Acts which, in exchange for new benefits conferred, levy a rate upon *Zemindars* and others to provide for the cost. The income tax is for general purposes of revenue and is not allocated to any special purpose connected with the land or from which the land derives a peculiar benefit. But even if there should be found here and there on the Statute-book a tax imposed in apparent contravention of the Permanent Settlement, and no objection taken, I should hesitate to say that such a state of affairs would conclude the question now under consideration.

I have had an opportunity of perusing the judgment about to be delivered by my learned brother with which I regret I am unable to agree. The question I think is one of some difficulty but I can find nothing in the Income-tax Act of 1922 indicating an express intention to deprive the proprietors of permanently settled lands of the exemption created by the Bengal Settlement Regulation of 1793.

In the circumstances, and for the reasons stated in an earlier part of this judgment, I think that the case should be remanded to the Income tax Commissioner to determine the following question of fact, namely, whether the *jalkar*, *hat* and *ghatlagi* rights In respect of which the exemption is claimed formed a part of the assets taken into consideration in settling the *jama* at the date of the Settlement with the predecessors-in-title of the assessee. The parties will be at liberty to adduce fresh evidence upon the question for determination.

Mullick, J.—The only point which I propose to discuss is whether the petitioner is entitled to exemption in respect of the income from *Jalkars*, *Ghatlagi*, and markets. On all the other points the petitioner must clearly fail.

It is accordingly necessary at the outset to examine what was the precise nature of the bargain which the East India Company made

with the *Zemindars* of Bengal by the Permanent Settlement Regulation (Regulation I of 1793). Article II of the Regulation states that "the Marquis of Cornwallis, Governor-General in Council, now notifies to all *Zemindars*, independent *talukdars* and other actual proprietors of land paying-revenue to Government, in the provinces of Bengal, Bihar and Orissa, that he has been empowered by the Hon'ble Court of Directors for the Affairs of the East India Company to declare the *jama*, which has been or may be assessed upon their lands under the Regulations above-mentioned, fixed for ever." The Regulations above-mentioned mean the Regulations for the Decennial Settlement made on the 25th November 1789 and the 10th February 1790.

Article III recites "that the Governor-General in Council declares to the *Zemindars*, independent *talukdars* and other actual proprietors of land with or on behalf of whom a settlement has been concluded under the Regulations above-mentioned, that at the expiration of the term of the Settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever."

Article VI runs as follows: "It is well known to the *Zemindars*, independent *talukdars* and other actual proprietors of land, as well as to the inhabitants of Bengal, Bihar and Orissa, in general, that from the earliest times until the present period the public assessment upon the land has never been fixed, but that according to established usage and custom, the rulers of these provinces have from time to time demanded an increase of assessment from the proprietors of land; and that, for the purpose of obtaining this increase, not only frequent investigations have been made to assertain the actual produce of their estates, but that it has been the practice to deprive them of the management of their lands, and either to let them in farm, or to appoint officers on the part of Government to collect the assessment immediately from the *raiyats*." The section further recites: "The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed forever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates." Article VII recites that "the *jama* . . . is to be considered entirely unconnected with, and exclusive of any allowances which have been made to them in the adjustment of their *jama*, for keeping up *thanas* or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose."

But the Company in whom were vested the rights of the Sovereign, were the owners of the land. For reasons, into which it is not necessary to enter, they decided that the *Zemindars*, independent *talukdars* or proprietor was the person best entitled to settlement. A limited right of ownership was conferred upon him not only in respect of the owner's share of the produce of the soil but also in the soil itself. The demand was based on contract and it was open to the *zemindar* to decline to engage. If he accepted the engagement not even the total destruction of the property was a ground for remission. The demand had some of the attributes of a land-tax but it was not a tax; in reality, the transaction was a sale of the owner's rights on the basis of the capitalized value of the assessment. Where the assessment approximated to the economic rent it was in effect rent for use and occupation, but the frequency with which estates came under the hammer for arrears of revenue immediately after the Permanent Settlement indicates that, in practice, the assessment had no relation to the actual rents collected from tenants or to the value of the produce which would have been recovered if the land had been rented to them. The fact is that, tempted by the income to be derived from the cultivation of the waste land which according to some reports was more than one-third of the whole area and by the offer of an interest in the soil itself, the *zemindar* entered into a gamble. The Company offered to convert him from an office-holder to an owner in fee simple in return for a fixed price. Though the

price was heavy he paid it, but there is no reason for holding that he purchased thereby an immunity from all future taxation. In one capacity the Company represented the Sovereign and the general community ; they were also the owners of the soil ; they surrendered to the *Zemindar* no part of their rights in the former capacity which included the right to tax but only a portion of their rights of ownership, namely, the right to the produce of the soil ; and it seems clear from the context that the declaration that the *jama* was unalterable could only refer to the limited purposes of the contract. Indeed, having regard to the fact that the proceeds of the Settlement constituted the principal source of revenue at that time it is difficult to see how any general exemption from taxes upon profits could have been intended ; for a proprietor whose only source of income is the produce of his estate every tax be it personal, direct or indirect, is a tax upon land. It is immaterial that the tax is calculated on the value of his land; that is merely a matter of machinery and whether the basis of calculation is the produce of his land or the number of his servants or the income from his trade or profession, the tax in the end falls upon the land. Even if it were conceded that the assessment had all the attributes of a land tax (which I have already found it had not) no exemption from future taxation was expressly or by implication given, and, therefore, the decision in the *Associated Newspapers Limited* v. *Corporation of the City of London* (2), has no application. Here there was no exemption from taxation but merely a promise that the rent would not be enhanced, and therefore the question whether the general words of subsequent taxing Statutes are sufficient to exonerate the assessee does not arise.

Therefore in the absence of any clear and unambiguous declaration by the authors of the Permanent Settlement, I think it is permissible to invoke the aid of the principle of "Contemporary Exposition." Here it is not a case of one or two stray Statutes in the administration of which the strict rule of construction has been overlooked. On the contrary, a uniform course of dealing is disclosed which shows that profits from permanently settled estates have been taxed for the purposes of the State without express words revoking the exemption alleged to have been given by the Permanent Settlement Regulation ; and I have been unable to discover a single Statute in which any such exemption has expressly or by implication been recognised. To illustrate this attitude of the Legislature it will suffice to refer to a few important Statutes. In these no question of benefits sought by the subject arises ; he has no option to accept the obligation or refuse ; the discretion to impose the obligation is absolute and unconditional ; it is not open to the assessee to contend that he has derived no benefit therefrom. Though in principle indirect taxes or taxes imposed for services rendered stand on the same footing for the purposes of the present discussion, I have, for the sake of convenience, chosen only Statutes imposing direct taxes. It seem to be immaterial whether the funds raised are for a stated object or for the general purposes of the State.

The first of the Statutes which I propose to cite is the *Zemindari* Dak Cess Act of 1862. Within a few years of the Permanent Settlement, Regulation XX of 1817 was enacted imposing on *Zemindars* the duty of maintaining peons for the purpose of carrying the post from one Police station to another. The Regulation made no distinction between permanently settled and temporarily settled estates. The liability was next converted into a direct tax by Act VIII B. C. of 1862 and all *Zemindars*, *sudder* farmers and other persons paying revenue to Government in respect of lands situated within the district were liable to contribute for the payment of the establishments required for the purpose of maintaining the *Zemindari* daks. Again, no distinction was made in the Act between permanently settled and temporarily settled estates and the general words used were accepted without question for nearly 50 years as creating a liability on both classes of estates. The *Zemindari* Dak Cess Act has since been repealed but that circumstance does not affect the question of contemporaneous exposition.

I next desire to refer to the District Road Cess Act (Act X of 1871) and the Provincial Public Works Act (Act II of 1877) both of which were repealed and consolidated by Act (B. C.) of 1880. Act IX of 1871 provided for local revenue for the construction and maintenance of roads and other means of communication, and Act II of 1877 was

enacted for the levy of a cess for the construction and maintenance of provincial public works. In respect of the charging sections, there is no material difference between the Act of 1880 and these of 1871 and 1877. Their object was the imposition of cesses upon all immoveable property situated within a district. This is clear from section 5 of Act IX of 1880. Section 6 enacts that the road cess and public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries and tramways and other immoveable property, ascertained respectively as in this Act prescribed. Part II of the Act gives rules for the mode of assessment, and makes special reference to the mode in which summary valuation is to be made of revenue paying estates and tenures. The Act has always been construed as applying to permanently and temporarily settled estates alike and if any exemption was granted to the former by the Permanent Settlement, there must be somewhere in the Act a clear and unambiguous declaration of the Legislature's intention to revoke the same. Obviously, the reference to revenue-paying estates is Part II will not suffice because it does not necessarily include permanently settled estates, and unless the general words of sections 5 and 6, are adequate to charge the same the hitherto accepted construction is indefensible It is permissible, therefore, to infer that those who were charged with the administration of the Act were of opinion either that the exemption was never given or that, if given, the general words of sections 5 and 6, were adequate to reveke it.

I next proceed to consider the Bengal Municipal Acts. Ths earliest Act which empowered the Local Government to constitute a Corporation and to raise funds was Act XXVI B. C. of 1850. That Act was followed by Act XX of 1856 which again was followed by Act VI of 1868 (The District Towns Act) which allowed only one basis of calculation, namely, the circumstances and property of the persons to be benefitted and the funds to be applied to the maintenance of the Police, to the repair of roads, to conservancy, vaccination, general improvement and maintenance of dispensaries. The next important Act on the subject is Act III B. C. of 1884, which empowers a Municipality to levy ten different kinds of tax one of which is a rate on buildings, lands and holdings. The rate is to be levied on the annual value of the lands calculated upon the gross annual rate at which the holding may reasonably be expected to let. It is clear that where a holding comprises either a part or the whole of a permanently settled estate it is liable to be rated on its annual profits. No distinction is made between permanently settled and temporarily settled estates and, so far as I know, permanently settled estates are always assessed although there are no express words revoking the provisions of the Permanent Settlement.

Again, the Embankments Act (Bengal Act II of 1882) empowers the Government to remove embankments and alter water courses for the purpose of protecting lands and to recover the expenses from the *zemindars* of the estates thereby benefitted or protected in proportion to the respective benefits derived. No exemption from liability is made in favour of permanently settled estates.

Similarly, the Drainage Act (Act VI of 1880) empowers the Local Government to frame a scheme for better drainage and improvement of lands and to apportion the cost upon each landlord in respect of his improved lands, such cost being the first charge upon the lands in question and not avoidable by the sale of such lands for arrears of revenue. The Act makes no discrimination between permanently settled and temporarily settled estates.

Next, the Court of Wards Act (Act IX B. C. of 1879) empowers the Collector to take charge under certain circumstances of the property of a proprietor and to apply part of the profits in paying for the expenses of management and supervision. This is a tax payable out of the profits of the estate and no distinction is made between permanently and temporarily settled estates.

Again, the Village Chowkidari Act (Act VI B. C. of 1870) empowers the Village Panchayat to levy for the payment of village *chowkidars* a rate on every person owning or occupying a building in the village according to his circumstances and the property to be protected. The tax is to be calculated on the income derived from the property or according to the value of the land which the owner or occupier holds without regard to the nature

of his Settlement with Government in the event of his holding the land as a proprietor.

Finally, the Bengal Tenancy Act empowers the Local Government to order a Record of Rights and to recover from the landlords the costs of the operations in such proportions as the Local Government may determine. The proprietor of a permanently settled estate has always been considered liable to contribute although no special provisions prescribing such liability are contained in the Act.

Therefore, it seems to me that even if it be conceded that the exemption now claimed refers only to direct taxes as opposed to indirect taxes, such as the Stamp Act, the Court-Fees Act, the Probate Act and the Bengal Settled Estates Act the uniform view of the Legislature has been either that no exemption from any further tax based on the profits of the estate was ever given or that, if given, then general words not materially different from those used in the Income Tax Act (Act XI of 1922) are sufficient to revoke it.

It is necessary, therefore, to consider whether anything is to be gathered from the Income Tax Act itself as to the intention of the Legislature in respect of non-agricultural income from Permanently Settled Estates.

The first Income Tax Act, namely Act XXXII of 1860, seems to have made no exemption in favour of the proprietor of a permanently settled estate who like others had to pay the prescribed percentage upon his profits. Agricultural income was not exempted and yet no question seems to have been raised as to any breach of the Permanent Settlement. Next, Act II of 1878 was passed to provide, ammong other things, for an insurance against famine. The Act was in force in the United Provinces and the Punjab, but in Bengal the Local Government adopted similar legislation by passing Act III B. C. of 1878 and for the first time agricultural income was not exempted. The next Act, namely, Act II of 1866, converted the tax into a general income-tax (by an *Act applicable* to the whole of India) and taxed non-agricultural income of all kinds and in regard to the matters material to the point now under consideration, the provisions of the law have remained unchanged in the present Act, namely Act XI of 1922. The scheme of this last mentioned Act is ability to pay, with the exception that agricultural incomes are exempt. Agricultural income is defined in section 2 as rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to local rate assessed and collected by officers of Government as such. It would seem, then, that profits derived from non-revenue-paying agricultural lands are liable to the tax. Non-agricultural income derived from a temporarily settled estate would be liable, but, according to the petitioner, if derived from a permanently settled estate it would be exempt. It is possible that the agricultural income of a temrorarily settled estate should have been exempted from income tax in consideration of the periodical reassessment to which the estate was subject, but although considerations of distributive justice are not relevant, it does seem strange that the Legislature should have considered it necessary to exempt the agricultural income of the permanently settled proprietor also who enjoys the advantages both of fixity of tenure and of rent. That this inequality should be further accentuated by exempting his non-agricultural income seems difficult of explanation.

Further, if the contention of the petitioner is carried to its logical conclusion the results would be as follows. In non-agricultural areas he ought to pay neither cesses nor income tax while the proprietor of the temporarily settled estate would pay both. In regard to incomes from *Jalkars*, the Local Government has by notification exempted them from cess but if the contention of the petitioner is correct, the exemption should have been notified only in respect of temporarily settled estates and the notification in its present general form is inapt and too widely framed.

A similar objection applies to the drafting of section 2 of the Act, if the Permanent Settlement Regulation is sufficient to exempt the petitioner's agricultural income.

Again, in Municipal areas the petitioner should pay neither Municipal rates nor income-tax on *Jalkars* while the temporarily settled proprietor is liable to pay both.

But a far more important matter is that the petitioner would also be exempt from income-tax on royalties from mines within his permanently settled estates.

It is now conceded that the Permanent Settlement, unless a contrary intention was expressly indicated, carries with it sub-soil rights and hitherto every proprietor, whether temporarily or permanently settled, has been considered liable to pay income tax in respect of royalties on minerals, see *Manindra Chandra Nandi* v. *The Secretary of State for India* (3). The Income Tax Act makes no reference to minerals and the decided cases show that the charging sections apply to all royalties.

Why, then, should the charging sections, namely, 4 and 6, not be sufficient to impose a liability on all other property not expressly exempted in the Act. I cannot see any indication that the Legislature, while using such wide and general language, intended to make some limitation in favour of non-agricultural income arising out of the profits of permanently settled estates.

The result at which I have arrived may, therefore, be summed up as follows :—

(1) There was no exemption from future taxation granted by the Permanant Settlement Proclamation similar to that given to the appellants in *Associated Newspapers Limited* v. *Corporation of the City of London*, (2). The provisions of 7, George III, Chapter 37 material to that case prescribed that the owners and proprietors of the several wharves and grounds then abutting under the river Thames and adjoining the area in question were vested with the proprietary rights in the said wharves and grounds according to their respective interests free from all taxes and assessments whatever. No unlimited exemption of this kind was granted to the proprietors of permanently settled estates. It was an exemption limited to the particular objects of the Settlement, namely, use and occupation of the settled area, and the *jama* fixed for ever was the consideration for such use and occupation. The Crown did not in any way surrender its other rights on behalf of the general community. If this view is correct, the absence of any reference in the Income Tax Act to the Permanent Settlement is immaterial.

(2) If this view is not correct, then at least the language of the Permanent Settlement is ambiguous and does not clearly and distinctly give any exemption from all future taxes and rates. The meaning of the Legislature being doubtful, contemporary exposition can be resorted to and I have endeavoured to show that the uniform view of the Legislature and its servants has been that the Permanent Settlement Regulation did not intend to surrender all future rights of taxation in respect of the profits of the estates thereby affected.

(3) If the language of the Permanent Settlement Regulation is not ambiguous and if it clearly indicates an intention to surrender all such future rights of taxation then the interpretation placed upon Statutes similar to the Income Tax Act can be called in aid for the purpose of explaining the meaning of the words used in the Act. If such a course leads to the conclusion that similar general words have hitherto been considered sufficient to revoke the exemption granted by the Permanent Settlement, then the absence of express words in the Act will not prejudice the Crown and the affirmative language of the Act is sufficient to revoke the exemption in question.

The result, therefore, is that, in my opinion, the profits of *jalkar*, *ghatlaggi* and market rights are chargeable with income tax, but the point is one of considerable difficulty and I express this opinion with hesitation. On other points I agree with the learned Chief Justice and as his opinion on the question of law, which I have endeavoured to discuss, must prevail, I agree to the order for further enquiry which he proposes to make.

Z. K. *Case remanded.*

(1) 70 Ind. Cas. 504 ; 45 M. 518 ; 15 L. W. 496 ; (1922) M. W. N. 353 ; 31 M. L. T. 21 ; (1922) A. I. R. (M.) 325.

(2) L. R. (1916) 2 A. C. 429 ; 85 L. J. K. B. 1786 ; 118 L. T. 419 ; 80 J. P. 393 ; 14 S. G. R. 1027 ; 60 S. J. 694 ; 32 T. L. R. 700.

(3) 34 C. 257 ; 5 C. L. J. 148.

REWA MAHTON *v.* DALU MAHTO

PATNA HIGH COURT.

CIVIL REVISION NO. 302 OF 1923.

November 13, 1923.

Present : —Mr. Justice Das and Mr. Justice Ross.

REWA MAHTON—APPLICANT
versus
DALU MAHTO—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151—Amendment of decree after appeal—Inherent power of Court.

A Court of law has authority over its own record and may amend the record or the decree passed by it even after an appeal has been filed against the decree.

Mellish v. *Richardson*, (1832). 1 Cl. & F. 224 ; 6 E. R. 900 ; 36 R. R. 111 ; 6 Bl (N. S.) 70 ; *Kumud Nath Roy Chowdhury* v. *Jatindra Nath Chowdhury*, 9 Ind. Cas. 189 ; 13 C. L. J. 221 ; 15 C. W. N. 399 ; 38 C. 394, relied on.

Revision against an order of the Subordinate Judge, 2nd Court, Patna, dated the 16th May 1923.

Mr. *Ahmad Raza*, for the Petitioners.

Mr. *A. B. Mukherji*, for the Opposite Party.

Das, J.—It has been contended before us that the learned Subordinate Judge had no jurisdiction to amend the decree after an appeal was taken from that decree to the Appellate Court. In my opinion the contention is one which it is not possible for us to accept. There is very high authority for the view that a Court of Law has authority over its own record and it may amend the record even after an appeal is brought : *Mellish* v. *Richardson* (1) The Calcutta High Court in the case of *Kumud Nath Roy Choudhury* v. *Rai Jatindra Nath Choudhury* (2) relied upon the decision to which I have just referred for coming to the conclusion that where the Court would otherwise have the authority to amend the judgment it may do so even after an appeal has been taken. I entirely agree with the view which was taken by the Calcutta High Court in the case to which I have just referred. This application must be refused with costs. Hearing fee one gold mohur.

Ross, J.—I agree.

Z. K. *Application refused.*

(1) (1832) 1. Cl. and F. 224 ; 6 E. R. 900 ; 36 R. R. 111 ; 6 Bli (N. S.) 70.
(2) 9 Ind. Cas. 189 ; 13 C. L. J. 221 ; 14 C. W. N. 399 ; 38 C. 394.

NARUMAL WATOOMAL *v.* YUSIFALLY NOORDIN

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 37 OF 1921.

January 29, 1924.

Present :—Mr. E. Raymond, A. J. C., and Mr. B. C. Kennedy, A. J. C.

NARUMAL WATOOMAL—DEFENDANT—
—APPLICANT
versus
YUSIFALLY NOORDIN—PLAINTIFF—
ISMAIL NOOR MAHOMED—
DEFENDANT NO. 2—OPPONENTS.

Contract Act (IX of 1872), s. 72—Money paid by mistake—Consideration, absence of—Refund.

Plaintiff authorised a broker to purchase a particular property for him and paid a certain sum of money to the broker as earnest-money to be paid to the vendor. The broker made a contract in respect of an entirely different property with a different vendor and paid the earnest-money to the latter who received it in good faith. On discovering the mistake plaintiff sued to recover the money from the vendor to whom it had been paid by the broker ;

Held, that the case was covered by section 72 of the Contract Act and the defendant was bound to re-pay the money to the plaintiff.

Revision against the judgment and decree of the Judge, Small Cause Court, Karachi, dated 16th April 1921.

Mr. *Tolasing Khushalsing*, for the Applicant.

Mr. *Dharmdas Thawerdas*, for the Opponent No. 1.

JUDGMENT.—This is an application in revision under section 25 of the Provincial Small Cause Courts Act.

The facts are simple. Plaintiff-opponent No. 1's case was that the broker Nur Mahomed Ismail offered him a shop building for

sale. Plaintiff accompanied the broker to inspect it before the purchase. He was shown the shop of the applicant but the plaintiff did not approve of it. He was next shown by the same broker a shop in Mithadar quarter which the plaintiff says he approved and instructed the broker to make an offer of Rs. 4,500 for its purchase. The evening of the same day the broker took from the plaintiff Rs. 500 as earnest-money representing to him that the owner of the latter shop building had agreed to sell the property for the figure named Rs. 4,500. On the day following, that is, the 4th January 1920 the broker brought to the plaintiff a receipt for the Rs. 500 and the *kabala* for his signature. Plaintiff, on having the *kabala* read to him, found that the shop building agreed to be sold was the one in the Napier quarter which belonged to the applicant and that the purchase price was Rs. 5,900 He declined to sign the *kabala* as he had not authorised the broker to purchase this property, and demanded the refund of the Rs. 500. As this amount was not paid he filed a suit in the Small Cause Court against both the applicant and the broker and obtained a decree for this amount against both.

The applicant undoubtedly received the Rs. 500 ; the question is whether he is entitled to retain it. It appears evident that the broker was not the agent of the plaintiff in the transaction with the applicant. He had been authorised to purchase the property in Mithadar quarter for Rs. 4,500 and the sum of Rs. 500 had been handed to him for the purpose of negotiating this purchase, but he had no authority, express or implied or even any apparent authority, to purchase the property owned by the applicant. Under these circumstances, neither sections 237 or 238 Indian Contract Act have any application.

There can be little doubt on the evidence that the brokers have perpetrated a fraud on the plaintiff but it is argued for the applicant and quite correctly that he was not a party to the fraud and that he honestly believed the representation made to him by the brokers. The fact, however, remains that the applicant has obtained Rs. 500 for which there is no consideration. Is he entitled to retain it because of his good faith in the matter ? It is not correct to say that there was no privity of contract between the applicant and the plaintiff for the receipt for Rs. 500 clearly shows that the amount was received from the plaintiff. Reliance was placedupon the case of *Thomson* v. *Clydesdale Bank* (1) where a broker who had received specific instructions to invest a sum of money in a particular manner fraudulently paid the amount received to the respondent in reduction of the balance due by him on his account and it was held that the appellants were not entitled to recover it from the respondents. But there is a very important distinction between this case and that before us for the applicant must have known from the receipt executed by him that the sum of Rs. 500 which the brokers paid him was the property of the plaintiff and not that of the broker.

We think that section 72 Indian Contract Act is clearly applicable to the present case and that the sum of Rs. 500 was paid by the plaintiff to the brokers under a mistake of fact. Plaintiff believed that he was paying Rs. 500 for the purchase of the Mithadar property and the mistake was material as it led to the payment of money without consideration. There can be little doubt that the plaintiff had not the faintest idea that the money was to be utilised by the brokers in foisting upon him the property of the applicant for he promptly repudiated the *kabala* as soon as he was acquainted with the contents and declined to sign it. A debtor may recover from a creditor the amount of over-payment if it was made to him by mistake.

It was argued that the Court below was in error in regarding the plaintiff's money in the hands of the applicant as money had and received for the plaintiff, but by whatever phraseology it may be described there is the patent fact that there is an entire failure of consideration. And, as observed by the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (2), if there was never any consideration then the price paid by the appellant was money had and received to his account.

(1) (1893) A. C. 282 ; 1 R. 255 , 62 L. J. P. C. 91; 69 L. T. 156.

(2) 19 C. 123 (P. C.) 18 I. A. 158, 6 Sar. P. C. J. 91 , 9 Ind. Dec. (N. S.) 527.

It was lastly argued that the lower Court was in error in awarding the plaintiff the payment of the sum of Rs. 500, from the applicant as well as the broker, but in this application we are not concerned with the relief awarded against the latter. We are satisfied that the learned Judge was correct in directing the applicant to refund the sum of Rs. 500 to the plaintiff and this application is, therefore, dismissed with costs.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 93 of 1921.

February 19, 1924.

Present :—Justice Sir Jwala Prosad and Mr. Justice Kulwant Sahai.

RAJKESHWAR PRASHAD NARAIN SINGH—DEFENDANT—APPELLANT

versus

MUHAMMAD KHALIL-UL-RAHMAN—PLAINTIFF—MOHAMED AHSAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 81—Mortgage—Marshalling—Mortgagee, subsequent, purchasing mortgaged property in execution of decree, effect of—Civil Procedure Code (Act V of 1908) O. XXXIV, r. 4—Mortgage-decree—Sale, order of—Court, power of, to direct order of sale.

The object of section 81 of the Transfer of Property Act is to protect a subsequent mortgagee from the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also, and a subsequent mortgagee does not lose the benefit of the section merely by reason of the fact that he has purchased mortgaged properties in execution of a mortgage-decree obtained by him on foot of his subsequent mortgage.

Magniram v. *Mehdi Hossein Khan*, 81 C. 95 ; 8 C. W. N. 30 at p. 34 ; *Dilawar Sahai* v. *Diwan Bolakiram*, 11 C. 258 ; 5 Ind. Dec. (N. S.) 931 ; *Kommineni Appaya* v. *Mangala Rangayya*, 31 M. 419 ; 3 M. L. T. 287 ; 18 M. L. J. 229 (F.B.) ; *Webb* v. *Blessington*, (1828) 3 Moll. 123, distinguished.

Inderdawan Pershad v. *Gobind Lal Chowdhry* 23 C. 790 ; 12 Ind. Dec. (N. S.) 521, relied on.

Ordinarily, the right of selling mortgaged properties in execution of a mortgage-decree in a particular order rests with the decree-holder and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realisation of his mortgage-debt. But the Court can, in the particular circumstances of a case and in view of the equities arising in favour of the various parties, apart altogether from any question of marshalling, direct, under O. XXXIV, r. 4 of the Civil Procedure Code, the order in which the properties should be sold.

Appeal from a decision of the Subordinate Judge, 2nd Court, Patna, dated the 21st January 1921.

Messrs. *R. C. Bhaduri*, *Rai Guru Saran Prasad* and *Raghunandan Prasad*, for the Appellant.

Messrs. *Noorul Hossain* and *B. C. Sinha*, for the Respondent.

Jwala Prasad, J.—This appeal arises out of a mortgage-suit. Defendant No. 14 Edal Singh, who died after the institution of the suit, is now represented by his minor son Rajkekeshwar Prasad Singh under the guardianship of *Musammat* Dulhin Sona Kuer. The plaintiff is Muhammad Khalil-ul-Rahman. He seeks to enforce two mortgages, both of them bearing the same date, viz., the 9th July 1904, one was for Rs. 500 in favour of Jadunandan Prasad Singh, defendant No. 48, in the suit (Ex. 1), the other was in favour of Baldeo Narain Singh, defendant No. 49, for Rs. 900 (Exhibit 1-a). The last mentioned bond was taken in the name of Raghunath Prasad Singh, defendant No. 50. The mortgagor was *Musammat* Wahidunnissa, wife of Sheikh Muhammad Ahsan *alias* Ahamdi. The plaintiff purchased the aforesaid mortgages by two deeds of sale (Exhibits 2 and 2 (a). Exhibit 2 was executed on the 23rd July 1915 by Baldeo Narain Singh. Exhibit 2 (a) was executed on the 20th July 1915 by Jadunandan Singh. The plaintiff thus is an assignee of the mortgage-bonds of the 9th July 1904 and he seeks to enforce the aforesaid mortgages by sale of the mortgaged properties detailed in the bonds and reiterated in the schedule attached to the plaint. Defendant No. 14, who is the appellant before us, had taken three mortgages from *Musammat* Wahiddunnissa: (1) dated 25th October 1914 for Rs. 13,000, (2) dated the 29th November 1915 for Rs. 6,500

and (3) dated 3rd December 1915 for Rs. 800. We are concerned with two of the properties mortgaged in these three bonds : Maksudpur Ogawan and Nisf Ogawan as they are also mortgaged in the bonds in suit.

Edal Singh enforced his mortgages, obtained consolidated decree on the 22nd December 1917, and is said to have purchased the mortgaged properties in execution of that decree. His defence in the present case *inter alia* is that the mortgages which the plaintiff wants to enforce have been extinguished, inasmuch as under the sale-deed (Exhibit A) executed by Sheikh Muhammad Ahsan *alias* Ahmadi and Wahidunnissa on the 22nd November 1914 in favour of Mr. Zakaria Gauhar Ali (defendant No. 20) and Bibi Roqaitul Fatima (defendant No. 21), the vendees had to pay the mortgages in suit and had for that purpose kept with them sufficient money out of the consideration of the sale-deed and, as a matter of fact, did pay up the mortgages in suit and got the assignment deeds (Exhibits 2 and 2-a) executed in the *farzi* name of the plaintiff who is their relation. Defendant No. 14, therefore, says that the plaintiff has no right to institute a suit.

The next point urged is that the bond of the defendant No. 14 is subsequent to that of the plaintiff, and consequently he has a right to marshalling ; in other words, his case is that the properties which were not mortgaged to defendant No. 14 should be sold first in order to satisfy the mortgages in suit and if any sum be still found due, then and then only the properties mortgaged to defendant No. 14 should be sold. The learned Subordinate Judge has overruled both these contentions and has given a decree in favour of the plaintiff giving him right to sell the mortgaged properties in any order he likes. Defendant No. 14 impugns the decision of the Subordinate Judge.

The first ground urged by Mr. Bhaduri, who appears for the appellant, relates to limitation which is covered by issue No. 1 framed in the lower Court. The learned Subordinate Judge says that the issue was not pressed before him and on the face of his finding that the suit was filed on the 28th June 1919, and that the due date of the two mortgage-bonds was 9th July 1907, no question of limitation could arise. Mr. Bhaduri disputes that the suit was filed on the 28th June 1919 and says that in fact it was filed on the 22nd July 1919. That was the date on which the plaint was admitted and registered. Order No. 1 in the Order Sheet of the Court below clearly shows that although the plaint was registered on the 22nd July 1919, it was filed much earlier on the 28th June 1919 and that the delay in the registration of the plaint was due to the Court-fee stamps having had to be re-placed as those originally filed bore endorsement of the Patna High Court. These facts being pointed out, Mr. Bhaduri now concedes that the point taken by him was raised under misapprehension.

He next contends that the mortgages in suit have been discharged. It is not disputed that Mr. Zakaria and Roqaitul Fatima undertook to pay to the original holders thereof, Jadunandan and Baldeo, the dues under the two mortgages in suit and in order to pay them retained with them sufficient money out of the consideration of the-sale deed (Exhibit A) of 22nd May, 1914. In fact, the deeds of assignment (Exhibits 2 and 2-a), dated 23rd July and 20th July 1915, respectively, on the strength of which the plaintiff has brought this action, recite this, but adds that the vendees Mr. Zakaria Gauhar Ali and Roqaitul Fatima did not pay the mortgages in suit. On behalf of the defendant it is urged that the recital is false and in fact the original mortgagees, Jadunandan and Baldeo, were paid by Mr .Zakaria and Roqaitul Fatima, who, in order to prejudice the defendant, got the said deeds of assignment executed in the *farzi* name of the plaintiff, their relation. In order to prove this case the defendant has examined three witnesses Girbardhari Mahto, Etwari Mahto and Ramdhan Lal. Girbardhari was formerly a servant of Mohammad Ahsan *alias* Ahamadi, husband of the mortgagor Wahidunnissa. He wants to prove that in a regular conference in which Mohammad Ahsan, husband of Wahidunnissa, Jadunandan and Baldeo the original mortgagees, Musa representing his brother Mr. Zakaria and Mahbub-alam representing his mother Roqaitul Fatima were present, it was settled that Mr. Zakaria and Roqaitul Fatima would pay the mortgages in suit and take the deeds of assignment in the *farzi* name of the plaintiff. Etwari

Mahto is a vendee of certain properties from Muhammad Ahsan and Wahidunnissa and took from them asale-deed, Exhibit B, on the same day as the sale-deed, Exhibit A, in favour of Zakaria and Roqaitul Fatima was executed, that is, the 22nd May 1914. He says that he had to pay the dues of Edal Singh and Raja Harihar Prasad Singh just in the same way as Zakaria and Roqaitul Fatima had to pay the mortgages in suit of Jadunandan and Baldeo and that he paid Edal Singh and Raja Harihar Prasad Singh, and Mr. Zakaria and Roqaitul Fatima got their dues satisfied by taking deeds of assignment in the name of their friend. Ramdhan Lal says that Khalil-ul-Rahman is the son of the maternal uncle of Roqaitul Fatima who, along with Zakaria, purchased village Dosut under sale-deed (Ex. A) and paid the dues of Baldeo and Jadunandan and took assignment of their deeds. No connection of Khalil-ul-Rahman with Zakaria has been established; Ramdhan Lal who is a *karpardaz* of Edal Singh admits it in cross-examination. The presence of Girbardhari Mahto, servant of Mohammad Ahsan, at the negotiation seems to be suspicious. He is now the tenant of the appellant and this may account for his evidence. Etwari Mahto does not pose himself to be an eye-witness to the payment of the mortgage-debts in question by Mr. Zakaria and *Musammat* Roqaitul Fatima. The evidence given by the defendant is not convincing and reliable.

The plaintiff, on the other hand, has examined witnesses to prove that the money was actually paid by him and that the assignment was taken for his benefit. The learned Vakil for the appellant has also drawn our attention to the statement of Sheikh Abdul Hafiz, witness No. 4, on behalf of the plaintiff, to show that Khalil had himself no intention of acquiring properties and purchasing the bonds himself. True, this witness says that Kalil took these bonds as Shah Ali Syed told him that the properties were accessible to him and that if he would not like to keep them he would take them. He also says that Khalil has not purchased any other deed. Such statements are not enough to show that, as a matter of fact, Khalil was not the real purchaser. The bond of Jadunandan was to some extent considered in the case brought by Edal Singh to enforce his mortgages, judgment of which (Exhibit 3) was delivered on the 22nd December 1917. In that case Khalil was defendant No. 35. No doubt, this is an observation in the judgment in that case (that the circumstances connected with the bond were suspicious), but the actual finding was that the bond of Jadunandan of the 9th July 1904 was prior to that of Edal Singh and thus no effect was given to the contention that Khalil was a *benamidar* only under the deeds of assignment in question.

We have carefully considered the evidence on the record. All that we can say is that the circumstances disclosed in the evidence referred to above and relied upon by the learned Vakil for the appellant raise some suspicion as to Mr. Zakaria and Roqaitul Fatima being the assignees of the mortgages in question and the plaintiff being their *farzidar*, but the evidence falls short of the conclusive proof of Khalil-ul-Rahman being a mere *farzidar*. We agree with the learned Subordinate Judge in the view that he has taken of the transaction in question and the conclusion arrived at by him as regards this issue relating to the *farzi* character of the assignments in favour of the plaintiff. This contention of the appellant on this point is, therefore, overruled.

The next question raised relates to marshalling. The learned Subordinate Judge concedes that if defendant No. 14 had continued to be the mortgagee of the properties held by him under his mortgages he would have been entitled to compel the plaintiff to have his debts satisfied in the first instance, out of the properties not mortgaged to defendant No. 14. He, however, seems to think that the right, which the defendant No. 14, had, ceased to exist upon his having purchased the properties in execution of his mortgage-decree. In short, his view is that whereas the principle of marshalling applies to the case of a subsequent mortgagee it ceases to apply when he purchased the mortgaged property in execution of his mortgage-decree. In support of this, he has cited the case of *Magniram* v. *Mehdi Hossein Khan* (1). The facts of that case are not similar. On the 15th October 1881 the defendant first party mortgaged four properties to defendant fourth party. On 12th January, 1888 the first two properties were purchased by defendant first party and on the 9th July 1888 the remaining two properties were purchased by

(1) 31 C. 95 ; 8 C. W. N. 30 at p. 31

the plaintiff. On the 26th April 1892 the defendant fourth party, the mortgagee, obtained a decree on his mortgage of the 15th October 1881 and in execution of his decree he purchased two of the properties which had been purchased by the plaintiff in 1888. The plaintiff then commenced an action for contribution from defendant first party, the purchaser of the first two properties. His case, in short, was that all the four properties were liable to contribute rateably to the satisfaction of the mortgage-debt and whereas the entire morgage-debt was satisfied out of the two properties purchased by him, the defendant who had purchased the remaining two properties ought to contribute to the defendant proportionate to the value of those properties. The question of marshalling did not, therefore, directly arise in that case, but an analogy drawn from it as an argument against the plaintiff's right of contribution was disposed of by their Lordships in the following words:—

"The rule of marshalling as laid down in the Transfer of Property Act, section 81, is, no doubt, limited to the case of mortgagees, and does not apply to the case of purchasers of mortgaged properties subject to prior incumbrances. Nor does the rule of marshalling in the case of purchasers as laid down in section 56 of the Act apply to a case between purchaser and purchaser, section 56 being limited in its operation to the case in which the party claiming marshalling is purchaser and the party against whom it is claimed is the original mortgagor. For the same reason the case of *Delawar Sahai* v. *Dewan Bolakiram* (2) cited in the argument, in which a claim for marshalling was disallowed, may be distinguished from the present case. Upon reason and principle it is difficult to say why, if marshalling is to be allowed as betwen two subsequent mortgagees, it should not be allowed as between subsequent purchasers. But though that is so, and though, as has been found by the Court below, the defendants first party bought without notice of the prior mortgage in favour of the defendants fourth party, as the plaintiff was a purchaser for value it would not be right to hold that the plaintiff is not entitled to claim contribution if the sale of his property results in the satisfaction of the mortgage-debt completely..... In our opinion, then, if the sale of the plaintiff's property has resulted in the complete satisfaction of the mortgage-debt, the plaintiff is entitled to contribution." There their Lordships laid down the principle upon which the contribution should be allowed. The fight in that case was not between a prior and a subsequent mortgagee as to marshalling but was one of contribution between two private purchasers from the owner of different properties all of which were previously mortgaged to a third person who obtained entire satisfaction of his mortgage by sale of the properties held by one of the purchasers, the properties held by the other purchaser having thus been altogether exonerated from the mortgage incumbrance. That case is not, therefore, an authority for the point for which the learned Subordinate Judge has used it that a mortgagee having purchased the mortgaged property in execution of his decree loses his right of marshalling. The learned Vakil for the respondent has cited the case of *Kommineni Appayya* v. *Mangala Rangayya* (3). The same remark applies to this case as to the case of *Magniram* v. *Mehdi Hossein Khan* (1), already dealt with. The right of marshalling was claimed not by the purchaser in execution of a subsequent mortgage-decree but by a subsequent private purchaser who comes not under section 81 but under section 56 of the Transfer of Property Act. In that case their Lordships while holding that the private purchaser was not entitled to have the property marshalled pointed out. "Under section 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold, and if parcel No. 2 is sufficient and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree itself its sale before the other property."

Referring to section 56 of the Transfer of Property Act which entitles the buyer of one of the two properties mortgaged to another to have the charge satisfied of the other property as against the seller only, Sir Rash Behari Ghose in his book on Mortgage seems to be of

(2) Ind. 11 C. 298; 5 Dec. (N. S.) 931.

(3) 31 M. 419; 3M. L. T. 287; 18 M. L. J. 229 (F. B.).

opinion that the object of the enactment is to secure that the rights of the creditor must not be diminished or unduly hampered and he quotes the case of *Webb* v. *Blessington* (4), in order to show that a purchaser of part of the mortgaged property may claim that the plaintiff shall not resort to the purchaser's part of the estate, unless the remainder of the lands and premises should prove insufficient.

Their Lordships of the Madras High Court in the case of *Kommineni Appayya* v *Mangala Rangayya* (3), cited on behalf of the respondents and referred to above, observed that the right of the private purchaser arising under section 56 to marshall the property claimed by him was not referred to a Full Bench for decision nor was it argued ; and as to the right of private purchaser to marshall, their Lordships in the case of *Magniram* v. *Mehdi Hossein Khan* (1), referred to above, observed upon reason and principle it is difficult to say why, if marshalling is to be allowed between two subsequent mortgagees, it should not be allowed as between subsequent purchasers."

The Courts have, however, in practice given effect to it and the particular equities arising in a case are often adjusted by direction under O. XXXIV, r. 4 of the Civil Procedure Code (corresponding to section 88 of the Transfer of Property Act) given by the Court to sell the property in a particular order. We are not concerned in this case with the rights of private purchasers to marshall under section 56 of the Act, but with the rights of the purchaser in execution of a subsequent mortgage-decree to marshall under section 81 of the Transfer of Property Act. Section 81 of the Transfer of Property Act runs as follows:—

"If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property."

Now, it is conceded that the right of marshalling was available to defendant No. 14 up to the moment he had not actually purchased the properties in execution of his mortgage-decree. That right to my mind continues so long as the properties mortgaged to defendant No. 14 are available to be sold in execution of a prior mortgage of the plaintiffs. The object of section 81 is to protect the subsequent mortgagee from the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also. It will be dangerous, and in many cases will make the provision nugatory, if it were held that the moment the subsequent mortgagee purchases in execution of his mortgage, his rights of marshalling are extinguished. Now, a mortgagee is a transferee of property and the mortgagee acquires certain rights and incurs certain obligations in the property mortgaged from the time he takes his mortgage. One of those rights is the right of marshalling. The right acquired by him passes to the purchaser in execution of the mortgage-decree whether he or a third person is the purchaser. The execution-sale does not extinguish the rights or obligations already acquired or incurred by the mortgagee at the time when the mortgage was executed. His rights and obligations against the mortgagor are thus not extinguished. Hence the purchaser of the property in execution of his mortgage-decree is entitled to enforce the rights of marshalling as against a prior mortgagee so long as that prior mortgage is not extinguished. None of the cases cited seem to conflict with this view. On the other hand, the case of *Inderdawan Pershad* v. *Gobind Lall Chowdhry* (5) seems to favour this view. In that case on the 21st June 1886 the defendant No. 1 mortgaged to plaintiff two houses and some share in a *mauza*. On the 17th August 1886 defendant No. 1 mortgaged to defendant No. 2 one of the houses only. On the 30th July 1887 defendant No. 2 obtained a mortgage-decree against defendant No. 1 passed upon his mortgage of 17th August 1886. On the 15th April 1891 he sold in execution of his

(4) (1828) 3 Moll. 123.

(5) 23 C. 790 ; 12 Ind. Dec. (N.S.) 524.

decree, dated the 30th July 1887, and purchased the house mortgaged. On the 4th April 1893 the plaintiff instituted a suit to enforce his mortgage of the 21st June 1886, the first mortgage. It was held that defendant No 2, the subsequent mortgagee, who had purchased the house in execution of his mortgage-decree one of the properties mortgaged to the plaintiff in the first mortgage of 1886 was entitled to marshalling, in other words, he was entitled to compel the prior mortgagee to sell in the first instance the properties which were not mortgaged and purchased by defendant No. 2.

Therefore, defendant No. 14 in the present case is entitled to marshalling and to compel the plaintiff to sell, in the first instance, the properties other than the properties mortgaged to him and purchased by him in execution of his subsequent mortgage. Those properties are:—(1) Present *tauzi* No. 10, 913, old 348 Maksudpur Ogawan; (2) Present *tauzi* No. 11,041, old 476 proprietary interest in *mauza* Ogawan Nisf. It is said that the defendant-appellant has failed to prove that these were the properties subsequently mortgaged to him and purchased by him in execution of that mortgage. Before the learned Subordinate Judge the point does not seem to have been seriously raised, as will appear from the following discussions in his judgment:—

" The defendant's mortgage was subsequent and he has purchased the property in his own decree obtained on his mortgage. The plaintiff's mortgage is prior and, therefore, binding on the defendant ".

Witness No. 3 has also referred to these two villages Maksudpur Ogawan and Ogawan Nisf in his evidence as being the properties mortgaged to Edal Singh and purchased by him in execution of his mortgage-decree. In the judgment, Ex. 3, of the 22nd December, 1917 passed in the mortgage suit brought by Edal Singh, Muhammad Khalil as well as Jadunandan, the original mortgagee, Mr. Zakiria-Gauhar Ali and *Musst.* Roqaitul Fatima were all parties. In that case it was recited that the properties mortgaged to Edal Singh were Maksudpur Ogawan and Ogwan Nisf and the case was fought out on the assumption that Khalil-ur was the assignee of the mortgage in which these properties were hypothecated. Therefore, the fact that these two properties were mortgaged to defendant No. 14 and that he purchased the properties in execution of his decree obtained on foot of his subsequent mortgage cannot now be seriously challenged.

It was then aruged by the learned Vakil for the respondent that at the time when Edal Singh purchased the 'property in execution of his mortgage he was aware of the prior mortgage. To my mind that does not alter the position and the real question is as to whether he was aware of the prior mortgage, at the time when he took his own mortgage, and on that point the learned Subordinate Judge has held that the mortgage by Edal Singh was taken without notice. The subsequent proceedings to enforce his own mortgage were in due course of time and the fact that he came to know of the existence of the prior mortgage at the time he purchased the property, does not deprive him of the right of marshalling which he had acquired already. This point seems to have been also concluded by the authority of the case *Inderdewan Pershad* v. *Gobind Lall Chowdhry*, already referred to.

Apart from the question of marshalling, it appears to me that the Court was undoubtedly right to direct under O. XXXIV, r. 4 that the properties mortgaged should be sold in a particular order. The section says that, in the event of the default of the defendant in paying the decretal amount, the mortgaged property or a sufficient part thereof should be sold. Now, ordinarily, the right of selling the property in a particular order rests with the decree-holder and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realization of his mortgage-debt. But the Court can, in the circumstances of a case and in view of the equities arising in favour of the various parties, direct the order in which the properties should be sold. Whereas the decree-holder has the right in the first instance to prescribe the order of the progress of the sale, the final orders rest with the Court which has to adjust and determine the equities of the parties before it. This seems to be now the accepted view of the law. In the present case no order has been prescribed in the mortgage-bond in which the properties should be sold and, therefore, in the circumstances of the case and in view of the complications created by the non-payment of the mortgage-bonds by Mr. Zakaira and Roqaitul

Fatima, the latter of whom is related to the plaintiff, and in view of the equities arising in the case, we think that defendant No. 14 is entitled to have the properties mentioned above, Naksudpur Ogawan and Ogawan Nisf, to have sold last of all the properties mentioned in the mortgage-bond. Accordingly, we vary the decree made by the learned Subordinate Judge and order that the decree be modified by inserting therein an express direction that the properties be sold in the order indicated above.

In the circumstances of the case, we think that defendant No. 14 is entitled to only half the costs incurred by him in this Court as well as in the Court below.

Kulwant Sahay, J.—I agree.

Z. K.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL CASE NO. 647 OF 1922.

February 2, 1923.

Present:—Mr. Justice Abdul Raoof.

SAMANDAR AND OTHERS—PLAINTIFFS—PETITIONERS
versus
FAZAL AND OTHERS—DEFENDANTS—RESPONENTS.

Civil Procedure Code (Act V of 1908), s. 151; O. XXXIX, rr. 1, 2—Injunction staying suit pending in another Court—Declaratory suit—Inherent power of Court.

The High Court has inherent power to grant an injunction in suitable cases irrespective of the provisions of O. XXXIX of the Civil Procedure Code.

An injunction will not be granted in a suit which is of a merely declaratory nature staying proceedings in another suit pending in another Court.

Petition under section 151 and O. XXXIX, r. 1, and O. XLI, r. 5, Civil Procedure Code for stay of partition proceedings in the Court of the Munsif, Attock, till the decision of the appeal noted above in this Court.

Mr. *N. J. Rustomji*, for the Petitioners.

Mr. *Aziz Ahmad*, for the Respondents.

Order.—Mr. Aziz Ahmad has appeared to show cause and he has put forward two contentions before me, namely:—

(1) that this application for injunction cannot be entertained as the injunction prayed for does not come either under r. 1, or r. 2 of O. XXXIX, Civil Procedure Code, and

(2) that the suit out of which this first appeal has arisen was only for a declaration and a permanent injunction as a consequential relief was not claimed in that suit.

The first contention has no force, because the High Court has an inherent power to grant injunction in suitable cases irrespective of the provisions of O. XXXIX, Civil Procedure Code.

The second contention has force. The suit is merely of a declaratory nature and I do not think it proper to grant an injunction staying proceedings in another suit pending in another Court. The rule 2 is discharged and the application is dismissed with costs.

Z. K. *Application dissmissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1915 OF 1921 AND 328 OF 1922.

January 28, 1924.

Present:—Mr. Justice Suhrawardy.

SATISH CHANDRA DE—APPELLANT
versus
GAGAN CHANDRA RUDRA—RESPONDENTS.

MOHENDRA KUMAR RUDRA AND OTHERS—APPELLANTS.
versus
GAGAN CHANRA RUDRA—RESPONDENT.

Co-owners—Agreement to sell shares only to co-owners, whether applies to involuntary alienations.

SATISH CHANDRA DE *v.* GAGAN CHANDRA RUDRA

An agreement between co-owners of a property not to sell or mortgage their shares in the property to anybody except the other co-owners does not apply to involuntary alienations, *e. g.*, sales ine xecution of decrees.

Case-law discussed.

Appeals against the decrees of the Additional District Judge, Chittagong, dated the 12th May 1921, affirming the decrees of the Munsif, South Raozan, dated the 28th January 1920.

Babu *Jogesh Chandra Roy*, with him Babu *Paresh Chandra Sen*, for the Appellant

No one appeared for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff-respondent for specific performance of a contract which came into existence in the following circumstances: There is a tank which originally belonged to defendants Nos. 1 and 2. They sold a moiety of it to the plaintiff on the 16th *Pous*, 1275. Two weeks after, namely, on the 29th *Pous* they entered into an agreement the principal clause of which runs thus: "If by chance the condition of either party becomes deplorable or if either party voluntarily wants to transfer the whole or a portion of his interest in the said tank or it becomes necessary to execute *kot* or simple mortgage of the tank, it must be to the other party. If it becomes necessary for any party to execute absolute sale, or *kot* simple mortgage of the whole or a portion of that property for any reason, then the party or their successors-in-interest transferring or mortgaging their share do so to the other party or their successors-in-interest." This is followed by another clause to the effect that if any party fails to carry out this agreement he will be mulcted in damages to the extent of Rs. 1,000. There is a further clause which is as follows: "We both parties or our successors-in-interest will be bound to carry out the conditions aforesaid. We both parties down to our sons and grandsons and successors-in-interest shall possess the tank with its water and banks in equal half share."

The plaintiff's case is that defendants Nos. 1 and 2 secretly executed a *kobala* in favour of their wives (defendants Nos. 3 and 4) conveying a 6-annas of the tank and that defendant No. 5 has attached the remaining 2-annas in execution of a fraudulent claim. The plaintiff, therefore, prays for specific performance of the contract aforesaid, namely, that defendants Nos. 1 and 2 may be directed to convey their share in the tank to the plaintiff by virtue of the aforesaid contract. Both the Courts have found that the plaintiff is not entitled to specific performance of the contract in respect of 6-annas, transferred to defendants Nos. 3 and 4 which transfer they have held to be *benami*, the property not having passed from defendants Nos 1 and 2. With regard to defendant No. 5, however, they have agreed in holding that the covenant is enforceable and have directed the defendants Nos. 1 and 2 to execute a conveyance to the extent of 2-annas share and ordered the plaintiff to deposit a share of Rs. 50 to the credit of the 5th defendant and on such deposit being made directed the defendants to execute a *kobala* in favour of the plaintiff conveying to him absolutely the two-annas share in the tank. It has been further ordered that the attachment by defendant No. 5 should be withdrawn and that the money thus deposited by the plaintiff may be withdrawn by defendant No 5 Against this decree defendant No. 5 has preferred S. A. 1915 of 1921 and defendants Nos. 1, 3 and 4 have preferred S. A. 328 of 1922, raising in both the appeals the same contentions. There are several points taken by the appellant but the one which requires consideration and is sufficient to dispose of these appeals is that there is no covenant against involuntary alienations. The view taken by the Courts below that the defendants Nos. 1 and 2 are restrained in fact, though not expressly, from allowing the properties to be attached is not correct and I think that the contention of the appellant ought to prevail. The law is now firmly established by authority that where property is sold off or leased out with a covenant attached to it that the vendor or lessee, will not be entitled to transfer the property to any one but to the vendor or lessor such a covenent does not apply to involuntary alienations. There are a number of authorities on this point but it will be enough to refer to a few of them, namely, the cases of *Nilamadhab Sikdar* v. *Narattam Sikdar* (1), *Golaknath Roy Chowdhury* v. *Manmatha Nath*

(1) 17 C. 826 ; 8 Ind. Dec. (N. S.) 1095.

Roy Choudhury (2), and *Promode Ranjan Ghose* v. *Aswini Kumar Nag* (3). This view has been adopted by the other High Courts also. In fact, so far as reported cases go, it was first considered by the Bombay High Court in the case of *Tamaya* v. *Timapa* (4). The Madras High Court has also held the same view from a long time and has lately asserted it in the case of *Parameswari* v. *Vittappa* (5). I, therefore, hold that in this case also the covenant restraining alienation by sale or mortgage does not extend to an involuntary transfer. In this case this principle applies with greater force. The property originally belonged to defendants No. 1 and 2. They sold one-half of it to the plaintiff. The agreement that came into existence did not form any part of this transaction but was executed subsequently. It cannot be said that this covenant attaches to the land for, in the first place, the covenant which the plaintiff now seeks to enforce is not a covenant which runs with the land came into existence long after conveyance. As it stands, it may also very well be argued that this covenant is bad as it contravenes the provisions of section 107, Transfer of Property Act. It may also be argued that it is bad on the ground of its offending the rule against perpetuity as it not only binds the parties but also their heirs *ad infinitum*. There is another objection as to why the plaintiff's suit should not succeed The two-annas share which is the subject-matter of this appeal has not yet been alienated, The defendant No. 5 has attached this share in execution of a decree against defendants Nos. 1 and 2 which has been found by the Court below to be *bona fide*. The real cause of action, therefore, has not yet arrisen. On this ground also I am of opinion that this appeal should succeed.

The result is that these appeals are allowed, the decrees of the Courts below are set aside and the plaintiff's suit will stand dismissed. The defendant No. 5 is entitled to his costs in all the Courts. The defendants No. 1, 3 and 4 are entitled to their costs of this Court; but they will bear their costs in the Courts below.

Z. K. *Appeals allowed.*

(2) 20 C. 273; 10 Ind. Dec. (N. S.) 185.
(3) 26 Ind. Cas. 233; 18 C. W. N. 1138.
(4) 7 B. 262; 4 Ind. Dec. (N. S.) 177.
(5) 26 M. 157; 12 M. L. J. 189.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 15 OF 1923.

October 8, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

AVANTIKA PRASAD SHUKUL—PLAINTIFF—APPELLANT

versus

GUR BAKHSH—DEFENDANT—RESPONDENT.

Oudh Rent Act (*XXII of* 1886) *s.* 127—*Mortgage—Ejectment suit by mortgagee—Burden of proof—Evidence—Mortgagor whether can plead non-performance of contract by mortgagor—Specific Relief Act* (*I of* 1877) *s.* 24 (*b*)—*Contract Act* (*IX of* 1872) *s.* 37.

Before a suit for ejectment can be held to be maintainable under the provisions of section 127 of the Oudh Rent Act, the plaintiff must show a title in ejectment against the defendant. [p. 805, col. 2.]

Where a mortgagee seeks to eject his mortgagor from the mortgaged property on the ground that the latter is his tenant, the primary evidence of the relationship of the parties must consist of the terms of the mortgage-deed. [p. 805, col. 1.]

Though a deed of mortgage is a conveyance, yet, when the mortgagee seeks to enforce the covenant in it relating to possession of the mortgaged lands, it is open to the mortgagor to set up the equitable defence of the mortgagee not having performed his part of the mortgage contract. [p. 806, col. 1.]

Appeal against decree of the District Judge, Rae Bareli, dated the 10th April 1923, reversing that of the Assistant Collector, Rae Bareli, dated 24th January 1923.

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

Mr. *Radha Krishna*, for the Respondent.

The facts will appear from the following order, dated the 27th August 1923, of the learned Additional Judicial Commissioner:—

This is a second appeal under the Oudh Rent Act. The plaintiff-appellant claimed against the defendant under the provisions of section 127 of the Oudh Rent Act a certain amount of rent for certain plots of land which are mortgaged to him by the defendant. He also prayed for the relief of ejectment. The Court of first instance gave a decree to the plaintiff in respect of both the reliefs. On appeal by the defendant the learned District

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Judge of Rae Bareli dismissed the plaintiff's suit on the ground that the pleadings raised questions of title between the mortgagor and his mortgagee in respect of the possession of the plots mortgaged and, therefore the suit as brought was not maintainable under the section mentioned above.

It is difficult to resist the contention of the plaintiff-appellant that he is entitled to the reliefs which were granted to him by the Court of first instance if he is "entitled to eject the defendant as a trespasser" but in view of what I am going to say shortly it is not necessary to decide this point just now. One thing is clear and it is that the plaintiff must show a title in ejectment as against the defendant before the suit can be held to be maintainable under the provisions of section 127 of the Oudh Rent Act. The lower Appellate Court has referred to two rulings in support of the opinion which it has formed with regard to the provisions of that section but both of these rulings were given before that section was amended by Act IV of 1921. Now, to establish a title in ejectment the primary evidence, in the nature of things, must consist of the terms of the deed of mortgage itself, more so in the present case when one of the pleas of the defendant is that on the conditions of the deed of mortgage the plaintiff was not entitled to possession. Strangely enough, however, none of the parties have produced either a certified copy of the deed of mortgage or the original deed. It seems to me that the non-production of the deed is an inherent defect without remedying which this suit cannot be properly decided. Both sides are agreed that the deed of mortgage be brought on the record as evidence in the case. I, therefore, direct the plaintiff-appellant to produce the original deed of mortgage dated the 8th April 1920 within fifteen days from this date. A date for the hearing of this appeal will be fixed after the deed of mortgage mentioned above has been produced. In the event of the plaintiff failing to comply with the order just now made, the appeal shall stand dismissed with costs.

JUDGMENT.—The facts of this case are given in my order of the 27th August 1923. The original deed of mortgage referred to in that order has been produced by the plaintiff-appellant. The learned pleader for the respondent accepts the genuineness of the deed. I have consequently ordered it to be admitted as evendence in the case The deed is one of an ordinary usufructuary mortgage. The amount of money in lieu of which the mortgage is made, is Rs. 5,400. Out of this sum, the amount of Rs. 2,815 is left with the mortgagee for payment to certain creditors of the mortgagor. These creditors are specified in the deed of mortgage and so are the amounts due to each of them from the mortgagor. The mortgagee undertook to pay off these creditors either himself and, in that event, to obtain a receipt from them, or to allow the mortgagor to make the payment in the presence of the mortgagee in which case, the former would obtain the receipt for the payments made and deliver it to the mortgagee. Subsequently to the covenant relating to the payments mentioned above, occurs the stipulation on the part of the mortgagor to put the mortgagee in possession of the mortgaged property from the date of the mortgage. The defence for the suit asking for the reliefs of the recovery of rent and of ejectment under section 127 of the Oudh Rent Act was, that the plaintiff failed to fulfil the conditions of the deed of mortgage inasmuch as he did not satisfy the previous creditors of the mortgagor as was agreed upon in the deed and, consequently, the plaintiff was not entitled to the reliefs for which he had prayed. This defence was considered to have no bearing on the plaintiff's claim by the Court of first instance The Court of first appeal has dismissed the suit on grounds other than those which arise out of the defence just now mentioned.

The learned pleader for the appellant has argued that the mortgage is the conveyance of the property, and consequently it gives him a perfect title to possession of that property and the defendant's plea that the previous creditors have not been paid up is not a ground on which the suit of the plaintiff can be resisted.

It is not disputed that the mortgage is the conveyance of the lands mortgaged but this fact alone does not, in my opinion, entitle the plaintiff to the reliefs which he wants to obtain in the present suit. On my interpretation of section 127 of the Oudh Rent Act, the plaintiff must show a title in enjectment as against the defendant as I have already expressed myself in my previous order of the 27th August 1923. For the purposes of the

decision of this appeal it has been assumed to be that the plea of fact set out in the defence already quoted that the plaintiff-mortgagee has not satisfied the obligation which rested on him under the mortgage-deed to pay off the previous creditors of the mortgagor is correct. This being so, I am clearly of opinion that, though the deed of mortgage is a conveyance, yet, when the plaintiff seeks to enforce the covenant contained in it relating to possession of the mortgaged lands, it is open to the defendant to set up the equitable defence of the plaintiff not having performed his part of the same contract. It is not possible to hold that the defendant should be deprived of that defence for the reason that the plaintiff has chosen to sue him under section 127 of the Oudh Rent Act instead of bringing a suit for possession and damages in a Civil Court. The equity of defence is clearly supported by the second part of clause (*b*) of section 24 of the Specific Relief Act (I of 1877). Further, under section 37 of the Indian Contract Act, IX of 1872 the mortgagee is under a legal obligation either to perform or offer to perform his part of the contract. It is assumed that he has not performed it and there is no offer made in the present case to do it. On these grounds I am driven to the conclusion that the decree of the lower Appellate Court should be maintained.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 779 OF 1922.

July 17, 1923.

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

Messrs. LAWRENCE PHILLIPS & Co.—PLAINTIFFS—JUDGMENT-CREDITORS

versus

M. R. F. NAZARETH AND ANOTHER—DEFENDANTS—JUDGMENT-DEBTORS.

Deccan Agriculturist's Relief Act (*XVII of* 1879), *ss.* 3 (*w*), 7 *and* 12—*Status as agriculturist not pleaded by defendant*—Ex parte *decree passed*—*Whether defendant can plead to be agriculturist in execution proceedings*—*Civil Procedure Code Act* (*V of* 1908), *s* 11—Res judicata.

Where defendant in a suit falling within cl. (*w*) of s. 3 of the Deccan Agriculturist's Relief Act, does not expressly raise the plea either that he is an agriculturist or claims to be tried under the provisions of that Act, and the Court passes an *ex parte* decree against him without examining him and the plaintiff under sections 7 and 12 of the Deccan Agriculturists' Relief Act, the Courts must be deemed to have decided by necessary implication that the defendant is not an agriculturist, and it is not open to the defendant to contend in execution proceedings that he was not an agriculturist at the time of the passing of the decree.

Mr. *C. M. Lobo*, for the Judgment-Creditors.

Mr. *Gulabrai Nihalchand*, for the Judgment-debtors.

ORDER.—A notice was issued under O. XXI, r. 37, Civil Procedure Code, to the judgment-debtors M. R. F. Nazareth and C. F. B. D'Souza to show cause why they should not be arrested in execution of a money-decree with costs against them for Rs. 2,461-9-0 and subsequent interest and costs. The defendants contend that they are agriculturists and claim protection under section 21 of the Deccan Agriculturist's Relief Act, XVII of 1879.

The defendants were sued as proprietors of two trading concerns carrying on business as wine merchants at Karachi in the names of C. V. D'Costa & Co., and Vincent & Co., and as having further jointly and severally guaranteed payment for the amounts which may become due by the two firms. They were described in the heading of the plaint as merchants and landlords residing at Karachi. They filed a written statement disputing the correctness of the amount and the prices charged for the goods supplied, and also denied their liability for interest. They did not, however, deny that they were not the proprietors of the two firms or that they were not merchants. They did not either expressly raise the plea that they were agriculturists or claim to be tried under the provisions of the Deccan Agriculturist's Relief Act. When the suit was called on for hearing they were absent, and it was decreed *ex parte* against them.

Mr. Lobo on behalf of the plaintiffs has contended that as in their defence to the

action the defendants failed to raise the plea that they were agriculturists, it is not open to them now to put forward this defence and has relied on the recent ruling in *Mulji* v. *Goverdhandas* (1). Mr. Gulabrai for the defendants has attempted to distinguish the Bombay ruling on the ground that as the defendants in the Bombay case were residing outside the jurisdiction of the Bombay High Court, it was necessary for them to raise the plea of their status, as in the event of the Court holding that they were agriculturists the Court would have no jurisdiction to go into the merits of the case, while in the present case the defendants resided within the jurisdiction of the Karachi Court and, therefore, it was not necessary for them to raise this plea during the trial of the suit. It is not asserted that the status of the defendants has changed since the date of the decree, and any subsequent change in their status would not avail them : Cf. *Balchand Chaturchand* v. *Chunilal Jagjivandas* (2). It is not contested that the nature of the suit is one which does not fall within clause (*w*) of section 3 of the Deccan Agriculturist's Relief Act. The provisions of sections 7 and 12 of the Deccan Agriculturist's Relief Act are mandatory; section 7 of the Act imposes a duty on the Court to examine an agriculturist defendant as a witness unless for reasons to be recorded by the Court it deems it clearly unnecessary so to do. Section 12 of the Act imposes a duty on the Court to examine both the plaintiff and the defendant as witnesses and, further, to inquire into the history and merits of the claim in suits falling within the purview of the clauses (*w*), (*y*) and (*z*) of the Deccan Agriculturist's Relief Act where the amount of he plaintiff's claim is disputed. *Lalji Asandas* v. *Mahomed Ali* (3) and *Muzammat Begum* v. *Topanmal Hiranand* (4). In the present case the defendants did dispute the claim, the correctness of the account and the prices for goods supplied. If the defendants were agriculturists it would be the duty of the Court to examine them as required by section 7 of the Act and also to examine them and the plaintiffs and to inquire into the merits of the case "with a view to ascertaining whether there is any defence to the suit, first, on the ground of fraud, mistake accident or otherwise, and, secondly, with a view to taking an account between such parties " as required by section 12 of the Act before passing any decree against them unless for reasons recorded in writing the Court considered it unnecessary. As the defendants have not been examined as witnesses and the history and merits of the claim have not been inquired into in accordance with the provisions of the Deccan Agriculturist's Relief Act, the decree of the Court can only be maintained on the assumption that the defendants were not agriculturists on the date of the decree. Can it then be said that the point whether the defendants were or were not agriculturists was not a point involved in the suit ? I am of opinion that though the status of the defendants was not expressly put in issue, it must be deemed to have been decided by necessary implication. I hold that, on the principle underlying section 11 of the Civil Procedure Code, it is not now open to the defendants to argue the question of their status in execution proceedings.

I disallow the objection and order a writ to issue for the arrest of the defendants.

S. D. *Objection disallowed.*

(1) 76 Ind. Cas. 148 ; 24 Bom. L. R. 1291 ; (1923) A.I. R. (B.) 36.
(2) 19 Ind. Cas. 901 ; 37 B. 486 ; 15 Bom. L. R. 387.
(3) 18 L. R. 57.
(4) 4 Ind. Cas. 599 ; 3 S. L. R. 106.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 236 OF 1922.

February 8, 1924.

Present.—Justice Sir Jwala Prasad, Kt., and Mr. Justice Kulwant Sahai.

MASUDANLAL—APPELLANT

versus

RAM GULAM SAHU AND OTHERS—RESPONDENTS.

Bihar and Orissa Public Demands Recovery Act (XIV of 1914) Sch II, r. 43—Sale in execution of certificate for arrears of cess—Judgment-debtor, whether can be purchasser—Sale, validity of—Purchase by co-sharer, whether for benefit of all co-sharers.

The prohibition contained in rule 43 of Schedule II to the Bihar and Orissa Public Demands Recovery Act applies only to a sale of a tenure in execution of a certificate for arrears of rent due from the tenure. It

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does not apply to sales held in execution of certificates for any other dues, such as, cess. An execution with respect to a certificate for cess is, therefore, governed by the general provisions of the Civil Procedure Code, which enjoins no prohibition on a judgment-debtor making a purchase in execution. [p. 809, cols. 1 and 2.]

The purchase by a judgment-debtor of a tenure or holding with respect to which the prohibition contained in rule 43 of Schedule II to the Bihar and Orissa Public Demands Recovery Act applies, does not in itself render the sale void ; but the sale can be avoided upon an application made by the decree-holder or any other person interested in the sale. [p. 809, col. 2.]

Where a tenure is sold owing to the default of all the co-sharers and is purchased by one of them, the purchase does not enure for the benefit of all the co-sharers. [p. 810, col. 1.]

Jotendra Mohan Tagore v. *Debendra Monee*, 2 C. L. R. 419 ; *Janki Singh* v. *Debinandan Prosad*, 15 C. W. N. 776 ; *Deonandan Prosad* v. *Janki Singh*, 39 Ind. Cas. 346; 21 C. W. N. 873 ; 15 A. L. J. 154; 32 M. L. J. 206; 1 P. L. W. 294 ; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 C. 573 ; 44 I. A. 30 (P. C.) ; *Faizar Rahman* v. *Nimma Khatun*, 20 Ind. Cas. 510 ; 17 C. W. N. 1233; 18 C. L. J. 111, distinguished.

Appeal from the order of the Subordinate Judge of Bhagalpur, dated the 25th May 1922.

Messrs. *K. P. Jayaswal*, *M. N. Pal* and *S. M. Gupta* for the Appellant.

Messrs. *S. M. Mullick*, *S. N. Bose* and *Harihar Prasad Sinha*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This is an appeal by Masudan Lal and his brother Saligram against the order of the Subordinate Judge, dated the 25th May 1922, disallowing his application to set aside an auction-sale held in execution of a mortgage-decree.

The mortgage-decree was passed on the 14th November 1914, and the sale of the mortgaged properties took place on the 21st March 1919, which was confirmed on the 9th December, 1920. One of the properties sold was Gossaingaon *alias* Bishunpur Gopi. Two-annas eight-pies, the share of Mr. Das, son of R. S. Das, one of the judgment-debtors, was purchased by Masudan Lall, on the 17th February 1915, in execution of his money decree. Masudan Lall obtained possession of the aforesaid 2-annas 8-pies of Gossaingaon on the 6th June 1915 and got his name mutated in due course in Register D of the Collectorate. On the 13th May 1919 the entire 16-annas of Gossaingaon was sold in execution of a Road-Cess Certificate under the Public Demands Recovery Act and purchased by one Mahendra Narayan Das. In that certificate Masudan Lall and Salig Ram, the appellants before us, and Shyam Sahay and others were judgment-debtors. On the 6th August 1921, Mahendra applied under O. XXI, r. 90 of the Civil Procedure Code to set aside the sale of 16-annas of *Mouza* Gossaingaon. His application was numbered Miscellaneous Case No. 125 of 1921. While this was pending, on the 11th August 1921, Masudan Lall and Salig Ram made a similar application to set aside the sale of 2-annas 8-pies of the said *mouza* and this was numbered Miscellaneous Case No. 129 of 1921. The applicants in both these cases applied for stay of delivery of possession which the mortgagee sought to obtain under his purchase of the 21st March 1919 in execution of the mortgage-decree of 14th November 1914.

On the 13th August 1921 the Subordinate Judge held that the decree-holder was not entitled to obtain *dakhaldehani* with respect to 2-annas 8-pies share purchased by Masudan Lall and Salig Ram In spite of this order, the Subordinate Judge apparently stayed delivery of possession with respect to the entire 16-annas.

Then the decree-holders came in revision to this Court, and a Division Bench of this Court remanded the case to the Court below for giving delivery of possession over 13-annas 4-pies of the property in question.

The record of the case was received back in the Court below on the 30th March 1922, and the Subordinate Judge then proceeded with the hearing of the applications for setting aside the sale. Evidence was then taken, which consisted of documents marked Exhibit 1 (sale certificate of Mahendra), Exhibit 2 (sale certificate of Masudan Lall) and Exhibit 3 (Register D). The hearing concluded on the 20th May 1922, and after the arguments of the parties judgment in the case of Masudan Lall and Saligram (Miscellaneous Case No. 129 of 1921) was delivered on the 23rd May 1922, with the result that the Court held that Masudan Lall had "no such interest as can be said to be affected by the sale and he has therefore no right to apply for setting aside the sale."

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Now it is contended in this Court that the view taken by the learned Subordinate Judge is erroneous and that Masudan Lall and Saligram had interest in the property which was affected by the sale and, therefore, they had a right to apply under O. XXI, r. 90 of the Code. The learned Subordinate Judge held that whatever interest Masudan Lall and Saligram had acquired by their purchase on the 17th February 1915 in execution of their money-decree was extinguished by the subsequent purchase of the entire *mouza* on the 13th May 1919 by Mahendra Narayan Das in execution of the Cess Certificate under the Public Demands Recovery Act.

Mr. Jayaswal contended that the purchase of Mahendra was wholly void, and consequently it did not affect the interest acquired by Masudan Lall and Saligram. It is said that Mahendra is son-in-law of Shyam Sahai, one of the judgment-debtors in the certificate-sale, and that the purchase was *benami* by the judgment-debtors themselves. In support of this Mr. Jayaswal relies upon the finding of the Court in the objection of Mahendra Das in Miscellaneous Case No. 125 of 1921 wherein the Subordinate Judge held that "the judgment-debtor was the real objector in the name of his son-in-law with a bogus purchase." Mr. Jayaswal says that a judgment-debtor has no right to purchase any property in a sale held under the Public Demands Recovery Act, and refers to rule 43 of schedule 2 of Bihar and Orissa Public Demands Recovery Act (Act XIV of 1914). That rule runs:—

"When a tenure or holding, situated in an area in which Chapter XIV of the Bengal Tenancy Act, 1885, or Chapter XVI of the Orissa Tenancy Act, 1913, is in force, is put up for sale in execution of a certificate for arrears of rent due in respect thereof, the certificate-debtor shall not bid for or purchase the tenure or holding."

The prohibition contained therin applies only to a sale of a tenure in execution of a certificate for arrears of rent due from the tenure. It does not apply to sales held in execution of certificates for any other dues, such as, cess. The execution with respect to a certificate for cess will, therefore, be governed by the general provisions of the Civil Procedure Code which, enjoins no prohibition upon a judgment-debtor making any purchase, though in r. 72, O. XXI, it enjoins upon the holder of the decree not to purchase without the express permission of the Court. This aspect of the case was apparently overlooked by Mr. Jayaswal, and the plain reading of rule 43 was also missed. It may also be pointed out that the purchase by a judgment-debtor of a tenure or holding with respect to which the prohibition contained in section 43 applies does not in itself render the sale void but that it can be avoided upon an application made by the decree-holder or any other person interested in the sale. This is obvious from clause (2) of rule 43. In no case, therefore, the sale in question in which Mahendra appeared as purchaser, dated the 13th May 1919, was a void sale, assuming that Mahendra was only a *benamidar* of Shyam Sahay, one of the judgment-debtors, and the latter was the real purchaser. The sale of the property in execution of the certificate for cess, dated the 13th May 1919, therefore, stands, and the effect of that sale was to extinguish the interest of Masudan Lall and Saligram.

It is then contended that no possession was delivered to the purchaser of the certificate sale, namely, Shyam Sahay or Mahendra, and consequently Masudan Lall continued to be in possession of the property which he had obtained on the 6th June 1915 and being in such possession he had interest in the property which was affected by the auction-sale in which the respondents purchased the property. But the title of the purchaser in the certificate sale did not depend upon the delivery of possession in order to perfect his title. It vested in him from the date the sale took place. The further proceedings of obtaining sale-certificate or *dakhaldehani* are merely in furtherance of the sale which took place on the 13th May 1919. The possession of Masudan Lall and Saligram after their right, title and interest passed to the purchaser in the certificate sale was merely on behalf of the purchaser in the latter sale. The possession of Masudan Lall and Saligram could not, therefore, be held to be on their own behalf, which they were entitled to protect. They have, therefore, no interest by virtue of their puchase. In this view the case relied upon by Mr. Jayaswal in Smith's Leading Cases, volume II, page 741, *Asher* v.

Whitlock (1), does not apply. No satisfactory evidence has been given as to the possession of Masudan Lall and Saligram after the 13th of May 1919. Some *Chalans* for payment of the revenue, though not exibited in the Court below, where shown to us. They showed payments, prior to the certificate sale, of revenue and cesses by Masudan Lall and Saligram. It was also not stated before us that any Government revenue or cess was paid after the certificate sale. Therefore, as a matter of fact, they failed to prove their possession over the property. It would appear from a reference to register D that the names of Masudan Lall and Saligram do not now stand registered, but have been expunged, and in their place the name of the mortgagee-purchaser has been recorded. The entry in Register D is of no avail to the appellants to show their interest in the property based either upon title or possession. The entry is liable to be corrected, and, as a matter of fact, has been corrected.

The next argument of Mr. Jayaswal has been that inasmuch as the real purchaser at the certificate sale was one of the judgment-debtors Shyam Sahay, his purchase was that of a co-sharer and must be held to enure for the benefit of the other co-sharers, Masudan Lall and Saligram and others. In support of this Mr. Jayaswal has relied upon the following cases *Jotendra Mohun Tagore* v. *Devendro Monee* (2); *Janki Singh* v. *Debinnandan Prasad* (3), which went up to the Privy Council and the judgment whereof is reported in *Deonandan Prashad* v. *Janki Singh* (4), and *Faizar Rahman* v. *Nimma Khatun* (5). These cases have no application to the present one. In those cases the sale was brought about by the default, laches, or even fraud of one of the co-sharers who purchased the property. Therefore, it was held that the co-sharer stood in fiduciary relationship with other co-sharers in the property and he could not take advantage of his own laches or fraud so as to deprive the other co-sharers of their interest in the property. No such thing has been shewn in the present case. We cannot presume that the sale under the certificate of arrears of cess was brought about by Shyam Sahay, one of the juddgment-debtors, on account of his own default, laches or fraud. The appellants had ample opportunity to prove that Shyam Sahay was guilty in having caused the sale of the property after the record was received by the Subordinate Judge from the High Court. It appears from the order sheet, extracts from which I have quoted above, that ample opportunity was given to the appellants, and in fact they had their witnesses also summoned; but no evidence was given at the hearing except the aforesaid documents Exhibits 1, 2 and 3 referred to above. We have, therefore, to base our inference upon those documents alone. Mahendra's certificate simply shows that the sale had taken place on account of arrears of cess due from the judgment-debtors among whom Masudan Lall and Saligram's names also appeared. The only possible inference is that they along with other co-sharers had equally defaulted. Therefore, the certificate-sale extinguished their interest in the property which vested in the purchaser at that sale whether he was Mahendra or one of the judgment-debtors Shyam Sahay. Upon the evidence, therefore, in the case the Court below is right in holding that the purchase by Masudan Lall and Saligram, in 1915, of 2-annas 8-pies of Gaosaingaon *alias* Bishunpur Gopi was of no avail to them and they ceased to have any interest after the 13th May 1919 when the entire village was sold in certificate sale.

The result is that the appeal is dismissed with costs.

Kulwant Sahay, J.—I agree.

(1) (1866) 1 Q. B 1; 35 M. L J. Q. B. 17; 11 Jur (N.S.) 925; 13 L T. 254; 14 W. R. 26.
(2) 2 C. L. R. 419.
(3) 7 Ind. Cas. 772; 15 C. W. N. 776.
(4) 30 Ind. Cas. 346; 21 C. W. N. 473; 15 A. L. J. 154; 32 M. L. J. 206; 1 P. L. W. 294; (1917) M W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 C. 573; 44 I. A. 30 (P. C.).
(5) 20 Ind. Cas. 510; 17 C. W. N. 1233; 18 C. L. J 111.

DEO BAKSH *v.* KALURAM

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST APPEAL NO. 38 OF 1922.

November 15, 1923.

Present :—Mr. Baker, J. C.

DEO BAKSH—DEFENDANT 5—APPELLANT,

versus

KALURAM AND BALIRAM—PLAINTIFF—DEFENDANT 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 51 (d), O. XL, r. 1—Receiver—Appointment in form prescribed—No power reserved—Possession whether necessary for validating appointment. Power of owner to lease—Reference by Receiver to Court—No order passed—Lease by Receiver—Validity of.

A Receiver may be appointed even when the property has not been attached.

In the absence of reservation of any powers, the Receiver has full powers of the owner with reference to the property when his appointment is made in the form provided in the Code of Civil Procedure, expressly giving full powers under the provisions of O. XL of the Code. [p. 812, col. 1.]

The validity of the Receiver's appointment does not depend on his taking possession of the property, but the powers commence immediately on his appointment by the Court. [p. 812, col. 2.]

The appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them from interfering with his possession except by permission of the Court. [p. 813, col. 1.]

The owner of the property is incompetent to deal with the property including a lease from the date on which the Receiver is appointed in respect of the same. [p. 814, col. 1.]

The failure of the Court to pass orders on the reference of a Receiver does not invalidate a lease if it was within his competence to grant it under the terms of his appointment. [p. 814, col. 1.]

Appeal against the decree of the First Subordinate Judge, Hoshangabad, in Civil Suit No. 18 of 1920, dated the 6th January 1922.

Messrs. *G. L. Subhedar*, and Mr. *J. Sen* for the Appellant.

Sir *B. K. Bose*, and Mr. *S. B.* Gokhale, for the Respondent No. 1.

JUDGMENT.—The facts of this case are lengthy and complicated, but the only point now in dispute may be comprised within a very small compass. The essential facts are that the father of the defendants Nos. 2-4 sued the defendant No. 1 Baliram and got a decree. In execution of that decree a Receiver of the defendant's estate was appointed. After the appointment of the Receiver the defendant No. 1 leased his land to defendant No. 5. Subsequently, the Receiver let the same land to the present plaintiff. There was thus a contest between the plaintiff Kaluram and defendant No. 5 Deo Baksh for the possession of the land, and the present suit is brought by the plaintiff for damages for crops cut and removed by defendant No. 5 from the land in suit.

The Subordinate Judge, Hoshangabad, awarded the plaintiff Rs. 2,532. Defendant No. 5 appeals against this decree. The plaintiff also put in a cross-appeal against the amount awarded; he does not press that and it will be accordingly dismissed.

The whole of this case depends on the powers of the Receiver from whom the plaintiff derived his title. There is no dispute as to the actual facts except as regards the possession and the value of the crops that had been removed. Most of the facts of this case will be found set out in the order-sheet of the Court executing the original decree and in the judgment of this Court in revision application arising out of these execution proceedings which is Exhibit 5 D-10, but, as I have stated, most of these facts are not material as the remaining defendants are no longer on the record. Defendant No. 1 has not appealed and the contest is now between plaintiff Kaluram and defendant No. 5 Deo Baksh and arises merely out of their respective leases.

There is no dispute as to the dates. The Receiver was appointed on 3rd December 1917; on 26th January 1918 security was dispensed with; and the lease to defendant No. 5 by defendant No. 1 was in January 1918, admittedly after the appointment of the Receiver. The right to hold the land was put to auction by the Receiver and sold to the plaintiff in March 1918, and a written lease in his favour was executed in June. So it is not disputed that the Receiver had been appointed on the date when the defendant No. 5 took the land from the defendant No. 1. The

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issues in this case are mainly those of law, namely, the powers of the Receiver.

It has been contended on behalf of the appellant that as the Receiver never formally took possession of the defendant No. 1's land, he had no power to deal with it, and reference is made to two cases of this Court, one Exhibit 5 D-10 in this case and the other Second Appeal No. 477 of 1921, decided on 8th July 1922 and reported in *Ram Krishna* v. *Ganpati* (1). The land of defendant No. 1 being occupancy tenancy land could not be attached, and it is admitted was never attached. The order appointing the Receiver was passed on 3rd December 1917 and the order of appointment is Exhibit P-9 and also 5 D-2, which will be found in the paper-book, dated the 26th November 1917. This is in the form prescribed in the appendix F, form 9, of the Code of Civil Procedure, which is the form for the appointment of a Receiver under O. XL, r. 1. That form refers to the attachment of property and was copied apparently in its entirety as admittedly there is no attachment of property. It has, however, been contended that the powers of a Receiver to manage property to the exclusion of the judgment-debtor or rather the inability of the judgment-debtor to deal with the property, while it is under the management of the Receiver, depend on section 64 of the Civil Procedure Code, and, therefore, unless an attachment is made the Receiver has no power to deal with the property. Now, from section 51, Civil Procedure Code, it is clear that a Receiver may be appointed where the property has not been attached. The appointment of the Receiver in this case is made in the form provided in the Code of Civil Procedure which expressly gives him full powers under the provisions of O. XL, Civil Procedure Code, and it must, therefore, be taken that he had all the powers under O. XL, r. 1 (*d*), and as no powers were reserved he had all the powers of the owner with reference to the property.

The principal contention of the appellant is that unless the Receiver took formal possession of the property, he had no power to deal with it, and he, therefore, contends that he had no powers to lease it.

The second ground is that the Receiver applied for the orders of the Court as the plaintiff was unable to pay the lease money till after the harvest and that as no orders were passed the lease cannot have been supposed to have been sanctioned. Now, with regard to the powers of the Receiver it has been held by the Calutta High Court in *Hudson* v. *Morgan* (1), that the Receiiver's title to possession accrued on the date of his appointment, for as regards the rights of third persons the appointment of a Receiver does not take effect or date back by relation to a period prior to his appointment. It seems also that the appointment of the Receiver is complete on the entry of an order of appointment although he may not be able to take actual possession of the property until the security is approved. This is a clear authority for the proposition that the validity of the Receiver's appointment does not depend on his taking possession of the property, but the powers commence immediately on his appointment by the Court, which in this case was November 1917.

It will be necssary to consider whether this Court has held a contrary view as contended by the appellant. The first of the two cases referred to is 5 D-10 which is the order of this Court in revision proceedings. I need not go into the history of these proceedings. It is sufficient to say that there were several applications by the plaintiff and defendant No. 5 with regard to the appointment of the Receiver. The Subordinate Judge refused to remove the Receiver. In 1918 there were appeals against this order to the District Judge; neither the plaintiff nor the Receiver were parties to these proceedings and before the District Judge there was a compromise between the decree-holders, defendants Nos. 2-4 and defendant No 1, as a result of which it was arranged that the property should go into the possession of defendant No. 1. This is stated by the plaintiff to be collusive, but we are not concerned with it because, admittedly, neither the plaintiff nor the Receiver were parties to it, nor can they be bound by an order passed behind their backs. The plaintiff and the Receiver then appealed to this Court and Exhibit 5 D-10 is the judgment of my learned predecessor in that matter.

The observations on which the appellants rely are as follows. "Without a formal order

(1) 68 Ind. Cas. 482 ;(1923) A. I. R. (N) 6.

(1) Ind. Cas. 856 ; 36 C. 713 ; A. L. J. 724 13 C. W. N. 654 ; 9 C. L. J. 653.

deciding whether Deo Baksh could be removed or not the Receiver was not entitled to place Kaluram in possession and I know no authority for the view that the Receiver could oust the judgment-debtor's lessee merely on the ground that his order of appointment was prior to the date of the lease. It does not appear that any attachment of the holding was effected at any time so that section 64, Civil Procedure Code, which makes any private transfer of attached property void as against all claims enforceable under an attachment has no application. That the mere appointment of a Receiver has a legal effect similar to that of an actual attachment does not appear from any provision of the Civil Procedure Code or from any reported case of which I am aware." These remarks must be regarded as *obiter dicta*.

It was held in *Mahommed Zohuruddeen* v. *Mahommed Noorooddeen* (2), that the appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them from interfering with the possession of the Receiver, except by permission of the Court.

It would appear, therefore, that the judgment-debtor or his lessee could not interfere with the possession of the Receiver or the plaintiff, his lessee, unless with the permission of the Court.

The other case on which the appellant relies is *Ramkrishna* v. *Ganpati*, (3) of this Court in which it was held that "there was no appointment of a Receiver, but taking for the purposes of this case that a Receiver was appointed on 30th April 1918 under clause (a) of r. (1) of O. XL it is very clear that from the terms of that rule that mere appointment does not immediately vest the property in the Receiver. The transfer of the property to his possession, actual or constructive, and the conferral of special powers on him require specific orders under clauses (b), (c), (d) of the same rule and no such order was passed at that time.

Later on it is stated that even if the order of 30th April 1918 was an appointment it is impossible to hold that of itself it vested the property in the Receiver, that is to say, in the Court— much remained to be done before that could happen and it was not done till 22nd December 1918, nearly four months after the tenant against whom the decree was being executed had been ejected, and the land had passed to the *Malugzar*."

It will appear that this case can be at once distinguished from the present case on the ground that there was no proper order of appointment at all or at most there was a mere order of appointment under clause (a) of rule 1 of O. XL there was no order that the should take possession.

In the present case the order of appointment, as I have said, was in form 6 of Appendix F, of the Civil Procedure Code which gave the Receiver full powers under the provisions of that order, which includes the power of taking possession, although no formal order for removing the judgment-debtor from possession was passed. The judgment-debtor himself was in possession so clause (2) of r. 1 of O. XL, Civil Procedure Code, has no application. It has been held in England that so for as respects parties to the action, the rents and profits of the estate over which a Receiver has been appointed are bound from the date of the order for the appointment: *Lloyd* v. *Mason* (4) and *Codrington* v. *Johnstone*. (5). It has also been held that a Receiver of lands does not take actual possession unless the order specifically directs him to do so: cf. *Ex-parte Evans* (6). The same case lays down that the appointment of a Receiver of the rents of land at the instance of a judgment-creditor, though conditional on the Receiver's giving security, on registration operates as an immediate delivery of the land in execution, and when the security is afterwards given the order relates back accordingly: cf. *Re. Shephard* (7).

I have referred to Kerr on Receivers and Woodroffe on Receivers. It is stated there that the effect of the appointment is to remove the parties to the action from the possession of the property, subject to this that the Court cannot remove from the possession

(2) 21 C. 85 ; 10 Ind. Dec. (N. S.) 689.
(3) 68 Ind. Cas. 432 ; (1922) A. I. R. (N.) 6.
(4) (1837) 2 Myl. & C. 487 ; 40 E. R. 725.
(5) (1838) 1 Beav. 520 (N. S) ; 8 L. J. Ch. 282 ; 3 Jur. 528 ; 49 R. R. 130 48 E. R. 1012.
(6) (1887) 13 Ch. D. 254 at p. 256 ; 49 L. J. Bk. 7 41 , L. T. 565; 28 W. R. 127.
(7) (1889) 43 Ch. D. 131 at p. 133; 59 L. J. Ch 88 ; 62 L. T. 337 ; 38 W. R. 188.

or custody of the property any person when the parties to the suit or some of them have not a present right so to remove. A Receiver of land never takes actual possession. He only receives the rent but not by virtue of an estate or title vested in him, but merely as an officer of the Court upon the title of some persons parties to the action. He has the power of leasing under the order appointing him.

On considering the law both English and Indian on the subject I am of opinion that the property must be held to have vested in the Receiver in the present case from the date of his appointment and that from that date the owner (judgment-debtor) was incompetent to lease it. This being so, the lease by the judgment-debtor to the appellant was void as against the Receiver and his lessee and the view of the lower Court is, therefore, correct.

As regards the point raised that the Court passed no order on the Receiver's reference to it regarding the postponement of the payment of rent till after the harvest, this is not of great importance. Under the terms of his appointment he had the power to lease though in important matters he is required to obtain the direction of the Court: *Balaji* v. *Ramchandra* (8). The failure of the Court to pass orders on his reference would not, in my opinion, invalidate the lease, which was within the competence of the Receiver to grant under the terms of his appointment.

The appellant has admitted in Exhibit P-8 that the Receiver took the land under his management.

The Insolvency Act has nothing to do with this case as the claim is solely against appellant (defendant 5) who is not an insolvent.

As regards plaintiff's possession which is disputed it is admitted he got the *jowri*. The question of plaintiff's possession has been fully discussed in paragraph 30 of the lower Court's judgment. The plaintiff was entitled to possession under the lease from the Receiver and he is entitled to damages from the person by whom he was wrongfully kept out of possession. It is immaterial whether he has paid the rent to the Receiver.

(8) 19 B 660; 10 Ind. Dec. (N. S.). 442.

The view of the lower Court is, in my opinion, correct.

The lower Court has considered the question of the value of the crops at great length and the only modification required is that in Schedule A attached to the plaint (Paper-book page 6) the plaintiff has valued the Bhusa at 4 baskets per rupee, whereas the Subordinate Judge has taken 2 baskets per rupee. The amount awarded for Bhusa by the lower Court is Rs. 472. This must be halved and the decretal amount accordingly reduced by Rs. 236. With this modification the decree of the lower Court, is confirmed and the appeal dismissed with costs.

G. R. D. *Decree modified.*

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 945 OF 1923.

July 16, 1923.

Present:—Mr. Justice Sulaiman.

Pandit KHUB CHAND—DEFENDANT—APPELLANT

versus

TODAR MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXI, s. 15—Joint mortgage-decree—Execution by one decree-holder—Property purchased by decree-holder, whether for benefit of other decree-holders.

A mortgage-decree was passed in favour of several co-mortgagees. One of the decree-holders issued out execution of the decree subject to the reservation of the rights of his co-decree-holders, and himself purchased the property of the judgment-debtor setting off the purchase-money against a portion of the decretal amount;

Held, that the purchase must be deemed to have been made for the benefit of all the decree-holders and that the decree-holders other than the purchaser were entitled to recover from the latter their proportionate shares of the property.

Gangasahai v. *Kesri*, 30 Ind. Cas. 265; 37 A. 545; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 22 C. L. J. 508; (1915) M. W. N. 713; 42 I. A. 177 (P. C.) followed.

Ganeshi Lal v. *Jagannath*, 32 I. C. 171, distinguished.

Second appeal against the decree of the District Judge of Budaun, dated the 14th March 1923.

KHUB CHAND *v.* TODAR MAL

Mr. *Harnandan Prasad*, for the Appellant.

JUDGMENT.—This is a very clear case. One Sewa Ram, a mortgagee, left four sons who were entitled to his mortgagee rights on his death. These persons secured a decree for sale of the mortgaged property for a sum exceeding Rs. 1,200. This decree was put in execution in September 1916 by Khub Chand, defendant No. 6, alone. The learned District Judge has found that when Khub Chand applied for execution he expressly reserved the rights of his co-decree-holders, but for this reservation it is possible that the Court would have declined to execute the decree under O. XXI, r. 15, sub-clause, (2), Civil Procedure Code. The property of the judgment-debtors was put up for sale and was purchased for a sum of Rs. 5,562 in the name of the decree-holder Khub Chand. No money was paid in cash by him but the price was set off against part of the decretal amount. Khub Chand obtained a sale certificate as well as the delivery of possession and has admittedly remained in exclusive possession of the property ever since.

One of the co-decree-holders has brought the suit for recovery of possession of his one-fourth share in the property as well as mesne profits.

Both the Courts below have decreed the suit holding that the purchase must be deemed to have been made on behalf of and for the benefit of all the decree-holders.

In my opinion the view taken by the Courts below is perfectly correct. The property was purchased in lieu of a part of the decretal amount which had belonged jointly to all the decree-holders. Execution had been ordered subject to the reservation of the rights of the co-decree-holders. One decree-holder, therefore, cannot be allowed to purchase the *decree* exclusively for himself and realise his share of the decretal amount leaving nothing for the co-decree-holders. In equity and justice, therefore, the sale must be deemed to have taken place in favour of all the persons who were interested in the decretal amount.

The learned Vakil for the defendant-appellant has relied on a case of this Court reported in *Ganeshi Lal* v. *Jagannath* (1). It may be that that case is distinguishable from the present case inasmuch as the facts of that case were somewhat different. There the co-mortgagees had not joined in the suit at all, but had been arrayed as *pro forma* defendants. The decree was in favour of one mortgagee alone. Then at the time of the auction-sale it appears that the decree-holder had purchased the property for himself in spite of the protest raised by the other mortgagees. On those circumstances, the Court was of opinion that the other mortgagees had no interest in the property purchased at auction-sale though they might have had a right to insist on the deposit of the purchase-money in Court. But even if that case on principle were not distinguishable from the present case it would be impossible for me to follow it as it would then be contrary to the view expressed by their Lordships of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (2). In this latter case Ganga Sahai one of the co-decree-holders, had applied for execution of his mortgage-decree against the mortgagor and his application had stated that execution was sought subject to the rights of the other mortgagees. The purchase, however, was made by Ganga Sahai himself in his own name and the purchase-money was set off against the decretal amount. Their Lordships held that the properties in question must be deemed to have been purchased for the benefit of all the mortgagees and that the co-decree-holders were entitled to recover from Ganga Sahai their proportionate share of the properties purchased by him in execution of the joint mortgage-decree, in fact the present case is quite parallel to it.

In my opinion, therefore, there is no force in this appeal and I dismiss it under O. XLI, r. 11, Civil Procedure Code.

Z. K. *Appeal dismissed.*

(2) 30 Ind. Cas. 265 ; 37 A. 545 at. pp. 551, 555 ; 19 C. W. N. 1175 , 18 M. L. T 203 ; 20 M. L. J. 329 ; 2 L. W. 837 ; 13 A. L. J. 999 ; 17 Bom. L. R. 998 ; 22 C. L. J. 508 , (1915) M. W. N. 713 ; 42 I. A. 177, (P. C.).

SARADINDU MUKERJEE *v.* GIRISH CHANDRA TEWARI

CALCUTTA HIGH COURT.

CIVIL RULE 1090 OF 1923.

January 30, 1924.

Present :—Mr. Justice Suhrawardy.

SARADINDU MUKERJEE AND OTHERS—PETITIONERS

versus

GIRISH CHANDRA TEWARI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XLVII, r. 1.—Execution of decree—Dismissal for default—Restoration, application for—Review—Appeal, whether lies.

An execution case was erroneously dismissed for default and the decree-holder applied for restoration of the case by way of review and also headed his application under section 151 of the Civil Procedure Code. The application was allowed :

Held, that the application for restoration was one under section 151 of the Civil Procedure Code and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration.

Rule against the order of the District Judge of Nadia, dated the 9th July 1923.

Babu *Girija Prosanna Rai Choudhury* (with him Babus *Romesh Chandra Sen* and *Bankim Chandra Banerji*), for the Petitioners.

Babu *Tarakeswar Pal Chaudhury*, for the Opposite-Party.

JUDGMENT.—The facts relating to this Rule are that the petitioners (who are the decree-holders) attached in execution of their decree certain properties belonging to the judgment-debtor. A claim was preferred by a certain person in respect of two of those properties. The petitioners applied for the issue of the sale proclamation and it was ordered on the 13th February 1922 that the sale proclamation might issue on their depositing costs. On the 18th March 1922 the claim was allowed and two of the properties were released from attachment. On the 18th March the petitioners applied for the issue of fresh sale-proclamation in respect of the remaining properties. The order passed thereon was that the 11th May 1922 be fixed for the sale and that the sale proclamation should issue on the petitioners' paying the necessary costs. On the 11th May, the following order was passed. "Correct process not filed and no further steps taken. The execution case be dismissed for default." In the petition which has been presented to this Court it is alleged that the petitioners were asked by the officer-in-charge of the Execution Department to take back the sale proclamations previously filed and to file correct ones. The petitioners thereupon put in two correct proclamations and two new proclamations and offered to deposit costs for the usual advertisement in the newspapers. They, however, did not alter the original date that was put on the processes because they say that the dates were to be put in by the officers of the Court under r. 11, sub-rules (1 and 4) of the General Rules and Circular Orders (Civil) of the High Court. On the 11th May, it is further alleged that their officer went to the officer-in-chargeof the Execution Department and was given to understand that the sale day was again fixed for the 13th July. These allegations have not been contradicted and I must take them as they stand, as it appears that the learned Munsif who had to enquire into this matter believed this state of things. On the 11th May the Court passed the following order: "Correct processes not filed. No further steps taken. Execution case be dismissed for default". It does not appear from the order, nor have I been enlightened upon this point, as to which portion of the processes filed was incorrect. But I take it, as has been alleged by the petitioner, that the incorrectness lay in the wrong date that was allowed to stand on the proclamations. Thereafter, the petitioners applied for setting aside the order passed on the 11th May and for restoration of the execution case. The application was headed under O. XLVII, r. 1 and section 151, Civil Procedure Code. That application was registered as one under O. XLVII, r. 1. It was presented not before the officer who passed the order on the 11th May, but before his successor and it was heard by another officer succeeding the latter. The learned Munsif who heard this application purported to treat the application as one under O. XLVII, r. 1, Civil Procedure Code. After considering the circumstances of the case his conclusions were summed up in these terms : In any view it appears that there are good grounds for restoring the case to file and setting aside the

order of dismissal passed in this case. There was an appeal from this order of restoration of the execution case to the District Judge. The learned District Judge held that the application under O. XLVII, r. 1 was incompetent inasmuch as there were contraventions of r. 2, not having been presented to the Court that passed the order sought to be revised. In this view he decreed the appeal and allowed the order of dismissal passed on the 11th May to stand.

Against this order this Rule is directed and it is urged that the Courts below were wrong in placing the petitioners' application under O. XLVII, r. 1, as it was in reality an application under section 151, Civil Procedure Code The same point was raised before the learned Judge and he was of opinion that the provisions of section 151 could not be invoked in the present case because the Court, in the exercise of its inherent power, cannot assume jurisdiction to grant a review where it is expressly forbidden by the Legislature. This view is correct if the application was made by the petitioner under O. XLVII, r. 1. I have quoted the ordering portion of the Munsif's judgment which looked as if the order was passed under O. IX, r. 6 (2), if that provision of the law be applicable to execution proceedings. The learned Munsif seems to have been of the opinion that the mistake was due to the Court and that the petitioners were not at fault. It is admitted by the learned Judge that this is a very hard case. The learned Judge further observes in determining the question of costs that the order dismissing the petition for execution was wrongly passed and he does not think that he should also allow the appellant's costs. It is, therefore, conceded that the order passed on the 11th May was wrongly passed. That being so, I think it is a fit case in which I should interfere in the exercise of my revisional jurisdiction either with the order of the learned District Judge on appeal or with the order passed by the Munsif on the 11th May 1922. It was no doubt an error on the part of the petitioners to have headed their application as one under O. XLVII, r. 1 also. Probably it was prepared for presentation before the officer who had passed the original order, but his departure made the application for review infructuous. But it also purported to have been made under section 151 on the ground that it was due to the mistake of the Court that their execution case was dismissed for default. Though the learned Munsif treated it as an application for review of judgment, it was open to the petitioners to argue before him that it was an application under section 151. A similar view was taken under very similar circumstances in the case of *Abdul Rahaman Saha* v. *Shahana* (1). If it was not an application under O. XLVII, r. 1 but an application under section 151 clearly no appeal lay to the District Judge. I should, therefore, set aside the order of the District Judge in appeal restoring the order of the Munsif passed on the 11th May 1922: and I further set aside the order passed by the Munsif on the 11th May 1922 and restore the execution case to its file. As these proceedings are the result of the fault of no party, I make no order for costs in any of the Courts.

Z. K. *Revision allowed.*

(1) 58 Ind. Cas. 748 ; 1 L. 330 ; 82 P. W. R. 1920 ; 1 L. L. J. 188.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 862 of 1923.

December 17, 1923.

Present: —Mr. Raymond, A. J. C.

YUSIF MAHOMED—PLAINTIFF

versus

ABUBACKER IBRAHIM AND OTHERS — DEFENDANTS.

Cutchi Memons—*Succession — Inheritance — Hindu Law—Muhammadan Law—Joint family property — Presumption—Commensality—Partition amongst Muhammadans—Property acquired by one member—Jointness—Burden of proof.*

In matters of succession and inheritance Cutchi Memons are governed by Hindu Law. [p. 826, col. 2.]

There is no such thing as joint family property under Muhammadan Law and the presumption of Hindu Law that money spent by a member of the family came from the joint fund is not applicable to Muhammadans. [p. 827, col. 1.]

YUSIF MAHOMED *v.* ABUBACKER IBRAHIM

Amongst Muhammadans mere commensality is insufficient to prove jointness in estate.

In a partition-suit amongst Muhammadans the burden of proof that property acquired by one member only was purchased out of the joint fund, is on the members who allege it.

Mr. *Jhamatmal Valiram*, for the Plaintiff.

Mr. *Khanchand Gopaldas*, for the Defendant No. 1.

Mr. *Gordhandas A. Kikla*, for the Defendants Nos. 2 and 3.

JUDGMENT.—The parties to this suit are Cutchi Memons. Plaintiff is Yusif, son of Mahomed, defendant No. 1, is his paternal uncle Abubacker and defendants Nos. 2 and 3 are the daughter and wife of Ahmed, deceased, the brother of Mahomed and Abubacker. The suit is for partition of immoveable and moveable property the latter consisting of cash, ornaments and furniture detailed in the schedule attached to the plaint and the former of a house purchased by Abubacker in 1917 for Rs. 29,500. The allegations in the plaint are that Mahomed, the father of the plaintiff, who died in 1917, Ahmed who died in 1906 and defendant No 1 were brothers, sons of Ibrahim Hassan, Ibrahim died in 1896 and it is alleged that both in his life time and after his death they lived together, their earnings were thrown into a common fund, and they were joint in food and estate. In his life time Ibrahim did the business of supplying provisions to residents at Manora. After his death Ahmed carried on the business and after Ahmed's death, defendant No. 1, Abubacker, has been attending to it. It is alleged that though Mahomed did not actively participate in the supply of provisions at Manora owing to his physical incapacity, his legs being paralysed and he could move about only with the aid of crutches, yet he materially assisted in the Manora business by writing up the accounts, helping in the purchase of provisions and effecting settlement of disputes that arose with the customers. Whilst Ahmed and Abubacker attended to the Manora business, plaintiffs say that Mahomed engaged himself in cane work which he could manage with the aid of servants in spite of his crippled condition, and contributed his earnings to the common stock. It is also contended that Ahmed, during the period that he managed the Manora business, also placed his earning in a common fund and as Abubacker has purchased the property in suit with the aid of the joint funds, he is responsible to the plaintiff, as the son of Mahomed, for his share in it. With regard to the cash, ornaments and furniture which it is alleged have been wholly appropriated by defendant No. 1, plaintiff asks that his share in them be awarded to him as they are joint family property. The suit was filed on the 19th July 1919 on a Court-fees stamp of Rs. 10 and for the purposes of jurisdiction the subject-matter of the suit was estimated at Rs. 80,000, but the plaintiff contends that he is in joint possession of the family properties with defendant No. 1. In the plaint, as originally filed, the only defendant was Abubucker. Plaintiff amended his plaint later by bringing on the record Amibai, the daughter, and Mariam, the widow, of Ahmed deceased.

In the plaint, as originally framed, it is alleged that the parties to the suit, being Cutchi Memons, are governed by Hindu Law in matters of inheritance and succession and that they were possessed of joint family property which remained unpartitioned. In his opening address to the Court, Mr. Jhamatmal, for the plaintiffs set out a case which appeared to me not to be borne out by his allegations in the plaint and I suggested to him that an amendment of his plaint was essential if he intended to establish the case that was outlined in his address. He accordingly applied for the amendment of his plaint and for para. 1 of the original plaint he desired to substitute the following:—"That the plaintiff's father Mahomed, son of Ibrahim, defendant No. 1 and Ahmed, son of Ibrahim, father of defendant No. 2 and husband of defendant No. 2, are all three brothers and by caste, Cutchi Memon, and as such, according to custom and usage applicable to the parties, are governed by Hindu Law in matters of succession, inheritance and property." And in lieu of para. 4 of the original plaint, the following para: " plaintiff claims partition of these properties as joint family properties acquired either by inheritance or survivorship and from the joint earnings of the members thereof, during the life-time and thereafter of Ibrahim, the common ancestor of the parties, the parties and their other deceased ancestors having

continued to live, work and own property jointly up to the date of death of the plaintiff's father Mahomed. It is further submitted that plaintiff and is father were either joint tenants or tenants in common, with the defendants in regard to the said properties and according to custom and law plaintiff is entitled to seek partition of the said properties."

Mr. Khanchand for defendant No. 1 strongly objected to the amendment application being granted as, apart from the time that had elapsed since the filing of the suit, he contended that the plaintiff was attempting to make out a new case which was not set out in the original plaint. It is true that four years have elapsed since the suit was filed, and were it not for the suggestion that emanated from the Court the plaintiffs would have proceeded to trial of the suit as originally framed. In view of the grounds as propunded by Mr. Jhamatmal on which the plaintiffs seeks relief, the plaint is rather inartistically drawn but I do not think that the amendment sets out a new case. It only seeks to amplify and state more specifically the grounds on which the plaintiff's case is based. Mr. Khanchand for the defendant urged that in the plaint as first filed there was no reference to the joint earnings of the brothers nor did the plaintiff assert that the Hindu Law, not only as to succession and inheritance but also as to property governed the parties to the suit. But the original plaint does emphasize the point that the brothers were possessed of joint family property and by implication that their earnings were joint as they not only lived together but were joint in food, as to Hindu law being applicable to *Cutchi Memons* with its characteristic incidents as to the devolution of property is not to set out an inconsistent case but only to enlarge the grounds on which relief is sought. In my opinion the powers of amendment as vested in the Courts byO.VI r. 17, Civil Procedure Code, cannot be circumscribed in the manner that defendant No. 1's pleader would have me to do and I think all such amendments should be allowed as may be necessary for determining the questions in controversy between the parties. I, therefore, allowed the amendment and was prepared to safeguard the interests of Mr. Khanchand's client against any prejudice that may be caused to him by the amendment, but he did not desire to file any supplementary written statement or to amend the issue but preferred to proceed forthwith with the hearing of the case. As regards defendants Nos. 2 and 3 they make common cause with the plaintiff and had nothing to urge against the amendment.

In addition to the moveable property described in the annexure to the plaint and of which partition is sought, there are five immoveable properties in respect of which plaintiff originally claimed partition. Two of these were plots Nos. 74 and 63 with buildings thereon situated in the Rambagh Quarter, Karachi. These originally belonged to Hussan, the father of Wahidino and Ibrahim. The parties to this suit desired that the dispute between them as regards these properties should be referred to the joint arbitration of Messrs. Lobo and Jhamatmal, pleaders. There were other persons that were interested in the estate of Hussan who also signed the reference. The award is Exhibit 15. I shall have to refer to it later in my judgment. The rights of the parties are concluded by this award and the dispute between them as regards these two properties is withdrawn from the jurisdiction of this Court. The other two immoveable properties, Plot No. 75 situated in the Serai Quarter and Plot No. 3 with buildings thereon situated on the Port Trust land, admittedly belonged to Wahidino, the brother of Ibrahim. Wahindino and his immediate heirs being dead, the only male descendants were plainitiff and defendant No. 1 and again the parties, that is, plaintiff and defendant No. 1, appointed Messrs. Lobo and Jhamatmal as Comissioners to partition the properties between them. This has been done and the Commisioner's report accepted by the parties is on the record.

The present suit is, therefore, confined to the rights of the parties to Plot No. 76, with buildings thereon purchased by Abu Backer in July 1917 situate in Serai Quarter, and a share in certain jewellery, cash and furniture to which I shall advert later.

The position taken by defendant No. 1 as formulated in his written statement may be summarized as follows :—He denies hatt he and plaintiff's father were joint in food or estate or that they lived together. Plot No. 76 was purchased by him in his name and with his earnings and he has been in exclusive possession of it and the plaint-

iff has no interest in it nor defendants Nos. 2 or 3. He denies that he had in his possession any jewellery, cash, or furniture to which the plaintiff or defendants Nos. 2 or 3 are entitled.

With regard to the position of defendants Nos. 2 and 3 in this suit it is necessary to set out the following facts. This suit was filed on the 10th July 1919, as I have observed, against defendant No. 1 only. On the 27th October 1919 an application was made to bring on the record as co-defendants Nos. 2 and 3. This application was granted on the 13th November 1919. On the 10th October 1919 Mr. Lobo undertook to file a *Vakalatnama* on behalf of defendants Nos. 2 and 3 but none was filed nor any written statement on their behalf. Issues were framed on the 11th March 1920 and the suit set down for hearing on the 26th October 1920. It was only on the 23rd June 1923 that defendants applied to file their written statement. Mr. Aston, before whom this suit was then for disposal, after hearing the arguments disallowed this application. When the suit was called on for hearing before me defendants Nos. 2 and 3 filed their written statements and asked me to admit it on the record. I, however, declined to do so both on the ground of the previous rejection for which good reasons were given and also I was of opinion that after the lapse of four years since the institution of the suit and the absence of adequate reasons to justify so belated a written statement, it should not now be admitted on the record. Mr. Kikla who represented defendants Nos. 2 and 3 stated that he did not press for any adjournment if the written statement was accepted but its acceptance would render it necessary for the plaintiff to file a rejoinder and I thought it imperative to proceed with the hearing, of a case that had been awaiting disposal for four years

The issues framed in the case were the following :—

1. Are Jumnabai widow of Usman son of Umer, Rabiabai, Asibai, Karimabai daughters of Wahidino, necessary parties to the suit?

2. Is the suit sufficiently stamped?

3. Did plaintiff, his father Mahomed, son of Ibrahim, defendant No. 1 and Ahmed, son of Ibrahim, form a joint family? If so what was the joint family property?

4. Is plaintiff entitled to a share in Plot No. 76 sheet B21 and the cash and jewellery shown in the schedule attached to the plaint?

5. What provision should be made for defendants Nos. 2 and 3?

6. What order should be made as to costs Covers paras. 10 and 12 of the written statement.

7. Is the defendant No. 1 entitled to credit for expenses incurred by him in connection with the estate of Wahidino?

8. General.

Issues Nos. 1, 5, 7 are not pressed and issues, 3 and 4 form the *crux* of the case and I address myself to their discussion. It has been established that Ibrahim in his life time did what is called the "Mannora business," that is, the supply of provisions to the European residents of Manora, a privilege that is only enjoyed by those who hold a license for the purpose from the Port Officer. How long he did this business and what was the income earned by him, and whether he left any cash or other property at the time of his death are not shown. It is clear that his three sons lived with him till his death, Mahomed being the eldest, next Ahmed, and the youngest was Abubackar, defendant. The evidence adduced by the plaintiff as to the brothers living together and being joint in food and estate and, above all, their earnings being thrown into a common fund is certainly divergent and the witnesses are not agreed to the actual state of things in the plaintiff's family. Some of the witnesses are related to the plaintiff, some have drawn largely on their imagination in their attempt to support the plaintiff's case but some appear to me to have made an honest attempt to state the facts as far as they are within their knowledge and in my view, the following facts may be taken as established on the evidence in the case:—

We must start with the fundamental consideration before our mind that plaintiff is the son of Mahomed and that it is in this capacity that he claims a share in the property in suit. It is true that the property of Hassan, the father of Ibrahim remained, unpartitioned after his death till the suit was filed. This consisted of the two buildings on the two plots Nos. 74 and 63 to which I have referred above, but these remained unpartitioned even in the life time of the two sons of Hassan, *viz.*, Wahidino

and Ibrahim. They were partitioned only after this suit was filed and in them others had an interest besides the parties to this suit. Hence they afford no indication of the brothers Mahomed, Ahmed, and Abubacker being joint in estate and the other sharers in Hassan's property were admittedly not joint with Ibrahim or his sons.

Equally, the partition of the property left by Wahidino between the plaintiffs and defendant No. 1 after this suit was filed does not necessarily lead to the inference that the brothers were joint in estate. The male descendants of Wahidino died after him and but for this unfortunate incident, Wahidino's estate would have fallen neither to the lot of the plaintiff nor defendant No. 1. It is true that after the death of Abdur Rahman, son of Wahidino, Abubacker managed the estate of Wahidino but he did so at the request of the widow of Abdur Rahman and in the absence of any adult heir of Wahidino to look after it. There is no other immoveable property except that purchased by defendant No. 1 which is the subject matter of this suit. When it was purchased in 1917 Mahomed was still alive and there is no doubt that he urged his claim to a share in it which was immediately resisted by defendant No. 1. Admittedly, this property was purchased by defendant No. 1 and stands in his name alone and there is not the slightest doubt on the evidence that it had been exclusively in the possession of Abubucker since the purchase, in fact, plaintiff does not even venture to assert that it was ever in his or his father's possession. The allegation, therefore, that the three brothers were joint in estate has very little to support it so far as the immoveable property is concerned. It has, however, been strenously urged that the purchase-money was drawn by defendant No. 1 out of the joint funds and that out of his own earnings it was impossible for Abubacker to accumulate the sum of Rs. 29,500 which was the purchase price.

This leads me to the consideration of the evidence as to the earnings of the brothers being joint.

I have remarked above that there is no evidence that Ibrahim left any property at his death.

It is in evidence that in Ibrahim's life time Mahomed was in the service of Nusserwanji and Co., for some years. After leaving this service he opened a shop for the sale of sundry articles at Keamari. This shop was carried on for about a year when it had to be closed owing to Mahomed's insanity and Mahomed was consigned to the Lunatic Asylum at Gidu Bunder for about six months. On his recovery he proceeded to Aden in some service and whilst he was still in Aden his father died. It has been impossible to elicit from the witnesses the dates as to the events mentioned above but it may be taken as established that in 1896, the year of the death of Ibrahim, Mahomed was in Aden. He remained at Aden for about a year. On his return he did the business of hawking goods in the shops at Keamari and started a tailoring shop. In 1897, according to the evidence of Yusif Rahimtulla, Ex. 20, a witness for the plaintiff " Mahomed was paralysed and he could not do any work after that and he had to be assisted by others to rise. He opened a shop for his son for caning work with the aid of two servants and Mahomed supervised." Almost all the witnesses are agreed as to Mahomed being afflicted with paralysis of the legs and could move about, if at all, with the aid of crutches. The evidence is practically uniform that this affliction befell Mahomed about 20 years before his death which occurred in 1917.

With this physical infirmity on him it is perfectly evident that Mahomed could not attend to the Manora business. It is, however, urged that his interest in the Manorabusines is demonstrated by the assistance rendered by him to both Ahmed and defendant No. 1 in its management. It is said that he wrote up the accounts of the Manorabusiness which were dictated to him by both Ahmed and Abubacker every evening, it is also said that he helped his brothers in the purchase of provisions for Manora, that before the provisions were daily carted to Manora, they were brought in every morning at his cane shop where apparently they were sorted out and, lastly, that he advised his brothers as to the business. Now, with regard to Mahomed entering up the accounts of the provisions supplied at Manora, three account books were produced which plaintiff asserted were in the hand-writing of Mahomed. Defendant No 1, however, denies the assertion flatly and says that the hand-writing in the books is that of Ahmed. Certainly

there is some evidence to show, independently of the account-books produced that Mahomed did write down the accounts of the provisions supplied at Manora but whether he did so daily and for what period the evidence is conflicting. Defendant No. 1 denies outright that Mahomed ever wrote up the accounts of the Manora provisions but I am not prepared to accept his unqualified denial. I think it quite probable that Mahomed did occasionally write up the accounts of the Manora business both in the life time of Ahmed and Abubacker but this circumstance has to my mind a very remote connection with Mahomed's interest in the Manora business so as to entitle him to a share in the earnings. Mahomed's children were fed and maintained by Ahmed and Abubacker and in consideration of this and as the eldest brother Mahomed rendered such assistance to his brothers as his physical condition allowed him to, it is difficult to draw the inference that Mahomed was a partner with either of his brothers in their earnings. Equally feeble is the argument as to the purchase of provisions by Mahomed. From the evidence I can only gather that Mahomed sometimes accompanied one or the other of his brothers in a carriage to the market when they went to make their purchases and Mahomed may well have done this more for the sake of an outing in the morning rather than to assist his brothers in the purchases. It is not alleged that he rendered any active assistance in the purchase of the provisions. Again, the provisions were probably brought to the cane shop of Mahomed before they were taken to Manora but this shop was situated on the Bunder Road, by which the brothers had to drive on their way to Manora, and their alighting at the shop and probably re-arranging the stock they had purchased could hardly be said to be a piece of evidence establishing the interest of Mahomed in the Manora business. It was also sought to prove Mahomed's participation in the earnings of the Manora business by the allegation that the dogcart which Mahomed used was still in the service of Abubacker. It is not apparent on the evidence whether this cart was purchased by Mahomed or Ahmed though all the three brothers have been using it and from this again the conclusion is deduced that the brothers were joint in their earnings. Mr. Jhamatmal was constrained to admit that each of these items by itself would have very little probative value but he urged that the cumulative effect of them was such as to lead to the only conclusion that the three brothers were joint in their earnings. In my opinion the evidence, even if taken collectively, cannot and does not establish that the brothers were joint in their earnings from the Manora business.

Now, so far as Ahmed and Abubacker are concerned, their only source of income was the Manora business, Mahomed was a physical and mental wreck. It is not shown that by any of his adventures before he took to cane work, he had either accumulated any savings or contributed to the family support. The only business that he attended to for about 15 years was the cane work. His son Yusuf says he earned about Rs. 200 per mensem out of this business, whereas Abubacker puts it down at Rs. 50 to Rs. 60. No account-books are produced though it is stated that accounts were kept of the earnings from the case business. I will not go the length of saying that Mahomed was a debauchee but it appears from the plaintiff's own witnesses that he occasionally enjoyed the *nautches* of dancing girls and drank liquor. All this meant expense and it seems tolerably certain that Mahomed's earnings, which certainly could not have been Rs. 200 as stated, must have been exhausted upon himself.

On the evidence I have not the least hesitation in holding that Mahomed did not and could not have contributed anything to the joint funds even if these did exist.

It was urged that all the three brothers lived together as long as Ahmed and Mahomed were alive and had their food together and their earnings were kept jointly in a family box out of which the household expenses were defrayed. It appears from the evidence that Ibrahim and Wahidino, his brother, lived in the same compound but after Ibrahim's death there arose some dispute the particlars of which are not quite clear but Ahmed, Abubacker, the children of Mahomed (his wife being then dead) left the place and took up their residence in another house whereas Mahomed still continued in the same place. All the members of the family except Mahomed first lived in the house of one Abdulla Kadirdino and after a short time transferred themselves to

the house of Bachal Kadirdino. Mahomed, after leaving the compound of Wahidino, first took up his abode in the house of Faizullah and then engaged the house of Sidik which is described as his *otak* All these houses were no doubt in close proximity of one another. It is argued that Mahomed lived apart from the others as there was not sufficient room in the house of Abdulla Kadirdino and that Sidik's house was engaged by him as his *otak* for the purposes of his cane business. Now there is no doubt on the evidence that Mahomed, though living apart, had his meals with the others which were either sent to him at his residence or he came over to the family house where he partook of them. It is contended that, in spite of Mahomed living apart, I must hold that the three brothers lived jointly as they were joint in food and Mahomed's children lived with the others. So far as the three brothers living together is concerned, I have stated the facts as disclosed by the evidence and mere commensality is not sufficient to prove that the brothers were joint in estate. Much stress is, however, laid upon the earnings of the brothers being joint and this seems to be the crucial point in the case for, according to the plaintiff, it is out of the joint earnings that the immoveable property in dispute in this suit was purchased by Abubacker. Undoubtedly, it is difficult to procure evidence as to the internal condition of things in a family and Mr. Jhamatmal has pressed upon my attention the evidence, of Mariam, defendant No. 3, the wife of Ahmed. Before I touch upon her evidence it is necessary to premise that she is witness very much interested in the success of the plaintiff's case. Ever since the death of Ahmed Mariam and her daughter, defendant No. 2, have lived with defendant No. 1. It is only about two or three years prior to the suit that she lived apart owing to a disagreement with defendant No. 1. Her daughter is married to the plaintiffs and in this suit Mariam complains as to defendant No. 1 not having returned all her ornaments and claims them from him. There is evidence on the record to show that at the intervention of some respectable members of the community defendant No. 1 was induced to return her ornaments which he did, and a list of the ornaments returned was prepared and signed by witnesses. Mariam, however, still charges the plaintiff with not having returned to her all her ornaments. Considering, therefore, the existing relationship between defendant No. 1 and Mariam it is hardly possible to look upon the latter as a disinterested witness and to my mind her evidence in the case has been clearly inspired by the motive of befriending the plaintiff.

According to the evidence of Mariam, when she married Ahmed, both Ibrahim and Mahomed's wife were dead and defendant Nos 1 was then about 14 years of age. Mahomed, she says, was doing cane work, and had been a paralytic for two or three years prior to her marriage. She has resiled from the latter portion of her statement in her cross-examination for she said that Mahomed became a paralytic at the time of her marriage and attended to cane work about eight years after her marriage. The substantial portion of her evidence with regard to the joint earning is the following. " All the three brothers kept their earnings in one box. The key remained with my husband ever since my marriage. The key remained with Ahmed as he did the Manora business. After Ahmed's death the key remained with Abubacker. "Again, in her evidence later she says :" Mahomed brought cash and notes to the house when he worked at the cane shop but I do not know how much it was. Mahomed used to give the money he brought to Ahmed and Abu but I do not know how much it was. I do not know how much Mahomed earned a day. He said it was Rs 5 to Rs. 8 a day " Again, " the money that was spent in the house was given me by Mahomed. " But she contradicts herself again and says " when Ahmed was alive he gave me the money for the house hold provisions and after Ahmed's death, Abubucker." It is mainly on her evidence that Mr. Jhamatmal has relied as to proof of joint earnings coupled with the pathetic plea that it was impossible for him to get any other evidence as to the condition of things in the management of the household. To my mind Mariam's evidence appears untrustworthy and I have little doubt that she had indulged in reckless statements at the sacrifice of truth. She has gone the length of stating in her evidence, though she admits she never saw what money or jewellery was lying in the cash box, that at the time of Ahmed's death there was a sum of Rs. 5,000 to 7,000 and this,

she says, she learnt from Mahomed and Abubacker. Further, to show that all the brothers participated in the management of the household, she stated that Mahomed supplied the grain, Abubacker the vegetables and Ahmed the rest of the provisions. As the only adult female member of the house for some years after her marriage Mariam no doubt looked after the creature comforts of the other members of the family but her evidence as to the earnings being joint appears to me entirely unreliable. According to her, Mahomed was a paralytic when she married and incapable, therefore, of contributing to the support of the family. Ahmed was the only working man as Abubucker was then 14 years of age, and it was clearly Ahmed that supported his elder brother as he did his children. Mahomed's savings from his cane work seem to me a myth. Prior to Mahomed taking to cane work there is not a tittle of evidence on the record to show that Mahomed had any savings and after he started the cane business there is evidence of the plaintiffs own witness that Abubacker had to help him with funds: *See* Exhibit 26. Raumuttala Ishak a cousin of Mariam Abubacker has stated in his evidence that he occasionally helped Mahomed with money who otherwise quarrelled with him. Mr. Jhamatmal argued that this pecuniary aid to Mahomed was an indication as to the brothers being joint. I think otherwise, and in my opinion these money advances were rather intended to procure peace and prevent family squabbles. I may further observe that, even according to some of the plaintiff's witnesses, Mahomed had no concern in the Manora business. Thus, for instance, the witness Yusuf Rahimtulla, Exhibit 20, whose evidence Mr. Jhamatmal stated he accepted, says Mahomed never attended to the Manora business as he was lame. The Manora earnings were kept by Ahmed at first and after his death by Abubacker. They never gave any of these earnings to Mahomed. With regard to the accounts the witness says: "Mahomed kept the accounts for one or two years after Ahmed's death. Rahimtulla Isakh, Exhibit 23, witness for the plaintiff, says Mahomed had no concern with the Manora business."

Exhibit 26, Nur Mahomed, states Mahomed had no connection with the Manora business.

Two other incidents were relied upon by the plaintiff's pleader as supporting his contention that the brothers were joint in estate. One was that the ornaments of the wife of Mahomed were given to Halima, the sister of the three brothers, on her marriage. The evidence on this point is slender but, even assuming the truth of this statement, it is difficult to infer that the brothers were joint in estate or in their earnings. Mahomed probably had no use for these ornaments after his wife's death and hence may have handed them to his sister at her marriage. The second point was that the daughter of Mahomed had been married at the expense of Abubacker and that Abubacker defrayed half the expense of the marriage of defendant No. 2 with the plaintiff. This would be quite natural as he was the uncle of both and the father of Amibai was dead.

Taking all the circumstances into consideration, even the cumulative effect of the various incidents as to the alleged jointness, as Mr. Jhamatmal would have me do, I am far from being convinced on the evidence that Mahomed was joint in estate or in earnings with Ahmed and Abubacker. I am not even prepared to hold that the three brothers could be considered as living together as Mr. Jhamatmal argues, though they supplied Mahomed with his meals.

Now, if Mahomed is held not to have been joint with his brother either in estate or in his earnings, much less Yusuf, the plaintiff. In fact, the only basis of his claim is that he is the son of Mahomed. He states that he was about 14 years of a age at the time of the death of Ahmed and, so far as the Manora business was concerned all that he did was to accompany Abubacker to Manora occasionally, it was probably a pleasure trip for him. He was maintained and supported by Ahmed and Abubacker, till he was about 15 years of age when, according to him, his father Mahomed started the cane business and he was made to learn it and he is still engaged in this business. Again, according to Yusuf, his father slept at the *otak* at night and spent also the day there coming to the family house where Yusuf stayed only for his meals. I need not enlarge on the claim of Yusuf independently of his father to any share in the property in suit because he clearly has none, nor did his pleader make the faintest attempt to establish it. I propose now to deal with the position of Ahmed

in the family for it was argued by Mr. Jhamatmal that if it were proved that Ahmed and Abubacker were joint in estate, the presumption will be that Ahmed was also joint with them. This argument is, of course, based on the rather startling assertion made by Mr. Jhamatmal that the Hindu Law of joint family property is also applicable to Cutchi Memons. I shall advert to the legal aspect of the case later.

Notwithstanding the denial of defendant No. 1, I am inclined to hold on the evidence that on the death of Ibrahim, the Manora business was attended to by Ahmed. The contention of the defendant No. 1 is that after the death of Ibrahim, Ahmed took service with one Karim Ahmed and proceeded to Quetta from which place he returned after a year and opened a tea shop for a short time. Then his uncle Nur Mahomed Fakir Mahomed who also did the business of supplying provisions at Manora made over his business to Ahmed and it was *this* business that he carried on till his death. The object of this defence is apparently to show that it was not Ibrahim's business that descended to Ahmed. The evidence of some of the plaintiff's witnesses, particularly that of Rahimtulla Ishak, Ex 23, and Nur Mahomed, Ex. 26, is to the effect that at Ibrahim's death it was Ahmed that took up the Manora business. The probabilities would also point to it, for though the business in normal times may not be very lucrative, yet it was a source of income to the family which could not easily be despised and the fact that it continues in the family to the present day shows that it has been regarded as a valuable asset. Now, it is possibly the case that Ahmed did take service in Quetta and subsequently opened a tea shop but this was probably during the period that his license to supply provisions at Manora had been stopped by the Port Officer the prohibition having lasted for about three years. The evidence shows that when Nur Mahomed Fakir Mahomed ceased to supply provisions at Manora he succeeded in making over his customers to Ahmed and the latter didthebusiness till his death. This would, therefore, tend to establish that though Ahmed did continue Ibrahim's business on his death yet he ceased to do it for about three years and Ibrahim's customers, therefore, must have passed into the hands of other suppliers and the business that Ahmed secured later was not the business of Ibrahim but that of Nur Mahomed Fakir Mahomed. Now, according to Abubacker, he helped Ahmed in the Manora business and he was fed, clothed and supported by Ahmed and was married at his expense. Abubacker who describes himself as 38 years of age, must have been about 20 or 21 years old when Ahmed died, and in all probability he was satisfied with Ahmed supplying all his wants without giving him any salary. The position then was that, till Ahmed's death, he was the only earning member of the family and defrayed all the household expenses. Under these circumstances, there were no joint earnings of Ahmed and Abubacker nor was there any joint estate except that Ahmed and Abubacker were joint in food till the death of the former. What cash Ahmed left at his death is not apparent except Mariam's reckless statement that there was about Rs. 7,000 in the family cash-box. I am not unmindful of the statement of Abubacker elicited from him in cross-examination that he treated Ahmed's earnings as joint as between himself and Ahmed but this is obviously due to his regarding them as joint as he helped Ahmed in the Manora business. There is not a scintilla of evidence otherwise to show that Ahmed's earnings were joint. There now remains for consideration the argument that it was impossible for Abubacker to purchase the property in suit without the aid of the joint funds. It is argued that Abubacker's earnings from the Manora business could not have enabled him to accumulate the purchase price. The evidence for the defence on this point may be thus summarised.

[*After discussing the evidence the learned A. J. C. concluded as follows* :—]

After the death of Abdur Rahman the son of Wahidino Abubacker was asked by the widow of Abdur Rahman to manage the properties left by Wahidino and recover the rents. This Abubacker has been doing ever since 1912 and it does not appear that he shared the rents that he recovered with any of the other relatives of Wahidino. I do not for a moment insinuate that he has misappropriated them and the Commissioners in effecting a partition of Wahidino's estate took this point into consideration. But it serves to explain that Abubacker may have had the benefit of the rents besides his earnings from the Manora

business. At any rate, the burden was on the plaintiff to prove that the Rs. 24,000 which Abubacker paid towards the purchase of the house in suit or any part thereof was taken from the joint earnings or from any part of the joint property, and this he has certainly failed to do.

On the merits of the case, my conclusions are that there was no joint property left by Ibrahim nor did the threebr others acquire any joint property. Also that they did not either live together nor were their earnings joint. They had a common table but this is no indication they were either joint in property or in earnings. Mahomed had no interest in the earnings of Abubacker in the Manora business, neither the plaintiff. And the purchase price paid for the house in suit was out of the separate estate of Abubacker. This would suffice to dispose of this case so far as the plaintiff is concerned. But in deference to the legal arguments addressed to me I shall touch upon them briefly. Mr. Jhamatmal boldly asserted that the Cutchi Memons were governed by Hindu Law, not only, in matters of succession and inheritance but also in property. He maintained that the characteristics of joint family property as applicable to Hindus would also be applied to Cutchi Memons though he was careful enough to say that the applicability must be justified by custom. The only evidence as to custom on which Mr. Jhamatmal has relied upon is the award which disposed of the property left by Hassan. By this award, as I have observed, the property of Hassan has not been divided only between the male descendants of Hassan but other female descendants have been allotted a share and defendants Nos. 2 and 3 have been awarded maintenance. The property, therefore, has been partitioned according to Mr. Jhamatmal on the principles of Hundu Law, and this he says was according to the custom prevalent in the family. A perusal of the award clearly indicates that the arbitrators endeavoured to effect an equitable distribution of property left by Hassan amongst his various descendants, male and female, and there does not appear the remotest idea of enforcing any custom prevalent in the family. Besides, a custom cannot be proved by an isolated instance of this description scarcely a couple of years old. There is no other evidence of custom. I think the law is well settled that Cutchi Memons are governed by Hindu Law in matters of succession and inheritance alone. In *Haji Usman Haji Ismail* v. *Haroon Saleh Mahomed* (1), it was held that the application of the rules of Hindu Law by custom to the Cutchi Memons was limited to the rules of succession and inheritance and did not extend to the rules relating to the joint family property as applicable to Hindus The view taken in this judgment and other recent judgments has been accepted by the Legislature for, in Act XLVI of 1920, in the Preamble the Hindu Law as applicable to Cutchi Memons is referred to as relating to succession and inheritance, and if the rules of Hindu joint family property were intended as applicable to Cutchi Memons, there would have been some reference to them. In *Advocate-General of Bombay* v. *Jimbabai* (2), it was held that it had never been proved affirmatively that Cutchi Memons had ever adopted as part of their customary law the Hindu Law of joint family or the distinction existing in that law between ancestral family, joint family and ancestral property; and that Cutchi Memons were subject by custom to the Hindu Law of succession and inheritance only. I think that the law is well established on this point and there is no room for divergence of opinion particularly in the present case where there is not a scintilla of evidence as to any custom rendering the principles of Hindu Law as to joint family property applicable to the parties.

Mr. Jhamatmal relied upon *Abdul Kadar* v. *Bapubhai* (3), as establishing that in cases of partition of property the same principles were applicable whether the parties were Hindus or Muhammadans, but a perusal of the judgment clearly shows the grounds on which their Lordships proceeded. In a suit for partition of joint property amongst Muhammadans the lower Court refused relief to the defendants as they had not paid the Court-fees and observed that this was not a suit for partition of joint family property between Hindus but a suit for partition between Muhammadans. It was with reference to this observation that it was held that a suit for partition of inherit-

(1) 68 Ind. Cas 862 ; 47 B. 369 ; 24 Bom. L. R. 978 ; (1923) A. I. R (B) 148.
(2) 31 Ind Cas. 106 ; 41 B. 181 ; 17 Bom. L. R. 799.
(3) 23 B. 188 ; 12 Ind Dec. (N.S.) 124.

ance between Muhammadans is hardly distinguishable from a partition suit by Hindus. The judgment proceeded on a question of procedure only. Mr. Jhamatmal argued that, in the circumstances of this case, the burden of proof lay on defendant No. 1 in respect of his contention that the property in suit had been purchased out of his separate funds and relied on *Seochurn Doss* v. *Musst Thookra* (4). In this case the parties were Hindus, there were five brothers constituting an undivided Hindu family and one of them acquired personal property which with the aid of his brothers he established a banking business. It was held that such circumstances under the general principles of Hindu Law constituted a joint family property in which the brothers were entitled to share and that the burden of proof that such was only an ordinary partnership and not jointly acquired family property lies on the party claiming it to have been separately acquired. Had it been established in the present case that the price paid for the property in suit was acquired out of the joint earnings or with the pecuniary aid rendered by either Mahomed or Ahmed, the burden of proof would certainly lie on defendant No. 1 that it was his separate property. An analagous case to the present is that reported in *Mohobat Ali* v. *Tafar Ali* (5). The uncle and nephew lived together and land was purchased by the uncle in his name : *held* that the presumption was that the purchase was made by him exclusively, and that the burden was on the nephew to show that he supplied part of the purchase-money. "The presumption of Hindu Law that the money came from joint funds is not applicable to Muhammadans. There is no such thing as joint family property under the Muhammadan Law and even according to Hindu Law a business carried on by one of the co-parceners of a joint Hindu family is not a joint family business nor is every member of a joint family necessarily a partner therein. In the circumstances of this case, and on my view of the evidence recorded and the findings thereon, it appears to me perfectly unnecessary to make any reference to the other authorities that have been cited.

(4) 10 M. I. A. 490; 2 Sar. P. C. J, 177; 19 E. R. 1058.

(5) 76 Ind. Cas. 481, (1923) A. I. R. (Cal.) 369.

It follows on the conclusions that I have arrived at as to the property purchased by Abubacker being with his separate funds, it cannot be charged with any maintenance of defendants Nos. 2 and 3, the daughter and widow of Ahmed. I record my findings on this point as there is a specific issue raised.

With regard to the moveable property such as cash, furniture and jewellery no evidence has been adduced as to defendant No. 1 being in possession of any furniture that belonged to Mahomed or Ahmed or was the property of the family. In respect of the cash there is only the evidence of Mariam as to there being a sum of Rs. 6,000 to 7,000 in the family cash-box at the time of Ahmed's death. She does not profess to have seen this amount or any part of it in the box and there appears little foundation for her statement. It is very likely that there was some money in the cash box but it has certainly not been shown that any part of it either belonged to Mahomed or his son the plaintiff. As to the person that had the key of the box on Ahmed's death the evidence is conflicting, Mariam says that the key was with defendant No. 1 whereas he maintains that the key was with Mariam as the wife of Ahmed.

In respect of the jewellery no evidence has been led as to defendant No. 1 being in possession of any belonging to Mahomed or his wife or to the joint family. There was admittedly some jewellery of Mariam in the possession of Abubacker at the time Mariam separated from him. Ex. 21 is a list of the jewellery that was made over to Mariam by defendant No. 1 in the presence of witnesses, and there is no satisfactory evidence to show that all the jewellery that belonged to Mariam was not delivered to her.

My findings on the issues in the case are as follows :—

Issue 1. Unnecessary.

Issue 2. In the negative.

Issue 3. In the negative.

Issue 4. In the negative.

Issue 5. None.

Issue 6. Plaintiffs should bear the costs of defendant No. 1.

Issue 7. Unnecessary.

SAHEB SINGH v. INDAR KUAR

Suit dismissed. Plaintiff to bear the costs of defendant No. 1. Defendants Nos. 2 and 3 to bear their own costs.

S. D. *Suit dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 485 of 1922.

JULY 17, 1923.

Present :—Mr. Justice Daniels.

SAHEB SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mst. INDAR KUAR AND ANOTHER PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Separation of one co-parcener—Presumption—Re-union—Burden of proof.

Where the separation of one co-parcener in a joint Hindu family is proved, there is no presumption either way with regard to the remaining co-parceners, and an agreement between any two or more of them to remain united or to re-unite must be proved like any other fact.

Parsotam Das v. *Jagan Nath*, 50 Ind. Cas. 357 ; 41 A. 361 ; 17 A. L. J. 347.

Balabux v. *Rukhmabai*, 130 C. 725, (P. C.); 30 I. A. 130 ; 7 C. W. N. 642 ; 5 Bom. L. R. 469 ; 8 Sar. P. C. J. 470.

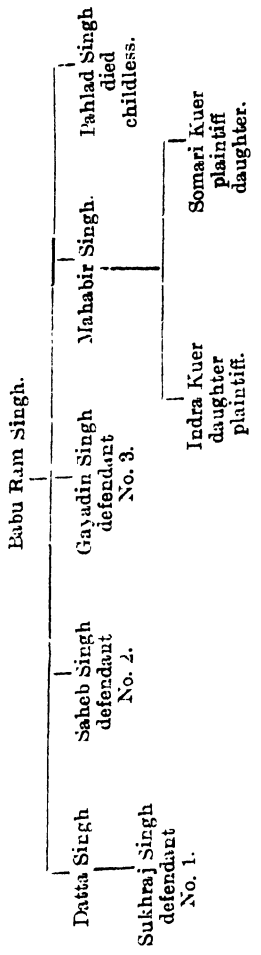
Jatti v. *Bamwari Lal*, 74 Ind. Cas. 462 ; 21 A. L. J. 582 ; (1923) A. I. R. (P. C.) 36 ; 18 L. W. 273 ; 45 M. L. J. 355 ; (1923) M. W. N. 687 ; 25 Bom. L. R. 1256 ; 4 L. 350, followed.

Second appeal against the decree of the District Judge of Azamgarh, dated the 24th of January 1922.

Mr. *S. D. Sinha*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The following pedigree will explain the position of the parties :—



The plaintiffs are claiming the property of both their father Mahabir Singh and their uncle Pahlad Singh, the latter having died childless. The defendants are their surviving uncles and the son of a deceased uncle. The facts found by the Court below are that the defendants Nos 2 and 3 and the father of the first defendant separated from Mahabir Singh and Pahlad Singh, but that the two latter remained joint. This is a finding of fact supported by evidence and on this finding the plaintiffs are entitled to the property. The only point pressed by the defendants in appeal is that when once it was found that the defendants had separated from the remaining two brothers Mahabir Singh and Pahlad Singh, it was

necessary to prove a re-union on the part of the latter. This goes beyond the rulings of the Privy Council on the point, and is in definite conflict with the ruling of this Court in *Parsotam Das* v. *Jagan Nath* (1). The principle laid down by the Privy Council in *Balabux* v. *Rukhmabai* (2), and lately reaffirmed in *Musammat Jatti* v. *Banwari Lal* (3), is that when the separation of one co-parcener is proved there is no presumption that the others remained united. There is in fact no presumption remaining either way and an agreement amongst the remaining co-parceners either to remain united or to re-unite (both alternatives are given in the judgment of *Balabux* v. *Rukmabai* (2) must be proved like any other fact. This point was definitely ruled in *Parsotam Das* v. *Jagan Nath* (1), where it was held that if separation of one member takes place it is not the necessary result in law that the other members must be taken to have separated *inter se*. They may have separated or they may have remained united. In this case the evidence proves, and the Court below has found, that they remained united. On this finding the appeal fails and it is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 59 of 1923.

November 13, 1923.

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

LANKA RAMA NAIDU—APPELLANT

versus

LANKA RAMAKRISHNA NAIDU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Proclamation of sale—Court fixing order of sale properties—Appeal, whether lies.

An order directing that properties advertised for sale in a sale proclamation be sold in a particular order is administrative in its character and is not appealable.

Appeal against the order of the District Court of Kistna at Masulipatam, dated 23rd January 1923, in E. A. No. 54 of 1923, in E. P. No. 49 of 1922 in O. S. No. 88 of 1919, on the file of the Sub-Court, Cocanada

Messrs. *G. Lakshmanna* and *V. Viyanna*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—This is an appeal under sections 47 and 96 of the Civil Procedure Code against an order made by the District Judge directing the sale of two items of properties, items 1 and 2, according to the order in which they were advertised for sale in the proclamation, that is, directing item 1 to be sold first and then item 2. The judgment-debtor, the appellant before us, had, without notice to the decree-holder, got an order from the District Judge that item 2 should be sold first and then item 1. This was an *ex parte* order which on the decree-holder coming to know of it, was sought by him to be altered so that the sale might take place according to the order in the sale proclamation itself. No doubt, the decree-holder stated as his reason in his application that item 2 was his own property and was wrongly included in the decree as chargeable with the decree amount. The District Jugde has not gone into that question at all or given any finding about it. He set aside his original *ex parte* order and directed that the property be sold according to the sale proclamation, that is, item 1 first.

The judgment-debtor appeals against that order, and a preliminary objection has been taken by the learned Vakil for the decree-holder that no appeal lies and reliance has been placed by him on *Sivagami Achi* v. *Subramania Aiyar* (1). The case before us certainly seems to be covered by that ruling as the order of the District Judge was merely one settling one of the items of the sale proclamation, namely, the order in which the property was to be sold. It was held in the Full Bench case that a District Judge acted not judicially but only administratively when he settled the sale proclamation and, therefore, the order in that case was not one which came within section 244 of the old Code, corresponding to section 47 of the present Code. We are bound by that ruling unless we can agree with the argument of the appellant that the altera-

(1) 50 Ind. Cas. 357, 41 A. 361, 17 A. L. J. 347.
(2) 30 C. 725, (P. C.) 30 I. A. 130 ; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 170.
(3) 74 Ind. Cas. 462, 21 A. L. J. 582 ; (1923) A. I. R. (P. C.) 136; 18 L. W. 273, 45 M. L. J. 355 ; (1923) M. W. M. 687 ; 25 Bom. L. R. 1256, 1 L. 350, (P. C.).

(1) 27 M. (250), 14 M. L. J. 57 (F. B.).

tion of the wording of O. XXI, r. 66 of the new Code which corresponds to section 287 of the old Code, has altered the position altogether. The only additions in the new Code which have been pointed out are that power is now given (1) to give notice to the judgment-debtor and the decree-holder to be present when the terms of the sale proclamation are settled and (2) to insist, upon every application for an order for sale under the rule to be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation, namely, as to the revenue assessed upon the property as to the incumbrance to which the property is liable, as to the amount for the recovery of which the sale is ordered, and other things which the Court considers material. It is argued that these provisions show that the Court is acting judicially and it is also urged that the omission of section 288 supports that argument. It seems to us that these two additions do not alter the position at all. They simply give power to the Court to have the parties before it in settling the sale proclamation and their affidavits so that it may get the help of the parties in settling it. The Full Bench in *Sivagami Achi* v. *Subramania Aiyar*(1), adduced as the most important reason for holding that a Judge, acting under section 287, was acting administratively and not judicially that special power was given to him under that section to summon a person when the Judge thought it necessary to do so and examine him in respect of matters on which information was wanted by the Court and to require him to produce documents. The argument of the Full Bench was that, if the Court was acting judicially in the matter, such power need not to have been expressly given but the Court would have the power to do so under its general powers without an express section provided for that purpose. That provision is left intact in the new Code and it is not altered and the argument, therefore, applies to the new Code. No doubt, the referring Judges in the Full Bench case did allude to the fact that section 288 also corroborated their opinion for it was argued that a special protection for a Judge need not have been given by a special section of the Code if that officer was acting as a Judge, as he would be protected under the Act for the protection of Judicial Officers. That argument no doubt will not now apply because the provision has been omitted, but we think that the omission of the provision does not lead to any conclusion that the Court now acts in a judicial capacity rather than in an administrative capacity in settling the terms of the sale proclamation. Section 288 was really put in by way of abundant caution and, as it was found to be unnecessary, it has been deleted and not because of any change in the law. We think that the ruling in, *Sivagamy Achi* v. *Subramania Aiyar* (1), still governs the case and that no appeal can be allowed in a matter like the one before us where the Court merely settles the order in which the properties are to be sold. Our attention was drawn to a decision in *Vedavyasa Aiyar* v. *Madura Hindu Sabha Nidhi Co., Ltd.*, (2) but that case is distinguishable from the present case, for there their Lordships were able to come to the conclusion on the facts of that case that what was decided in that case by the lower Court was not the order in which the properties were to be sold but whether the properties of one mortgagee or of another mortgagee should be sold first. On that view they held that the order was one affecting the rights of two defendants *inter se* and, therefore, it was a matter which would come under section 47 of the Code. Whether this is a right view or not we are not called upon to say for here no such question arises. This is merely a matter of settling the order in which the sale is to take place. *Sivagami Achi* v. *Subramania Aiyar* (1), has been followed and applied even to cases from the original side by the learned Chief Justice and one of us in *Zuvobar & Sons* v. *Hasscokdoss Banghmull* (3). In these circumstances, we hold that no appeal lies in the present case and dismiss it.

Under the circumstances, we do not allow any costs to either side in this appeal.

V. N. N. *Appeal dismissed.*

(2) 77 Ind. Cas. 148 ; (1923) M. W. N. 662 ; 18 L. W. 311 ; 45 M. L. J. 478.

(3) 76 Ind. Cas. 124 ; 45 M. L. J. 611 ; 18 L. W. 647 ; (1923) M. W. N. 834 ; 33 M. L. T. 72.

AYYADEVARA SURYA CHENDRA MOULESWARA RAO *v.* AYYADEVARA DURGAMBA

MADRAS HIGH COURT.

APPEAL No. 68 OF 1921.

October 17, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

AYYADEVARA SURYA CHENDRA MOULESWARA RAO, MINOR, BY MOTHER AND GUARDIAN RANGAMMA, AND ANOTHER —DEFENDANTS—APPELLANTS

versus

AYYADEVARA DURGAMBA *alias* MAHALAKSHMAMMA—PLAINTIFF —RESPONDENT.

Hindu Law—Maintenance—Agreement fixing rate of maintenance permanently by widow, whether binding.

An agreement by a Hindu widow not to claim enhanced maintenance is a binding agreement and must be enforced.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada, in O. S. No. 34 of 1919.

Mr. *V. Suryanarayana*, for the Appellants.

Messrs. *V. Ramadoss* and *V. Rama Rao*, for the Respondent.

JUDGMENT.—In this case the plaintiff is the widow of the deceased brother of the 1st defendant's father and she brought this suit for maintenance and obtained a decree. The defendants now appeal.

When the plaintiff brought her suit originally she ignored the existence of certain documents executed in 1913, Exs II and IV, whereby her right to maintenance was fixed at Rs. 75 per annum but after the written statement was filed she amended her plaint and alleged that these documents were not binding on her and that she was entitled to maintenance at a higher rate. The Subordinate Judge found that the documents of 1913 were not obtained by undue influence and that the plaintiff had executed her counter-part with full knowledge of its contents and effect; but he held that the stipulation in that document that she would not claim any higher rate of maintenance in the future was not binding on her apparently because the first defendant's father had not similarly undertaken that he would never claim a right to reduce the rate of her maintenance. On this ground he held that the plaintiff was not bound by her agreement.

The argument advanced by Mr. Ramadoss on behalf of the respondent is, that in no circumstances can a Hindu widow enter into a valid agreement agreeing to relinquish her right to claim enhanced maintenance in future; but we have been referred by the learned Vakil for the appellant to cases of this Court in which the right of a widow to relinquish her right to enhanced maintenance in the future has been recognised. In two unreported cases, Appeal No. 12 of 1920 and A. A. O. No. 316 of 1918, it has been definitely held that an agreement by a widow not to claim enhanced maintenance is a binding agreement and must be enforced. The case in *Subramania Pattar* v. *Vembammal* (1) is not a direct authority, because in that case there was only an agreement to receive maintenance at a certain rate for life and it was there held that that did not amount to a release of the widow's right to increased maintenance in the future; but it is clear from the judgment that the learned Judges recognised the possibility of a widow releasing her right, such a release being binding upon her. As against this, Mr. Ramadoss has referred us to several cases, not one of which is exactly in point, but which go to show that an agreement or a decree for maintenance at a specific rate is always subject to alteration in the future if the circumstances of the family necessitate such a change: vide, *Gopikabai* v. *Dattaheya* (2) *Raja Venkatappa Nayanin Varu* v. *Raja Thimma Nayanin Varu* (3) and *Bangaru Ammal* v. *Vijayamachi Reddiar* (4). They undoubtedly recognise the fact that an agreement to receive maintenance at a particular rate is not binding for all time; but none of them is an authority for holding that, when the agreement goes further and binds the widow not to claim a higher rate even in changed circumstances, it is not binding on her. The cases we have already referred to

(1) 14 M. L. J. 330.
(2) 24 B. 386; 2 Bom. L. R. 191; 12 Ind. Dec. (N.S.) 790.
(3) 27 Ind. Cas. 379; 27 M. L. J. 656; (1914) M. W. N. 900.
(4) 22 M. 175; 8 Ind. Dec. (N. S.) 124.

cited by the appellant are authority to the contrary and we entirely agree with the views therein expressed. In that view, these documents Exs. II and IV are binding on the plaintiff and she is not entitled to any higher maintenance.

It was then sought to support the decree of the lower Court on the ground that the finding that Exs. II and IV were executed with the plaintiff's knowledge of their contents and effect was wrong. The argument put forward here was that the plaintiff being a woman had not had the opportunity of extraneous advice and that she had been induced by her brother-in-law, the 1st defendant's father, to execute these deeds. In the first place, that was not her case in the plaint where she alleged that she was deceived into putting her signature to some documents of the contents of which she had no idea and in her evidence she also stated that it was only after the written statement in this suit was filed that she understood that the maintenance deed was in existence. In the evidence as put forward the only thing that appears, even if we believe the witnesses, is that neither the plaintiff's father nor her brother were present when the maintenance deed was executed; but it is admitted that one Veerabhadra Ayyar, who is closely connected with the plaintiff's uncle and manages his estate, not only attested the document but identified the plaintiff at the Registration Office. On this evidence we think that the Subordinate Judge's conclusion is perfectly right.

It is then urged for the respondent that she ought to be given a right of residence because that was not expressly released in the documents executed by her and it is contended that the right of residence is a separate right from that of maintenance. Without our deciding that point, however, the first defendant has agreed that the plaintiff should be allowed a room which is to be built on the site adjoining the family house in Nandigama for her residence. Therefore, while allowing the appeal and setting aside the decree of the lower Court, we give a direction that the plaintiff be given one room to be built as above.

The respondent will pay the appellants' costs throughout,

V. N. V. *Appeal allowed.*

S. D.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT NO. 188 OF 1903.

August 30, 1923.

Present : —Mr. Justice Kumaraswamy Sastriar.

M. SABAPATHY CHETTY—PLAINTIFF

versus

A. SHANMUGAPPA CHETTY AND OTHERS —DEFENDANTS.

Limitation Act (IX of 1908), Sch. I, Art. 183, proviso—Sale in execution—Purchase-money deposited in Court—Court, whether agent of judgment-debtor—Payment to decree-holder under order of Court—Subsequent application for further execution of decree—Limitation operation of.

A Court directed payment to a decree-holder out of funds standing to the credit of a suit, but the application for payment out was not made till some years after by the legal representative of the decree-holder and then the order was passed and payment made On an application for further execution being taken out more than 12 years from the date of the original order but less than 12 years from that of the payment:

Held, that the Court could properly be said to be acting as the agent of the judgment debtor within the meaning of the proviso to Art. 183 of the Limitation Act, and the payment ordered by the Court could save limitation as the payment made by an authorised agent of the defendant.

Mr. *S. Doraisami Iyer*, for the Plaintiff.

Mr. *V. V. Srinivasa Aiyengar*, for the Defendants.

JUDGMENT.—This is an application to execute the decree in C. S. No 188 of 1903 by the transferee-plaintiff, and the only question is whether the application is barred by limitation. The decree is dated 14th December 1904. An appeal was filed against that decree which was also dismissed on 27th February 1906. On the 9th May 1908, execution was applied for and sale was ordered on 21st July 1908. The property was sold on 1st May 1909. The 1st defendant applied to set aside the sale and that application was dismissed on 29th September 1909. An order was passed on the 6th October 1909, giving leave to execute the decree as regards the balance

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The plaintiff decree-holder died shortly afterwards and his estate vested in the Administrator-General of Madras. He applied for payment out of the net sale proceeds and an order was passed on 9th January 1912, ordering payment to be made. The present application was filed on 1st February, 1923.

The order of the 6th October 1909, as regards payment, runs as follows: "That the Registrar of this Court do from and out of the sum of Rs 26,250 standing in his hands to the credit of this suit pay to Messrs. Madras Sales and Agency Co., the auctioneers herein the sum of Rs. 289-14-6 as and for their commission as auctioneers and expenses of sale; and he do pay to the plaintiff herein the sum of Rs. 24,710-1-6." The plaintiff died without receiving this money. An application was made by the Adminstrator-General of Madras, who was appointed administrator *pendente lite* in respect of the Testamentary Suit No. 1 of 1910 relating to to the estate of the plaintiff, for the payment of the sum of Rs. 25,932-7-6 and an order was made on the 9th January 1912, directing the Registrar to pay this sum to the Administrator-General. The question is whether this order of the 9th January 1912, saves the period of limitation.

The Article applicable to cases of this kind is Article 183 of the Limitation Act. It provides a period of 12 years to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction the period to run from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right. The proviso, however, provides that the period of twelve years should be computed from the date of payment or acknowledgment in cases where some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent." Article 182 of the Limitation Act refers to execution of decrees of orders of any Civil Court not provided for by Article 183. The period is three years and varying periods are given in the third column as the date from which the period is to run. The first question is whether when a payment has been ordered by a Court that Court can be said to be acting as the agent of the judgment-debtor. This question has been decided in *Thangishettithi* v. *Duja Shetti* (1), and *Govinda Pillai* v. *Dasai Goundan* (2). The ground of the decision is thus put by Coutts-Trotter, J., in his judgment: "If a debtor's assets are so placed either by his own act or by operation of law that if some one other than he alone can realise them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words 'his agent duly authorised in that behalf' in section 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorises the payment; and that his handwriting is rightly described as that of the person making the payment." The payment ordered can, therefore, save limitation as the payment made by an authorised agent of the defendant. Article 183 also refers to the actual fact of payment and not to any order directing payment.

The main contention of the defendant is that, as the order of 6th October 1909, directed payment to the decree-holder of this identical sum he could have obtained payment at once and the fact that he delayed to obtain payment could not operate to extend the period of limitation, that he should have executed the order of 6th October 1909, and that as that was the only order which could be enforced period began to run from the date of that order and not from the date of subsequent payment made in pursuance of it. There is a great deal of force in the contention that a person cannot by his own volition defer receiving payment and thus keep the decree alive for his benefit. But what I have to see is the actual language of the Article and not any sequence that may arise on the application of that language. Article 183 applies only to

(1) 48 Ind. Cas. 226; 35 M. L. J. 575; (1918) M. W. N. 748; 8 L. W. 519; 24 M. L. T. 483.

(2) 68 Ind. Cas. 100; 41 M. L. J. 423; 14 L. W. 320; (1921) M. W. N. 683; 44 M. 971.

payment and where the Court orders payment and the authorities are that the Court so acting is the agent of the defendant, the requisites of Article 183 are satisfied. As regards Article 182 the cases reported in (*Venkataroyalu* v. *Narasimha* (3), *Kerala Varma Valiya Rajah* v. *Shangaram* (4), *Koomayya* v. *Krishananna Naidu* (5), *Bapu Chand* v. *Mogut Rao* (6), and *Thangi Shettithi* v. *Duja Shetti* (1), take the view that payment out of a sum from Court is a step-in aid of execution under Article 182, Cl. 5. But *Hem Chander Chowdry* v. *Brojo Sundres Debee* (7), *Fazal Imam* v. *Metta Singh* (8), and other cases take a contrary view. If the payment out of Court, irrespective of the date of order on which payment is ordered, is a step-in-aid of execution, I think that it can be held with equal force that the actual payment under Article 183 would be the starting point of limitation. I confess there is a great deal to be said in favour of the Calcutta view ; but I am bound by the Madras decisions. I am, therefore, of opinion on the authorities of the Madras High Court that this application is not barred by limitation. I stay execution for one month to enable the defendant, if so advised, to appeal and get stay of execution.

V. N. V.
S. D. *Execution stayed.*

(3) 2 M. 174 ; 1 Ind. Dec. (N.S) 392.
(4) 16 M. 452 ; 5 Ind. Dec. (N S) 1021.
(5) 17 M. 165 ; 3 M. L. J. 296 ; 6 Ind. Dec. (N.S) 113.
(6) 22 B. 340 ; 11 Ind. Dec. (N S.) 809.
(7) 8 C. 89 ; 10 C. L. R. 272; 4 Ind. Dec. (N.S.) 57.
(8) 10 C. 549 ; 5 Ind. Dec. (N.S.) 368.

NAGPUR JUDICIAL COMMISSIONERS COURT.

MISCELLANEOUS APPEAL NO. 13 OF 1921.

December 19, 1922.

Present :—Mr. Prideaux, A. J. C.

GANPAT *alias* DADA—DEFENDANT—APPELLANT

versus

MANOHAR HARBAJI—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (Act I of 1898)—Absolute occupancy tenant—Transfer of holding—Malguzar lambardar, *whether can avoid transfer.*

A *malguzar lambardar* has a right of re-entry if an absolute occupancy tenant transfers the holding without his consent

Appeal against the order of the District Judge, Wardha, dated the 31st January, 1921, in Civil Appeal No. 105 of 1920.

Mr. *D. T. Maugalmurti*, for the Appellant.
Mr. *D. W. Kathale*, for the Respondent.

JUDGMENT.—The plaint on which this litigation commenced states that plaintiff, the present respondent, was the sole *malguzar lambardar* of Khel C, in *Mouza* Sonegaon, Tahsil Wardha. One Govind Parshram was the absolute occupancy tenant of the following fields : Nos. 229, 230, 237 and 238, area 45, 12 acres, *jama* Rs. 49-4-0. He gifted 9 acres of land out of these fields to defendant and on 22nd September 1918 executed a deed of gift in favour of the donee. With the land Govind Parashram transferred a well and 12-annas interest in three mango trees and one *babhul* tree standing thereon. That document has been registered and in pursuance of its provisions the defendant took possession of the land which is now numbered as 229|2, 230|2, 237|2 and 238|2. No notice of the intention to transfer was given by Govind Parashram as required by the provisions of the Tenancy Act and the transfer in favour of the defendant not being consented to by the plaintiff *lambardar* is not binding on him. It was contended that the transfer, being in contravention of the provisions of the Tenancy Act, possession of the defendant over the land was illegal. He is a mere trespasser and liable to be ejected. Plaintiff asks to be put in possession of the land, well and the trees and costs.

In his written statement the defendant states *inter alia* that "defendant's father was the original tenant of those fields. He was indebted to Govind Parashram on a mortgage. He was also indebted to one Amritrao Bhoyer of Sonegaon. The latter had brought a suit against the defendant's father and obtained a simple money-decree. Fearing the attachment by Amritrao, the defendant's father entered into an agreement with Govind Parashram to the effect that the latter should purchase the fields, if attached and brought to sale by Amritrao and should take only 34·72 acres of land out of the entire area commensurate with the aggregate amount of mortgage-debt and

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Amrit Rao's debt in satisfaction of his mortgage-debt and debt of Amritrao Bhoyor and leave out the remaining 11 acres for the defendant's father. After this agreement was over, the fields were attached and sold and were purchased by Waman Nanji subject to the mortgage as *benami* for Govind Parashram. Waman Nanji then re-sold formally the fields to Govind Parashram. The latter then began to change, but through the intercession of some persons he agreed to execute a deed of gift in respect of 9 acres of land, a well and the mango trees in these fields. Accordingly, he executed the gift-deed mentioned in the plaint. But it was executed nominally in favour of the defendant. The defendant's father was the real person to be benefited by the gift The defendant lives with his father and the fields are ancestral. The defendant is the only son of his father. The defendant is in possession of the 9 acres of the fields with his father. The auction-sale, re-sale and the gift mentioned above amount to a single transaction whereby the original tenant parted with a portion of his holding reserving a portion for himself. As the original tenant is in possession himself, he cannot be ejected.

It was further pleaded that plaintiff has no right to question the arrangement between Govind Parashram and defendant, as Govind Parashram was a tenant whose tenancy had been continued as one and indivisible in spite of this arrangement ; it was further pleaded that the transaction in question had taken place with the consent of the then *lambardar* Gangadhar represented by his mother Saraswati Bai. Plaintiff was not the then *lambardar*. He being under the *lambardar* was bound by the consent of the lady. Defendant is not a trespasser and cannot be ejected. It was further stated : " The suit has been filed after the new Tenancy Act has come into force; under this law the landlord has no right to be placed in possession of a holding transferred without his consent. He can claim only pre-emption before a Revenue Officer. The change effected is only one of procedure and consequently the new Act is retrospective. Plaintiff cannot maintain the suit for ejectment. "

For the plaintiff it was admitted that Govind Parashram was the tenant of all the fields in dispute and could not transfer under the Tenancy Act even a portion of the absolute occupancy holding without the consent of his landlord and the transfer is thus void against the plaintiff. The transfer took place before the new Tenancy Act came into force and the right to eject the defendant accrued to the plaintiff under that Act ; it is not a question of procedure only. It was denied that Saraswati gave a consent to the transfer.

The case went to trial on the following issues :—

" (1) Whether the plaintiff has a right to avoid a tranfer of a portion of absolute occupancy rights under the Tenancy Act ?

" (2) Whether the plaintiff's rights is governed be the old Tenancy Act or by the new one and whether he has a right to pre-empt only and not eject ?

" (3) Whether Saraswati Bai consented to the gift on behalf of the then lambardar ?

" (4) Whether the transfer to defendant is *benami* for the defendant father and whether tenancy can be said to have revived to him and plaintiff cannot eject him ? "

There was an additional issue on remand as follows :—

" (5) If consent of Saraswati Bai is proved, whether she had ceased to be *lambardar* because partition proceedings were started at the time ? Whether she was served with a notice not to consent to any transfer during the pendency of the partition proceedings, if so, what effect it has on the alleged consent ? "

The first Court held that the plaintiff had no right of re-entry over the portion gifted to the defendant because Govind Parashram's holding was one indivisible and the plaintiff had a right to recover the rent of the portion gifted away from him. The first Court based its decision principally on the unreported case of *Lachman Pinjara* v. *Gangapuri* (Second Appeal No. 203 of 1905, dated 4th August 1905).

The lower Appellate Court says that the unreported decision has been materially shaken by the reported decision in *Madho* v. *Umrao* (1) and holds that the reasons given in the reported case at page 148 in support of the landlord's right of re-entry apply with equal force to the present case. It finds the landlord in the

(1) 17 Ind. Cas.370, 8 N. L. R 142.

present case has a right to eject the transferee assuming that there was a genuine transfer and that such transfer was not consented to by the landlord. It set aside the decree of the lower Court and remanded the suit for decision on merits. Against that order the present appeal has been filed.

Here the case of *Jodhraj* v. *Daulat* (2) is relied on as is *Nilkanth* v. *Bhagwant* (3) which, however, is a case of ordinary tenancy. *Nakulsao* v. *Ramadhinsao* (4) in quoted for the respondent.

I am inclined to the belief that the decision of the District Judge is correct, and that the landlord in the present case has a right to eject the defendant transferee in possession "assuming", to quote the words, "that there was a genuine transfer by gift and delivery of possession and that such transfer was not consented to by the landlord." In this view the order of remand is correct and I confirm it and dismiss this apppeal with costs.

G. R. D. *Appeal dismissed.*

(2) 68 Ind. Cas. 112; 3 N. L. J. 271; 18 N. L. R. 109; (1922) A. I. R. (Nag.) 241.
(3) 42 Ind. Cas. 270; 13 N. L. R. 175.
(4) 34 Ind. Cas. 698; 12 N. L. R. 86.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECISIONS NOS. 2309 OF 1920 AND 2601 OF 1921.

January 24, 1924.

Present :—Mr. Justice Rankin and Mr. Justice Mukerjee.

In S. A. 2309 *of* 1920.

UMESH (CHANDRA) DURBAR AND OTHERS—APPELLANTS

versus

CHOWDHRY JAMINI NATH MALLIK AND OTHERS—RESPONDENTS.

In 2601 *of* 1921.

PROHLAD CHANDRA CHATTERJEE —APPELLANT

versus

MAHENDRA NATH GOPAIT AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) s. 103 B (3), Ch X —Record of Rights, entry relating to local custom— Presumption — Burden of proof — Custom entitling raiyats to abatement of rent on inundation, whether unreasonable or vague.

An entry in the Record of Rights of a *mauzah* that if inundation takes place the *raiyats* are to get a rateable or proportionate deduction of rent from their landlords, is an entry of a local custom, and is not outside the purview of Chapter X of the Bengal Tenancy Act. The presumption of correctness laid down if section 103 B (3) of the Act, therefore, applies to the entry, the effect of the presumption being that the burden of proving the custom recited in the entry is taken from off the shoulders of the tenants, and the landlord is bound to prove that no such custom exists. [p. 840, col. 1.]

Case-law discussed.

The custom recited in the above entry is neither unreasonable nor vague. [p. 838, col. 2.]

In S. A. 2309.—Appeal against the decree of the 1st Additional Special Judge, Midnapur.

In S. A. 2601.—Appeal against the decree of the District Judge of Midnapore dated the 18th August 1921.

Babu *Mahendranath Roy* (with him Babu *Bhupendra Kumar Ghosh*), for the Appellant in No. 2309 and Respondent in No. 2601.

Babu *Dwarka Nath Chakraburty* (with him Babus *Surendra Nath Guha* and *Khirode Narayan Bhuiyan*), for the Appellant in No. 2601.

Babu *Dwarkanath Chakraburty* (with him Babus *Surendranath Guha* and *Khirode Narayan Bhuiyan*), for the Respondent in No. 2309.

JUDGMENT.

Rankin, J.—This is an appeal by the landlord in a suit brought by him to have an entry in the Record of Rights corrected. The entry is with respect to a *Mouzah* called Dakhin Aukhua and it is contained in what is called Part II of the general *khatian* in respect of that *Mouzah*. The entry is to the effect that in that *Mouzah*, if inundation takes place, the raiyats are to get a rateable proportionate deduction of rent from their landlords. The judgment under appeal proceeds upon the basis that that entry attracts the presumption under section 103 B, sub-section (3) of the Bengal Tenancy Act; in other words, that it shall be presumed to be correct until it is proved by evidence to be incorrect. Accordingly, the learned Judge of the lower Appellate Court has approached, first, the plaintiff's evidence and he has examined into the question whether that evidence, first of all, taken

by itself, succeeds or fails to rebut the presumption of the correctness of the entry. Having dealt with the plaintiff's evidence and having come to the conclusion that it does not rebut the presumption, he says that, in the circumstances, it is not necessary for him to consider the evidence on the defendant's side in detail ; but he proceeds to consider it with a view to see whether there is material in the evidence adduced by the defendants which assists the plaintiff in his contention that the Record of Rights is incorrect, and comes to the conclusion that the oral evidence on the defendant's side rather supports than detracts from the correctness of the entry. Having dealt with the case with a view to decide whether there is any ground for supposing that custom alleged in the Record of Rights is bad for any reason and having negatived that suggestion, he upholds the Record of Rights, allows the appeal and dismisses the plaintiff's suit.

The main contention of the plaintiff-appellant is that the entry in question is not entitled to the presumption of correctness laid down by section 103 B of the Bengal Tenancy Act and the reason which is relied upon to take the case out of that provision is that it is not an entry in respect of a particular tenancy in the *khatian* which is appropriated to a particular tenant or set of tenants but is an entry in the general *khatian*—a statement of a rule obtaining in the village ; not of a particular stipulation obtaining as between an individual landlord and an individual tenant. Such an entry of a general character, it is contended, is not within the contemplation of section 103 of the Bengal Tenancy Act. I propose, first, to deal with this contention.

By section 101 of the Act, the Local Government, in some cases with the sanction of the Governor General-in-Council, and in some cases without, may take an order directing that a Survey be made and a Record of Rights be prepared and by clause (4) of that section "the Survey shall be made and the Record of Rights prepared in accordance with rules made in this behalf by the local Government." The particular order governing the present case is not in evidence and no point has been or can be made upon any specific term in that order. When we come to section 102, we find that it provides that "where "an order is made under section 101 the particulars to be recorded shall be specified in the order and may include, either without or in addition to other particulars, some or all of the following." It will be seen, therefore, that it is for the local Government by its order to specify what is to be included for the purposes of the Record of Rights and it is not limited to the things which are mentioned in section 102. Moreover, the Survey is to be made and the Record of Rights prepared in accordance with rules to be made by the Local Government. Now, the particular things mentioned in section 102 not being exhaustive, it is pointed out that the general tenor of the language of section 102 is directly applicable to entries affecting particular tenancies. The present entry comes nearest, at all events, to sub-clause (*h*) which is "the special conditions and incidents, if any, of the tenancy." The provisions of the Bengal Tenancy Act as regards the method of making and preparing the Records of Rights provide for the preliminary publication of a draft. The Revenue Officer is to publish the draft in the prescribed manner, that is, in a manner to be prescribed by rules. He is to consider any objections which may be made to any entry or to any omission therefrom. After doing that, he is finally to frame the Record and to cause it to be finally published in the prescribed manner and he may publish separate draft or final records for different local areas, estates, tenures or parts thereof. It is after that final publication that the presumption of correctness is attributed to the record by the Statute.

In the present case, for the *Mouzah* now in question, there is a *khatian* of the following character. There are really five matters dealt with as general matters applicable to the *Mouzah* as a whole. The first matter is irrigation. As to this, there is a statement that there is no rule for irrigation but that the lands are watered by rain. Then comes the question of trees. It is said that the *raiyats* have full right in trees grown by them. As to other trees, their rights are governed by their contracts. As to grazing, it is said that the *raiyats* have a right to pasture the cattle by custom or usage. Then, weights and measures states how many seers there are to a maund and so forth. Lastly, comes paragaraph 4a which is headed by some vernacular words which may be translated as

special stipulation or special rights, and, under that heading, is the statement which I have already referred to as the entry now in question. It appears that particular *khatians* given to particular tenants in the *Mouzah* contain a reference by number to this general *khatian*. So that, in effect, what has happened is that, instead of repeating in each tenant's *khatian* as regards this *Mouzah* the vairious stipulations or terms stated in Part II of the general *khatian*, the Revenue Officer has done the same thing by reference. He has set forth once and in full the stipulations. He has not repeated them in each particular tenant's *khatian*.

Now, it was not apparently contested in the Courts below nor I think until Mr. Sen came to reply that the purport and effect of the entry now in question were to state a custom of the Mouzah. Certain it is that the plaintiff thought that it stated a custom. It is quite clear that all the other items are statements of the tenant's right and, speaking for myself, I cannot doubt that the entry now in question is, in substance, not merely a statement that the landlord of this *Mouzah* had in times past been kind enough to his tenants to make a remission but is, as in other entries, in the general *khatian*, statement, as it says, of a special right. I cannot, threfore, feel any doubt that this is an entry of a local custom and nothing short of it.

So far as the presumption of correctness is concerned, I am of opinion that there is no ground for holding that a statement as to the custom of a *Mouzah* is outside the purview of Chapter IX of the Bengal Tenany Act. On the contrary, I can imagine no more valuable part of a Record of Rights than the part which states the alleged customs. The provisions for publication, 'for objections', all apply. There can be no reason for implying a prohibition so far as regards the recording of such very necessary matters and, unless it was allowable in some way or another to deal with the matter of local custom, it may well be doubted whether the preparation of a Record of Rights would be worth the trouble and expense. As regards the manner in which they are to be recorded, I see no reason to think that in the present case, the Record of Rights was in any wise contrary to the terms of the order under section 101 or in any wise contrary to the rules made in this behalf by the local Government under clause (4) of section 101. It will be no doubt a matter for the local Government to consider very carefully when it lays down in detail the scheme for preparing a Record of Rights whether entries made in the general *khatian* are or are not sufficiently brought to the notice of the tenants or of the landlords in all cases by the provisions which the rules make in that behalf. In the present case, it appears that a reference to the general *khatian* was inserted in the individual *khatian* copies of which no doubt were, in due course, furnished to each of the tenant and to the landlord as required by the rules. That, however, is a matter over which the local Government by its rules has power of complete provision. There is nothing in the Act itself that would entitle us to lay down that the particular method as shown in this case is contary to the Statute or outside the purview of the same. It has been suggested that in such cases a person desirous of bringing a suit under section 106 to correct a statement of a general character might have to implead the whole of the neighbourhood and might be very much embarrassed. I fail to see in the case of a tenant why it should not be sufficient for him to debate the matter with his own landlord, and I do not think that there is, in fact, any difficulty as indeed in the present case the landlord's suit seems to show. However that may be, it is, in my opinion, not possible for us to lay down that a general *khatian* such as this is outside the scope of the Bengal Tenancy Act or outside the powers of the local Government to arrange for under their powers to make rules. In my opinion, therefore, the learned Judge of the lower Appellate Court was quite right in commencing his study of this case by giving to that entry the presumption of correctness until it was proved by evidence to be incorrect. On this footing, I fail to see that the judgment under appeal can be successfully challenged at all.

The present case is not one in which it can be contended as a matter of law that the custom is unreasonable or is too vague. In my judgment, the custom is manifestly reasonable and is not too vague.

It was suggested to us, however, that we should go into the findings of fact upon each side with a view not merely to see whether the plaintiff in the end had rebutted the correctness of the Record of Rights but from a point of view much more favourable to the appellant. It is said that, after all, there has been evidence given on both sides and, when evidence had been given on both sides the mere question of *onus* is of no great importance. Now, that is a proposition which I confess to have met with more then once and, as we have been referred to the cases in which it is said to have been laid down, I would like to say a word or two about it.

It is perfectly true that, in contested cases of fact, a great deal of time is constantly wasted in discussing mere propositions of law about the initial *onus*. In some cases of second appeals, that is almost the only way in which hostile findings of fact can be dislodged but before Courts of fact it is very often a purely vain employment for the simple reason that the *onus* shifts as each fact is brought to notice and it is generally wrong to select one particular fact arbitrarily and claim the benefit of the *onus* whereas, if other particular facts had been selected, the *onus* might have been the other way, still the proposition that we are now invited to accept is not only much too broad but in result might have a very extraordinary effect.

Now, the first case which seems to have stated the proposition is a case of the Privy Council (*Kundal Lal* v. *Musammat Begumunnissa*) (1). In that case, the suit was to enforce a mortgage-bond. The defence was that the bond had been paid off as appeared by endorsement on the back of the bond. The plaintiff replied that the endorsements were fictitous and fraudulent and the question went to trial in that way. The learned trial judge who saw the witnesses came to the conclusion that the endorsements were forgeries. The High Court came to an opposite conclusion and the Privy Council said this: (it is a judgment delivered by Viscount Haldane.) "It is no doubt true that the initial burden of proof rests on the appellant in such a case as this both on general grounds and by reason of the provisions of section 114 of the Indian Evidence Act. But this burden is one which shifts easily as the evidence is developed and their Lordships do not, after considering facts which appear to them to be sufficiently established in the two suits, attach much importance to the question on whom the initial *onus* lay." From that point of view, having come to the conclusion that it was more probable that the bond had not been paid off, their Lordships restored the decision of the trial judge who had come to that finding. That is, it seems to me, a perfectly justifiable and intelligible principle. In the case of *Saturatnam Aiyar* v. *Venkatachela Goundan* (2) decided by the Privy Council, the judgment being delivered by Sir Lawrence Jenkins, a comment was made upon a passage in the High Court's judgment. The plaintiff was a *Pattadar* and the question was whether certain tenants had a permanent right or not. The High Court said "We hold that the mere fact of the plaintiff being Pattadar does not entitle him to any presumption in his favour." The Privy Council said: "This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendant's claim to permanency and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say: "We also hold that even if that fact could be of any use to him the various circumstances proved unrebutted by anything in the plaintiff's favour necessarily raise a presumption that the defendants have occupancy rights." Sir Lawrence Jenkins went on to say: "The controversy has passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court and all that remained for decision was what inference should be drawn from them." The case most relied upon before us was the decision of this Court in *Jogendra Nath Saha Choudhury* v. *Maharaja Jagadindra Nath Roy Choudhury* (3). There, the learned Judges, after referring to the two

(1) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).

(2) 56 Ind. Cas. 117; 43 M. 567 at p. 569; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C.).

(3) 67 Ind. Cas. 170, 31 C. L. J. 133.

cases which I have already dealt with, said this: "Where, as in the present case, evidence has been adduced by each of the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial and importance should not be attached to the question on whom the initial *onus* lay." They went on to find that the Subordinate Judge had correctly held that the case for the defendant had been completely negatived by the evidence adduced on behalf of the plaintiff. Now, if that proposition is to be laid down in such a manner as contended for in the present case, it is manifest that the intention of the legislature in enacting that the Record of Rights should be presumed to be correct until it is proved by evidence to be incorrect might be entirely overthrown. The truth is that just as the law imposes a very heavy burden on a person who has to prove a custom—we have had a very careful and forcible exposition of the burden that is upon the person who has to prove the custom—so, when the burden is put upon the other person's shoulders and the presumption is in favour of the custom, the litigant claiming the benefit of the custom a very valuable right indeed. It is the intention of the Bengal Tenancy Act in matters such as this, the Record of Rights which is prepared with great care and publicity should be attached to it, a great presumptive value. It cannot be denied that, if the plaintiff adduced evidence insufficient to rebut the presumption and the defendants led no evidence at all, the plaintiff must fail. Can it then be contended that, if the defendant goes further and adduces some evidences in support of the record of the benefit of the presumption is lost to the defendant and he is in a worse position than if he had adduced no evidence at all? Plainly not. It seems to me, therefore, that the learned Judge of the lower Appellate Court handled this matter in a manner what was entirely warranted by the Bengal Tenancy Act. All the burden, heavy as it is, of proving the custom was by the record taken off the shoulders of the tenants. The landlord may show that the custom is unreasonable or vague and he may, by evidence show that, in fact, no such custom obtains. If that is the true form of the question, in my judgment, the learned Judge of the lower Appellate Court has dealt with it correctly. For these reasons, it seems to me that the appeal fails and should be dismissed with costs—hearing fee 3 gold mohurs.

Mukerji, J.—I entirely agree.

S. A. 2309 of 1920.

This appeal is not pressed. It is accordingly be dismissed with costs—hearing-fee two gold mohurs.

Z. V. *Appeals dismissed.*

NAGPORE JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 88 OF 1922.

November 26, 1923.

Present:—Mr. Baker, O. J. C. and Mr. Hallifax, A. J. C.

JAGESHWAR—DEFENDANT—APPELLANT

versus

PANDURANG—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872) s. 115—Estoppel—Proposition of law—Possession acquired under deed—Title whether can be repudiated—Hindu Law—Adoption—Daughter's son—Maharashtra Brahmans of Nagpur.

A representation of a proposition of law cannot effect an estoppel under section 115 of the Evidence Act. [p. 842, col. 1.]

Govind v. *Chandrabhaga*, 34 Ind. Cas. 675; 12, N. L. R. 190, followed.

If a man obtains possession of property under a deed he cannot afterwards set up another title to the property against the deed, though the deed did not operate to pass the property in question to him, and if he remains in possession of the property till twelve years have passed and the title of the true owner is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the deed. [p. 842, col. 2.]

Rajah Venkata Narasimha Appa Rao v. *Rajah Surnani Venkata Purushottama Jugganadha Gopala Rao*, 8 M. L. J. 409; *Dalton* v. *Fitzgerald* (1897) 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685, relied on.

JAGESHWAR *v.* PANDURANG

A person who obtains possession of certain property as the adopted son of a deceased person cannot, therefore, subsequently set up a title by adverse possession on the ground that his adoption was invalid, and claim the property as his self-acquisition. [p. 842, col. 2.]

Among the Maharashtra Brahmin community of Nagpur, the prohibition of the Hindu Law against the adoption of a daughter's son or of a sister's son has been abolished by custom. [p. 844, col. 1.]

Parmanand v. *Shiv Charan Das*, 59 Ind. Cas. 256; 2 L. 69; 21 P. L. R. 1921; 15 P. L. R. 1921; 3 L. L. J. 82; *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, 16 Bom. 470; 8 Ind. Dec. (N.S.) 722, referred to.

Appeal from the decree of the Additional District Judge, Nagpore, dated the 6th June 1922, in Civil Suit No. 1 of 1920.

Dr. *H. S. Gour*, for the Appellant.

Messrs. *V. R. Pandit*, *R. B.*, and *W. R. Puranik*, *A. D. Mande*, *R. B*, *M. B. Kinkhede*, for Respondent No. 1, and Messrs. *W. H. Dhabe* and *K. A. Pote*, for Respondent No. 3 and Mr. *M. Gupta*, for Respondent No. 5.

JUDGMENT.—The appellant, Jageshwar Pant of Nagpur, commonly known as Anyaji, was sued along with others by Pandurang, the elder of his two sons, for partition of a third share in the property of the joint Hindu family of which they are members, and the plaintiff has been given a decree for a quarter share, as it was held that Jageshwar's wife was also entitled to an equal share with the rest. Jageshwar Pant, who was the second son of Jaiwant Rao Bakshi, was taken in more or less informal adoption at his birth in 1874 by his mother's father Tukaram Bhut, the complete ceremonies being performed after Tukaram's death by his widow in 1881. The only defence to the claim was that the adoption was never made, and was invalid if it was made, so that Jageshwar Pant had been in wrongful possession of the whole property for over forty years, though he never knew or suspected it, and it must, therefore, be regarded as his self-acquired property. On his behalf the futility has at last been recognised of denying the fact and the validity, except in one respect, of his adoption as the son of Tukaram Pant, which has been accepted and recognised by himself and all the world since his birth in 1874 or, at any rate, since his formal adoption in 1881. The futility of the denial is emphasised by his describing himself in his own petition of appeal as the son of Tukaram and using Tukaram's surname of Bhut instead of his natural father's which is Bakshi.

The plea on which the appellant's legal advisers relied mainly in the lower Court and almost entirely in this Court is that the adoption of a daughter's son is invalid, being expressly forbidden by the Hindu Law. As his first wife belonged to the same *gotra* as the Bakshi family, the necessary implication is that the union was incestuous and the plaintiff is the bastard result of that incest. This appears to have been brought clearly to his notice, but he seems undeterred by the unsavouriness of the plea from allowing it to be pressed. It is, indeed, probable that Jageshwar Pant does not even now understand that that plea is being taken on his behalf. His deposition as his own fifth witness is a welter of untruths so obvious and so grotesque as to suggest that there is at least some truth in the statement made by more than one witness that the father who begot him was a lunatic.

It is almost impossible to find any sense or connected meaning in that deposition at all, but the gist of it seems to be this. He has been regarded as the adopted son of Tukaram Bhut from the day of his birth and is so regarded still, by himself and all the world. He is now, however, prepared to take the speculative plea that he is not the adopted son of Tukaram Bhut, not because he thinks or even suspects that there is any truth in it but because, if that plea happened to succeed, he would get the whole of the property and his son would get none of it. He does not, for a moment, believe that he is not the adopted son of Tukaram Bhut, and his only reason for thinking the plea might, perhaps, succeed is that on one occasion, ten or twelve years ago, he was told that he was not really the adopted son of Tukaram Bhut. No details or reasons were given to him, and at first he could not remember who it was that told him this, though later he appears to have said it was his real mother Jhingu Bai. All this seems to refer to the fact of his adoption. He apparently admits that the matter of the invalidity of the adoption of a daughter's son never entered his head till it was suggested to him by his pleader as a good defence to this suit.

He only mentions the matter once in his deposition, in answer to a question in cross-examination and it is harder to get any sense out of that answer than out of the rest of his deposition, so that it does not seem to have remained in his head very firmly or very long.

Insistence on such a plea as that on which his case now rests is, however, a matter of taste, with which we are not concerned, nor need we consider the morality of the position Jageshwar Pant has chosen to take up in contesting the validity of his adoption at all ; we have to examine its legality only. The remarks in the judgment of the lower Court on the motives that led him to take such a line of defence and the weakness of his own personality and the strength and unscrupulousness of that of his instigator are outside the case. As long as the moral sense of the community does not reprobate the taking of such a plea, as it does in most civilised countries of the world, strictures in judgments of the Courts will never prevent their being taken. The function of the Courts is to examine them as cold questions of law.

There appears to be nothing in the case that would legally estop the appellant from taking the plea of the invalidity of his own adoption. The representation made was not of a fact but of a proposition of law, and it was held by a Bench of this Court in *Govind* v. *Mt. Chandrabhaga* (1), that such a representation cannot effect any estoppel under section 115 of the Evidence Act. In that case the person who had made an adoption was allowed to plead and prove its legal invalidity against the person adopted. But, anyhow, it could not be said that the plaintiff in this case was damnified or induced to make any change in his position by being told untruly that the adoption of his father by Tukaram Pant's widow, made long before he was born, was not legally invalid.

There is no question of estoppel, but there is a question of adverse possession, of which one side only has been considered, and that not correctly. It seems to have been assumed that if Jageshwar Pant's adoption could be proved to have been invalid, he must be regarded as having been in possession of all the property of Tukaram Pant on his own account, as a trespasser and not as the son of Tukaram Pant, from the date of the invalid adoption. But it is beyond question that he went into possession of that property as the adopted son of Tukaram Pant, and held it in that capacity alone till after the institution of this suit, and indeed the net result of his contradictory pleadings and deposition seems to be that he regards himself as holding it in that capacity still.

In *Dalton* v. *Fitzgerald* (2) cited by the Madras High Court in *Appa Rao* v. *Gopala Rao* (3) Lopes, L. J., said : " If a man obtains possession of land claiming under a deed or Will, he cannot, afterwards, set up another title to the land against the Will or deed though it did not operate to pass the land in question, and if he remain in possession till 12 years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the Will or deed." Similarly, in this case Jageshwar Pant cannot claim to have acquired, merely by possession, an interest in the property of Tukaram Pant different from that which he would have taken if the property had rightly passed to him as the son and heir of Tukaram Pant.

But there is another side to this matter of adverse possession which has not been considered at all. The plaintiff Pandurang at his birth admittedly came into actual joint possession with his father of an undivided half share in the whole of the property. That was reduced to a third share on the birth of his half-brother, but he claims no more than that now. Of that third share he has been in possession since his birth, a great deal more than twelve years ago, along with his father, and later his half brother also, but in derogation of their title to possess the whole, that is to say, adversely to them. Even, therefore, if the property could be regarded as the self-acquired property of Jageshwar Pant, the plaintiff would still have been in adverse possession as a tenant-in-common of an undivided third share in the property for more than the statutory period, and he is entitled to claim partition of that share.

(1) 34 Ind. Cas. 675 ; 12 N. L. R. 100.

(2) (1837) 2 Ch. 86 at p. 93 ; 66 L. J. Ch. 604 ; 76 L. J. 700 ; 45 W. R. 685.

(3) 18 M. L. J. 40).

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The appeal must, therefore, fail whether the adoption was valid or not. In view, however, of a possible further appeal it is necessary to record a finding on that paint also. Jageshwar Pant's real mother was Jhingu Bai, the daughter of Tukaram Pant, and the adoption of a daughter's son is expressly forbidden by the *Mitakshara*. It lay, therefore, with the plaintiff, who asserted the validity of this *prima facie* invalid adoption, to prove the existence of a local custom in derogation of the Hindu Law as laid down in the texts. The locality of the custom he alleges does not seem to extend beyond the City of Nagpur, though it would be sufficient for him to prove that it existed is even a smaller area.

In *Parma Nand* v. *Shiv Charan Das* (4) Shadi Lal, C. J., a Hindu Judge, in reference to the validity of an exactly similar adoption in the *Khairi* caste of Amritsar, said there was "no doubt that the force of the doctrine of the Hindu Law prohibiting the adoption of a daughter's son has been considerably weakened." The weakening of the prohibition was, in that case, regarded as sufficient to justify the Court in holding the alleged custom to be established, in the absence of all evidence to the contrary, by six proved instances, all of which were apparently modern as three of them were proved by the persons adopted and the other three by the persons who made the adoptions.

Of the instances of the adoption of a daughter's son which have been proved here, one is of course that of Jageshwar Pant himself, and that is really sufficient of itself, for the purposes of this case at least, to prove the existence of the custom among the Maharashtra Brahmans of Nagpur. One of the very few things that do emerge clearly from his deposition is that he himself and all the Maharashtra Brahmans, with full knowledge of the facts, have accepted from his birth and still accept his adoption by his mother's father as valid. That is an admission that the conscience of the members of the community had come to regard such an adoption as permissible by custom in spite of the prohibition in the Hindu Law, which is mentioned as the standard proof required in such cases by Sargent, C. J., in *Patel Vandravan Jerkisan* v. *Patel Manilal Chunilal* (5).

The acceptance of the custom as good law by the conscience of the whole community is, however, very fully proved without any admission by Jageshwar Pant himself. Seventeen witnesses on both sides, in addition to Jageshwar Pant, speak of the matter. They are all either representatives of the leading families of Nagpur, including the Bhut and Bakshi families, or persons who are authorities on the personal and customary law of this community. Five of them were present at the formal adoption in 1881. From the statements of all of them it is abundantly clear that the adoption of the daughter's son was made advisedly, with full knowledge that the legality of such an adoption had been questioned but with the conviction existing in the minds of the whole community that it was legal. The same question had been much discussed between 1874 and 1877, that is, between the actual adoption of Jageshwar Pant at his birth and the formal performance of the ceremonies, in connection with a suit instituted to set aside the adoption of a sister's son in the *Munshi* family. That suit ended in a judgment of this Court in 1877 in which the learned Judicial Commissioner held that the adoption was not invalid, relying mainly on the unanimous opinion of certain Shastris of Nagpur who stated that it was permitted by the texts by which their community is governed.

Further, not only was the adoption regarded as legalised by custom when it was made, but with a few others of the same sort, it has also been treated as perfectly legal ever since, though the real relationship of the parties to all of them and the original prohibition of the Hindu Law were matters of common knowledge. The most striking instance of this is in the fact that Jageshwar Pant was allowed to marry the niece and foster child of one of the most respected inhabitants of Nagpur, ordinarily known as Doctor Daji Saheb (P. W. 13), a Rao Bahadur and an Honorary Magistrate, who is of the same *gotra* as the Bakshi family. If there had been any doubt whatever about the validity of the adoption, the marriage would never

(4) 59 Ind. Cas. 256 ; 2 L. 69 ; 21 P. L. R. 1921 ; 15 P. W. R. 1921 ; 3 L. L. J. 82.

(5) 16 B. 170 , 8 Ind. Dec. (N. S.) 722.

have been permitted, as, if Jageshwar Pant were still a Bakshi, the union would have been incestuous.

It was not really necessary to support this proof of custom by further instances specially after the existence of the custom had been admitted by the defendant, though it was denied for him Those instances that have been proved may, however, be shortly discussed. The conscience of the community was fully awake to the matter after the *Munshi* case, and the adoptions that are proved to have been made and to have been accepted as valid are among families of considerable standing, so that it cannot be said that they were accepted in ignorance either of the point of law involved or of the relationship of the parties to each adoption. Anand Rao Kaptan (P. W. 3) was adopted in 1873 or 1874 at the age of five by his mother's father. Chintaman Rao Diwale, (P. W. 6) a Pleader, adopted the son of his brother's daughter, which is very nearly the same thing. The adoption in the *Munshi* family, which was made in 1868, was apparently of a sister's son and Narayan Rao Wadabhat (P. W. 15) also says he himself was adopted by his mother's brother, though he may have used the word brother loosely for first cousin. These well known instances further strengthen the finding at which we have already arrived, that among the Maharashtra Brahman community of Nagpur the prohibition of the Hindu Law of the adoption of a daughter's son or of a sister's son has been abolished by custom.

The appeal of Jageshwar Pant will accordingly be dismissed and he will be ordered to pay all the costs incurred by the respondent Pandurang. Two of the other respondents were separately represented, but that was in support of their own appeals against parts of the decree and they also supported this appeal. They will, therefore, pay their own costs as respondents here. The value of the relief claimed in appeal is wrongly stated to be Rs. 24,029-8-0. That is the value of the third share in the property originally claimed by Pandurang. But the decree allots him only a quarter share worth Rs. 18,022-2-0, and in his appeal Jageshwar Pant is claiming three-quarter shares, that is, property worth Rs. 54,066-6-0. The pleader's fee entered in the schedule of costs will accordingly be calculated on that sum. The plaintiff Pandurang put in a cross-objection claiming a third share in the property in place of the quarter share given to him. This was not mentioned in argument nor does there appear to be anything that could be said in support of it. It must be taken to have been abandoned and the respondent Pandurang will pay the costs incurred in connection with it.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 389 OF 1922.

June 25, 1923.

Present:—Mr. Justice Ryves.

Babu NARAIN DAS—PLAINTIFF—APPELLANT

versus

BEHARI KAHAR—DEFENDANT—RESPONDENT.

Easements Act (V of 1882), s. 15—Easement over land belonging to Government—Period of user—Easement whether can be acquired against occupier.

An easement is a right which attaches to one piece of land or building over another piece of land, and a person cannot have an easement over a piece of land against one person and not against another. [p. 846, col. 1.]

When a person claims an easement over land which belongs to the Government, he must prove user of the kind mentioned in section 15 of the Easements Act for a period of at least 62 years. If he fails to establish an easement over the land, he cannot establish an easement against a person who is merely in occupation of that land, by proving user for a lesser period, *viz.*, twenty years. [p. 846, col. 1.]

Second Appeal against the decree of the Second Additional District Judge of Gorakhpur, dated the 22nd December, 1921.

Mr. *K. N. Malaviya*, for the Appellant.

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

JUDGMENT:—The suit out of which this appeal arises was brought by Babu

NARAIN DAS *v.* BEHARI KAHAR

Narain Das against three defendants (1) Behari Kahar, (2) the Municipal Board of Gorakhpur, and (3) the Secretary of State. The plaintiff was the owner of a house or adjoining houses lying to the south and west of two triangular pieces of land lying between the northern and eastern walls of his house or houses and the street, painted pink in the map forming part of the decree of the trial Court. The land in question was *nazul*, that is to say, belonged to Government and that is why the Secretary of State was made a party. It had been handed over to the Municipal Board by Government for management and the Municipal Board had leased it to Behari Kahar on the 23rd of January 1918 for a period of 30 years for building purposes. The plaintiff came into Court on the allegation that Behari Kahar had made certain constructions on the northern portion of this land which interfered with his right of easement both of access and of light over that portion of the land, and with regard to the eastern portion, he allegd that Behari Kahar intended to build on that portion in such a way as to interfere with his easements of access and light and air on that side also and he, therefore, prayed that the buildings on the northern side be removed and that a perpetual injunction be issued restraining the defendants from building on the eastern side in a way which might interfere with plaintiff's easements.

The trial Court decreed the suit against all the three defendants. All three defendants appealed and their appeals were decided by one judgment and all were decreed. The plaintiff comes here in second appeal only against the decree of the lower Appellate Court so far as it set aside his suit against Behari Kahar. The Court below held that, in order to prove his case it was necessary for the plaintiff to prove that he had enjoyed the easements which he claimed for a period of 62 years, and it came to the conclusion that so far as the piece of land on the north was concerned it was not proved that that part of the house had been in existence for anything like 60 years. The learned Judge seems to have been of opinion that that portion of the plaintiff's house could have been in existence for probably about 20 years. With regard to the eastern side of the house the lower Appellate Court has held that that was in existence probably for over 60 years.

Having come to the conclusion that the northern portion of the plaintiff's houses, that is to say the *junglas* or barred windows and that *phatak* or gate and *darwaza* or door had not been in existence for anything like 60 years and, that being so, the plaintiff had failed to establish the easements which he claimed over that portion of the land in dispute, because that land admittedly belong to Government and, therefore, under section 15 of the Indian Easements Act the plaintiff must prove uninterrupted user for at least 62 years, and for this reason it held that the plaintiff's suit must fail ; with regard to the eastern portion of the land in dispute the Court held that although the plaintiff had established the easements which he claimed it was premature to ask the Court to issue an injunction because although there was every probability that Behari Kahar would build on that land there was nothing to show that he would build in such a way as to interfere with the rights of the plaintiff and, therefore, the Court dismissed this portion of the suit also, merely warning Behari Kahar that if he did build on this eastern portion in any way so as to interfere with the plaintiff's easements he would have to bear the consequences. Incidentally, the learned Judge, who inspected the premises, came to the conclusion that the plaintiff had a means of ingress an egress through a door on the west side of the house and that so long as the defendant Behari did nothing to encroach on the plaintiff's convenient means of approach to this door, the plaintiff could claim nothing more. He, therefore, added in his judgment a note to the effect that the defendant should do nothing that would interfere with the land immediately in front of this door. This however, was not included in the decree which formally set aside the decree of the trial Court and dismissed the suit. The plaintiff comes here in second appeal and urges three points. The first is that the limitation applicable was 20 years and not 62 years. Counsel on his behalf has quoted three cases, *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1), *Pullanappally Sankaran Nambudri* v. *Vittil*

(1) 32 C. 129 (P. C.); 31 I. A. 203 ; 8 C. W. N. 809 ; 6 Bom. L. R. 765 ; 1 A. L. J. 585 ; 8 Sar. P. C. J. 698.

Thalakat Muhamod (2), and *Kutha Perumal Rajali* v. *The Secretary of State for India* (3). In my opinion none of these cases is applicable to the present case. They have nothing whatever to do with the question of easements. The land over which the plaintiff claims his easements undoubtedly belongs to Government and, therefore, in order to establish his right of easement he must prove user of the kind mentioned in section 15 of the Act for a period of at least 62 years. If he fails to establish an easement over that land it seems to me that he cannot establish easement against a person who is merely in occupation of that land, for a less period. An easement is a right which attaches to one piece of land or building over another piece of land and you cannot have an easement in my opinion over a piece of land against A and not against B. It seems to me that on this point the Court below was right, and if that is so then the finding of fact that the windows and doors and gates on the north side have not been in existence for anything like 60 years concludes that portion of the case.

Next, it is urged that on the finding of the Court below that the plaintiff has established 60 years user over the land on the east the injunction should have been granted. Here again I think the Court below was right. It was within its discretion to grant an injunction or not. It clearly told the defendant Behari that he must not build on this portion of the land so as to obstruct any of the easements which the plaintiff had acquired, and practically told the defendant that if he did so it would be at his peril. I am not prepared to say that the Court was wrong in not granting this injunction. The third point is that the Court should not have said anything about the door on the west side of the plaintiff's house. This ground is raised in the second paragraph of the memorandum of appeal to this Court. I agree to this extent that it was unnecessary for the Court to have said anything about it.

The Court has only done so in order to tell the parties clearly what in its opinion were their rights. This portion of the judgment is not incorporated in the decree and really amounts to nothing more than an expression of opinion. The only way in which I could interfere with it would be, I presume, to order that particular sentence to be expunged from the judgment. In my opinion the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 28. M. 505 ; 15 M. L. J. 416.
(3) 30 M. 245 ; 17 M. L. J. 174.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 955 OF 1921.

January 8, 1924.

Present :—Mr. Aston, A. J. C.

FIRM OF JESSARAM BHAGWANDAS—PLAINTIFFS

versus

RATANCHAND FATCHCHAND—DEFENDANT.

Principal and Agent—Suit for account—Right of agent to sue for account—Amendment of plaint, power of Court to grant.

Before being entitled to an order for an account the plaintiff must satisfy the Court that the defendant is an accounting party. [p. 848, col. 1.]

Raghu Nath v. *Ganapathi*, 27 A. 374 ; A. W. N. (1905) 3, relied upon.

An agent cannot maintain a suit against his principal for an account unless he makes out a special case, *e g.*, where the account between him and his principal is of a complicated nature. [p. 847, col. 2.]

Rajhunath v. *Ganpatji*, 27 A. 374, *Padwick* v. *Stanley* 9 Han. 627, *Padwick* v. *Hurst*, 23 L. J. Ch. 657, *Harington* v. *Churchward*, 29 L. J. Ch. 521 and *Smith* v. *Leveaux*, 2 De. G. J. and S. I., relied upon.

Harinath Rai v. *Krishna Kumar Bakshi*, I. L. R. 14 Cal. 147 P. C., distinguished.

The Court has jurisdiction to allow an amendment when special circumstances exist even though the effect of the amendment will be to take away from a defendant, a legal right which has accrued to him by lapse of time. [p. 848, col. 2.]

Charandas v. *Amirkhan*, 25 C. W. N. 289, followed.

Mr. *Kodumal Lekhraj*, for the Plaintiffs.

FIRM OF JESSARAM BHAGWANDAS *v.* RATANCHAND FATEHCHAND

Mr. *Khanchand Gopaldas*, for the Defendant.

JUDGMENT.—This is a suit filed by the plaintiffs for taking accounts. The plaintiffs are agents who did brokerage work for the defendant and the latter contends that the plaintiffs as brokers have no right to claim an account being taken. The following issues are, therefore, by consent tried as preliminary issues :—

1. Have the plaintiffs a right to claim an account from the defendant?

3. Is the suit as framed maintainable?

There were two classes of cases in which an action of account lay at common law. Such an action could be brought against persons who though not trustees stood in a sort of fiduciary relationship, *e.g.*, bailiffs and receivers. Again, a person naming himself a merchant might bring the action against another naming him as a merchant (see Snell's Principles of Equity, 18 Ed., p. 492). The right was extended by statute law so as to enable a joint tenant or tenant in common to obtain an account against another who had received more than his share of the rents and profits. In addition to this common law and statutory right the Court of Chancery had jurisdiction to order an account in aid of an equitable right as where a *cestue que* trust wanted an account from his trustee, or a mortgagor from his mortgagee, or a remainder man from a tenant for life. The Court of Chancery also ordered an account in aid of a legal right, *e. g.*, when a principal wished to have an account from his agent, or the owner of a patent from the infringer. Equity also ordered an account when there were mutual accounts between the plaintiff and the defendant or where there were circumstances of special complication. But an agent could not as a rule obtain an account against his principal, for an agent has usually all the knowledge requisite to support his rights and requires no discovery and reposes no special confidence in his principal. *Padwick* v. *Stanley* (1). See also Bowstead on Agency 6th Ed., p. 268 ; where it is pointed out that where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily disposed of in an action at law the agent has a right to have an account taken in a Court of Equity. *Padwick* v. *Hurst* (2), but that it does not follow merely because the principal has such a right that the agent has a similar right *Padwick* v. *Stanley* (1). See also Storey on Equity, 3rd Ed., p. 190, where it is observed that an agent could not maintain a suit in Equity against his principal for an account unless he made out a special case. *Horington* v. *Churchward* (3), *Smith* v. *Liveaux* (4).

Under section 213 of the Indian Contract Act an agent is bound to render proper accounts to his principal on demand. Mr. Kodumal was unable to mention any section imposing a corresponding obligation to account on a principal. He could only refer to the general right of the agent to be indemnified by the principal and to the agent's right under section 219 to detain moneys on account of goods sold.

Mr. Kodumal relied on a passage in Halsbury's Laws of England (Vol. 1, p. 200) to the effect that an agent has a right to have an account taken and that unless the accounts are of a complicated nature they will be taken in an ordinary action in the Kings' Bench Division, but the cases cited in support of this principle *viz.*, *Padwick* v. *Hurst* (2), and *Harington* v. *Churchward* (3), have already been referred to. The passage cannot in my opinion be interpreted as meaning that an agent has always a right, whether special circumstances exist or not, to claim an account against his principal. Reliance was also placed by Mr. Kodumal on a decision of the Privy Council in the case of *Harinath Rai* v. *Krishnakumar Bakshi* (5). But in that case it was the principal who was suing his agent and Lord Hobhouse pointed out that the suit was essentially one for account that nothing could prevent the defendant in a suit framed like that from claiming the benefit of an account if in his favour just as the plaintiff claimed it if a larger sum than he specified should be found due to

(1) (1852) 9 Hare 627 ; 16 Jur. 586 ; 68 E. R. 664.

(2) (1854) 23 L. J. Ch. 657 ; 18 Beav. 575 ; 18 Jur. 763 ; 104 R. R. (536 ; 52 E. R. 224.

(3) (1860) 29 L. J. Ch. 521 ; 6 Jur. (N.S.) 576 ; 8 W. R. 302 ; 121 R. R. 323.

(4) (1863) 2 G. J. & S. 33 L. J. Ch. 167; 9 Jur. (N.S. Do.) 1140, 9 L. T. (N. S.) 313; 12 W. R. 31; 139 R. R. 46. S. R. 274.

(5) 14 C. 147 ; 13 I. A. 123 ; 10 Ind. Jur. 475 ; 4 Sar P. C. J. 751 ; 7 Ind. Dec. (N.S.) 98. (P. C.)

him. There appears to me nothing in this decision to indicate that a principal is an accounting party to his agent or that the law relating to the rights and obligations of principals and agents has not been correctly stated by Snell and Bowstead and Storey in the passages to which I have referred.

Before being entitled to an order for an account the plaintiff in my opinion must satisfy the Court that the defendant is an accounting party. See *Rajhunath* v. *Ganpati* (6).

This the plaintiffs have entirely failed to do. The present claim has evidently has made in order to save the plaintiffs a certain amount of trouble and enable them to pay a somewhat lower Court-fee. Bhagwandas Jessaram, a partner in the plaintiff's firm, stated that it was necessary to have an account because brokerage was calculated on the actual number of pieces in the cases and that there was no other reason. In cross-examination, however, he admitted that brokerage was sometimes calculated on the average number of pieces in a bale and not on the actual number of pieces. He had great difficulty in pointing out one or two instances in his book showing brokerage was calculated on actuals and not on averages. His witness, Tarachand Tirdas, stated that the average is always taken. Another witness Naraindas Mohandas also stated that brokers are paid on averages but that merchants are bound to pay on actual figures if the broker demands it, but that the difference is generally insignificant. Menghraj Tarachand, a 3rd witness, stated brokerage is calculated on the average according to the piece goods imported. Lachiram Murlidhar also stated that brokerage is calculated on averages. Somnath Mithomal, another witness, admitted that he had filed a suit against the defendant for brokerage on an account prepared by him.

It is clear from the evidence of the witnesses that the brokers could get information about goods which were sent and did not arrive without obtaining an account from the principals. Plaintiff admitted there was no difficulty about exchange and that the only reason why he could not mention the exact amount due was that he did not know the actual number of pieces. In addition to the claim made by nearly every one of plaintiff's witnesses that brokerage is paid on averages there is also evidence of defendants' manager to that effect and since filing the suit, plaintiffs have applied for leave to amend the plaint with a view to suing for the specific sum of Rs. 3,022-1-3.

In my opinion plaintiff has entirely failed to prove that defendant is an accounting party or that any special circumstances exist making it necessary to order an account to be taken.

My finding on both issues 1 and 3 is in the negative Plaintiff to pay defendants' costs. Costs of trying these issues.

With regard to plaintiff's application under O. VI, r. 17, Civil Procedure Code what the plaintiffs really wanted it seems to me was their brokerage and I do not think it is just that their claim should be defeated on the technical ground that, instead of claiming a specific sum, they sued for an account. I am of opinion that the plaintiffs have been badly advised and that the Court should allow the amendment in the special circumstances of the case, subject to the plaintiffs paying the requisite Court-fee and the defendants' costs up to date. The case of *Charan Das* v. *Amir Khan* (7) shows that the Court has jurisdiction to allow an amendment when special circumstances exist even though the effect of the amendment will be to take away from a defendant a legal right which has accrued to him by lapse of time.

I, therefore, allow the application. Plaintiffs however to pay defendants' costs up to date and to pay the requisite Court-fee within 7 days.

P. B. A. *Application allowed.*
S. D.

(6) 27 A. 374 ; A. W. N. (1905) 3.

(7) Ind. Cas. 606; 25 C. W. N. 289 ; 39 M. L. J. 195 ; 28 M. L. J. 149 ; 2 N. P. L. R (P. C.) 124 ; 18 A. L. J. 1095 ; 22 Bom. L. R. 1370 ; 47 I. A. 255 ; 13 L. W. 49 ; 3 P. W. R. 1921 ; 48 C. 110 (P. C.).

PIYARE LAL *v.* BED RAM

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1161 OF 1923.

October 31, 1923.

Present :—Mr. Justice Sulaiman.

PIYARE LAL—PLAINTIFF—APPELLANT

versus

BED RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908) Sch. I, Arts. 32, 120, 144—Landlord and tenant—Occupancy tenant, constructions erected by, without permission of landlord—Suit for demolition and injunction—Limitation.

A suit by a landlord against his occupancy tenant for the demolition of certain constructions built by the latter on his occupancy lands without the permission of the former and for an injunction, is governed either by Article 32 or by Article 120 and not by Article 144 of Schedule I to the Limitation Act.

Lach Ram Rao v. *Jangi Ram*, 12 Ind. Cas. 108 ; 8 A. L. J. 914, followed.

Second appeal against the decree of the Subordinate Judge of Bulandshahr, dated the 9th of March 1923.

Mr. *St. C. Thompson*, for the Appellant.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for demolition of certain constructions and for an injunction. The plaintiff's case, as set forth in the plaint, was that the defendant had on his occupancy lands built these constructions without his permission some five years before the suit. The defendant pleaded that these constructions were not new but had existed for some 40 years When the case came on for hearing the plaintiff in his evidence stated that these constructions had been built some six or seven years before. On the other hand, the defendant's evidence was that they had been built some 15 years before. The Court of first instance in its finding on issue No. 3 came to the conclusion that these constructions were within six years of the institutionof the suit. It held that the Article applicable was Article 120 and, therefore, overruled the plea of limitation raised by the defendant.

On appeal by the defendant the lower Appellate Court has, it appears to me, come to a quite different finding on the facts. It was not impressed by the plaintiff's vague statement that the houses were built six or seven years ago and there being no other satisfactory evidence to corroborate it, it came to the conclusion that the plaintiff had failed to prove that these constructions were made within six years of the suit. By implication it has inferred that these constructions must have been made more than six years before the suit. On this finding it dismissed the suit holding that it was barred by time.

On appeal the only point taken is that the claim is not barred by time. The learned Counsel who apears for the appellant argues that the Article 120 is not applicable but that Article 144 is applicable. He has cited no other Article except Article 144. It is manifest that Article 144 can in no sense be applicable. The houses were built on defendant's occupancy lands. The plaintiff does not allege in his plaint that he had actual possession of the lands and has ever lost possession. It is not a suit for possession at all. The landlord has not tried to avail himself of his right to eject under section 57 (*b*) of the Tenancy Act. Under the circumstances, Article 144 can have no application whatever. If the defendant has by building the houses on the occupancy lands perverted the property to a purpose other than that for which he has a right to use, then the claims falls within Article 32 of the Limitation Act and is governed by only two years' rule of limitation. In any event, Article 120 only applies both as regards the relief for demolition of constructions and for an injunction. I take the finding of the lower Appellate Court to be that the cause of action accrued in favour of the plaintiff more than six years previous to the suit. The claim is, therefore, on that finding barred by time. I am supported in this view by the rule of law laid down in the case of *Lach Ram Rao* v. *Jangi Rai* (1). The appeal has no force and I dismiss it.

Z. K. *Appeal dismissed.*

(1) 12 Ind. Cas. 108 ; 8 A. L. J. 914.

DWARKA PRASAD *v.* NASIR AHMED

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 73 OF 1922.

November 7, 1923.

Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

DWARKA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus.

NASIR AHMED AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43—False representation by transferor—Estoppel—Mortgage by unauthorised person—Subsequent acquisition of interest—Interest whether can be made subject of mortgage—Pardah nashin lady—Husband, position of—Good faith—Burden of proof—Evidence Act (I of 1872), s. 111.

In cases falling under s. 43 of the Transferof Property Act the estoppel rests on the representation made by a transferor that he is "authorised to transfer," which representation subsequently turns out to be erroneous. But when the truth of the matter is known to both parties then can be no estoppel. [p. 851, col. 2.]

Mohari Bibee v. *Dharmadas Ghose*, 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.), followed.

Where a person having no title to the land purports to mortgage it to one who is fully aware of the absence of title in the mortgage, and the latter subsequently acquires an interest in the same property by inheritance, such interest cannot be made the subject of mortgage under s. 43 of the Transfer of Property Act. [p. 851, col. 2.]

In re *Bridgewaters Settlement: Partridge* v. *Ward* (1910) 2 Ch. 342 ; 79 L. J Ch. 746 ; 103 L. T. 421, distinguished.

Estoppel is a rule of equity and cannot apply to validate a mortgage which is void under section 23 of the Contract Act. [p. 852, col. 1.]

Sumsuddin Goolam Husein v. *Abdul Husein*, 31 B. 165 ; 8 Bom. L. R. 781, referred to.

Where a husband stands in a position of active confidence to his wife and he manages her property the burden of proving good faith is on him. [p. 852, col. 2.]

In the case of a mortgage purporting to be executed by his *purdah nashin* wife it must be proved not merely that she knew what she was doing or had done, but also how her intention to act was produced, whether all that care and providence was placed around her as against those who advised her which from their situation and relation with respect to her duty were bound to exert on her behalf. [p. 852, col. 2.]

Huguenin v. *Baseley* (1807) 1 Wh. and T. L. C. 7th Ed. 247 ; 14 Ves. (Jun.) 273 ; 9 R. R. 276 ; 33 E. R. 526 ; *Sri Kishan Lal* v. *Kashmiro*, 34 Ind. Cas. 37 ; 20 C. W. N. 957 ; (1916) 1 M. W. N 433 ; 3 L. W. 528 ; 31 M. L. J. 362 ; 14 A. L. J. 1236 (P. C.) referred to.

Appeal against decree of the Sub-Judge, Kheri, dated 30th October 1922.

Mr. *Bisheshar Nath*, for the Appellants.

Messrs. *Niamat Ullah* and *E. R. Qidwar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants for the recovery of Rs. 36,299-5-0 by sale of the property mentioned in paragraph 2 (*e*) of the plaint by virtue of a deed of mortgage, dated the 29th July 1905, executed by Nasir Ahmed and Umrao Ahmad, defendants Nos. 1 and 2, respectively, and their parents, Nawab Ali and *Mt* Ushshaqunisa *alias* Mondan Begam, since deceased. The third defendant to the suit is the wife of the defendant No. 1.

On the 31st January 1922, an *ex parte* decree was passed by the Court below against all the three defendants. On the 18th April 1922, this decree was set aside as against the defendants Nos. 2 and 3. It was, however, maintained and still subsists as against the first defendant. The result was, that the trial of the suit proceeded as against the defendants Nos. 2 and 3 only.

In defence to the suit, the following pleas were raised: 1. That *Mt.* Mondan Begam was the sole and exclusive owner of the property in suit at the time of the execution of the deed of mortgage. 2. That she did not execute the deed. 3. That it was fictitiously executed by her husband, Nawab Ali, in his own interest.

At a late stage of the suit the defendants, on the 15th July 1922, presented a petition for permission to set up an additional plea that the deed, even if proved to have been executed by *Mt.* Mondan Begam, was obtained from her by the exercise of undue influence upon her by her husband Nawab Ali, and that she had no independent advice in the matter. On certain conditions this amendment of the defendants' pleadings was accepted and the propriety of it has not been challenged before us in appeal. The result was that the plea of undue influence set forth in the case is one of the two main issues in it. The other important issue was one of estoppel raised by the

plaintiffs in paragraphs 14 and 15 of their replication.

The learned Subordinate Judge has found that the deed of mortgage was, as a matter of fact, executed by *Mt.* Mondan Begam; that the property mortgaged belonged to her alone; that the defendants were not estopped from setting up the exclusive title of *Mt.* Mondan Begam to the property which was the subject-matter of the mortgage; that *Mt.* Mondan Begam executed the mortgage in suit under the undue influence of her husband; that she was a *pardah-nashin* lady and entitled to the protection afforded by law and that she did not receive that protection in the transaction under consideration. On these grounds he has refused to give the plaintiffs the relief for the sale of the mortgaged property. He has, however, granted a simple money-decree against the defendant No. 2 and dismissed the suit altogether against the defendant No. 3.

We have already stated that the *ex parte* decree for the sale of the property in suit as against the defendant No. 1 was maintained. In the decree prepared after the trial of the suit, however, the learned Subordinate Judge has ordered that the share of the defendant No. 1 in the property in suit liable to be sold shall be less by the interest of the defendant No. 3 in that share. Besides the main appeal, we have also before us the cross-objections on behalf of the defendants-respondents, challenging the propriety of giving a simple money-decree against the defendant No. 2.

The first thing necessary to be stated at the outset is the fact that the finding of the learned Subordinate Judge that the property in suit was owned by and belonged exclusively to *Mt.* Mondan Begam was not challenged at the hearing of this appeal by the learned Advocate, who argued it on behalf of the appellants. The finding is based on ample evidence to which reference is made by the learned Subordinate Judge in his judgment under appeal and it will serve no useful purpose to recapitulate that evidence in our own judgment. We, therefore, start with the cardinal fact that the other three executants of the deed in suit, that is, the husband and the two sons of the lady, had no intertest in the mortgaged property and were consequently not competent to deal with it in any manner so as to bind that property by their acts collectively or individually. Another important matter, upon which the judgment of the lower Courts rests to a large extent, is the question of fact as to whether the plaintiffs-mortgagees were on the date of the mortgage aware or not of the real state of title in the property of which they took a mortgage. The learned Subordinate Judge has found that at the time of the mortgage the plaintiffs knew that the title to the property was exclusively with *Mt.* Mondan Begam. At the hearing of the appeal a faint effort was made to dispute this finding. After consideration of the evidence bearing on the question the conclusion at which we have arrived on this point is the same as that of the learned Subordinate Judge.

The plea of estoppel was the point argued before us by the learned Advocate for the appellants. In the first instance, reliance was placed, as it was in the Court below, on the provisions of section 43 of the Transfer of Property Act (IV of 1882). The principle of law on which those provisions rest is a well-known rule of estoppel sometimes referred to as feeding *the grant by estoppel*. In cases falling under section 43 of the Transfer of Property Act the estoppel rests on the representation made by a transferor that he is "authorised to transfer" which representation subsequently turns out to be erroneous. But where the truth of the matter is known to both parties there can be no estoppel: See the decision of Sir Ford North in the case of *Moheri Bibee* v. *Dharmodas Ghose* (1). In the case before us, as a matter of fact, that the mortgagees knew that neither the husband nor the sons of *Mt.* Mondan Begam had any interest in the property of which they took a mortgage from them. We are, therefore, of opinion that the interest which the sons had acquired by inheritance from their mother on the death of that lady cannot be made the subject of the mortgage under the provisions of section 43 of the Transfer of Property Act (IV of 1882). In this connection, it was further argued that the general principle of feeding the grant by estoppel would fasten the mortgage on the subsequently acquired interest of *Mt.* Mondan Begam's sons in the property in suit in

(1) 30 C. 539; 30 I. A. 114, 7 C. W. N. 441; 5 Bom. L. R. 421, 8 Sar. P. C. J. 371 (P. C.).

spite of the fact that the mortgagees knew that these sons had no interest whatsoever at the date of the mortgage and in support of this contention reliance was placed on the case of *Partridge* v. *Ward* (2), wherein it is held that the newly acquired interest will pass under the assignment even though the defect in title is apparent on the face of the assignment. Possibly, the rule laid down in the decision just now mentioned would apply to certain cases in India as well but it cannot certainly apply to a case like the one before us. The plaintiffs, with their eyes open and with full knowledge of the utter absence of any title in the sons and the husband of the lady, took the mortgage in suit from them. The real bargain, therefore, between the mortgagees and those persons when stripped of its apparent form given to it in the deed of mortgage was that they mortgaged such an interest of theirs as amounted to nothing more or less than the chance of surviving the lady and acquiring a share in the inheritance. A transfer of such an interest is clearly forbidden by section 6, clause (*a*) of the Transfer of Property Act. If we permit this mortgage to be given effect to we would be transgressing a clear provision of law. The mortgage of those interests was a fraud on the law as observed by the learned Subordinate Judge and no Court of justice can countenance it. Further the plea of estoppel, on which the learned Advocate for the appellants relies, is clearly a rule of equity and may be expressed in other words to be that no person shall be permitted to derogate from his own grant. The mortgage before us, so far as the interest of those three persons is concerned, was void under section 23 of the Indian Contract Act (IX of 1872) in view of the provisions of section 6, clause (*a*) of the Transfer of Property Act (IV of 1882) as we have pointed out above. The principle of equity relied upon by the learned Advocate for the appellants cannot be given the effect of validating a void contract. In this connection we may refer to the decision of Sir Lawrence Jenkins in the case of *Sumsuddin* v. *Abdul Husain* (3). The principle of estoppel, therefore, fails.

On the question of undue influence, the first line of attack was that the *onus* of establishing it rests on the defendants. As regards the question of burden of proof, no hard and fast rule can be laid down in the sense that the rule should apply to all cases. The determination of initial *onus* of proving a certain fact depends on the particular circumstances of each case, and *onus* also shifts from time to time during the progress of the trial as the evidence developes and facts are established. What are the facts of the present case? It is admitted that *Mt.* Mondan Begam was a *pardah nashin* lady. She had inherited considerable property from her father. The entire management was in the hands of her husband, Nawab Ali, who, to quote the learned Subordinate Judge, used to receive and expend the entire income without reaching the lady's hands. Nawab Ali was in such relations with his wife and sons that they would implicitly and quietly obey him and would do anything which he would tell them to do." In these circumstances, we are of opinion, and our opinion is in agreement with the learned Subordinate Judge, that Nawab Ali stood in a position of active confidence to his wife, *Mt.* Mondan Begam. The evidence of Zamin Husain (P. W. 7) whom the learned Subordinate Judge has accepted as a truthful witness, shows that "the transaction in suit was settled with the plaintiffs on behalf of the lady by her husband, Nawab Ali, and myself that is, Zamin Husain." He also says that he acted under the instructions of Nawab Ali and *Mt.* Mondan Begam did not take any part in the management of the property. The provisions of section 111 of the Indian Evidence Act (I of 1872), therefore, apply to this case. In the present case the question is not merely that the lady knew what she was doing or had done but the further and vital question is "how her intention to act was produced, whether all that care and providence was placed round her as against those who advised her, which from their situation and relation with respect to her, they were bound to exert on her behalf," per Lord Eldon in *Hughenin* v. *Baseley* (4). (White and Tudor's Leading cases, 7th edition, Vol. 1, p. 247 at p. 264). To the same effect is the decision of their Lordships of the Privy Council in the case of *Sri Kishen Lal* v.

(2) (1910) 2 Ch. 342 ; 79 L. J. Ch. 746 ; 103 L. T. 421.

(3) 31 B. 165; 8 Bom. L. R. 781.

(4) 1 Lah. & T. L. C. 7th Ed. 247; 14 Ves. (Jun.) 273; 9 R. R. 276; 33 E. R. 526.

Musammat Kashmiro (5). All those who could advise the lady in the matter of this transaction were expressly made a party to it. All avenues of protection and independent advice were, therefore, closed as against the lady. We have it in the evidence of Zamin Husain that the loan in suit was taken to pay off debts due from Nawab Ali. "It was applied in payment of Nawab Ali's debts. The lady and her sons received no part of this money." There is also evidence to the effect that a sum of Rs. 2,500 was spent out of the mortgage-money on the marriage of Umrao Muhammad, but this marriage came off at least two years after the execution of the deed in suit. It may be that Nawab Ali kept apart this sum in his own custody for the purpose of the marriage. For this reason alone the contract of mortgage cannot be made binding on the lady. It is quite clear to us that her sons as her representatives do not stand in any worse position. On the main points, therefore, the appeal fails.

It is also argued by the learned Counsel for the appellants that the sale of the share of the defendant No. 1 in the mortgaged property under the *ex parte* decree should not have been made subject to the interest which the defendant No. 3 has in that share. As we have said before, the defendant No. 3 is the wife of the defendant No. 1. She holds some interest in his share under an arrangement between them. This arrangement is evidenced by mutation in the name of the defendant No. 3. It would perhaps have been better on the part of the learned Subordinate Judge to have said nothing in this behalf in his judgment and the decree following the trial of the suit as against the defendants Nos. 2 and 3, but inasmuch as the deed of mortgage fails altogether as against these two defendants the result is the same.

As regards the cross-objections, we are of opinion that the claim for a simple money decree as against the defendant No. 2 is neither barred by time nor is opposed to the terms of the deed in suit. In fact, there is a clear provision of personal liability of the executants and there is also a promise to pay the money after fourteen years. The cross-objections also fail. The result is that we dismiss the appeal and the cross-objections with costs.

S. D. *Appeal and cross-objections dismissed.*

(5) 31 Ind. Cas. 37; 20 C. W. N. 957; (1916) M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362; 14 A. L. J. 1236. (P. C.)

NAGPUR JUDICIAL COMMISSIONER'S COURT

FIRST CIVIL APPEAL NO. 121 of 1922.

December 19, 1923.

Present:—Mr. Baker, O. J. C.,
Mr. Prideaux, A. J. C.

GANPATRAO AND OTHERS—DEFENDANTS.—APPELLANTS

versus.

Mt. TULSABAI—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898) s. 45—mortgage of sir land—Sanction of Revenue officer—Arbitration—Award—Decree—Assignment of decree—Fresh sanction, whether necessary—Civil Procedure Code (Act V of 1908) s. 97—Preliminary decree, whether can be questioned in appeal from final decree—Execution of decree—Executing Court whether can question correctness of decree

A dispute arose between the parties with reference to two mortgage-deeds in respect of which the sanction of the Revenue Officer had been obtained for the transfer of cultivating rights in *Sir* land. The dispute was referred to arbitration but all that the arbitrator had to decide was what sum was due under the mortgages and in what period of time it was to be paid. The arbitrator gave his award and a preliminary decree was passed in accordance with the award directing payment in a certain manner and allowing foreclosure in case of default. The decree-holders assigned the decree to one T the judgment-debtors failed to appeal against it and the decree was made final;

Held (1) that as the award flowed from the mortgage it could not be said that the rights of the parties were created by the award; [p. 856, col. 2.]

(2) that the sanction of the Revenue Officer for the transfer of cultivating rights in *sir* land having been obtained at the time of execution of the mortgages, no fresh sanction was necessary at the time of making the award or at the time of the assignment of the decree in favour of T; [p. 856, col. 2.]

GANPATRAO *v.* TULSABAI

(3) that the judment-debtors having failed to appeal against the preliminary decree were precluded, under section 97 of the Civil Procedure Code, from questioning the correctness of that decree in an apeal from the final decree. [p. 856, col. 2.]

Case-law discussed.

An executing Court has no power to enlarge, modify, or change a decree. [p. 856, col. 2.]

Case-law referred to.

Appeal against the decree of the Additional District Judge, Nagpur, dated the 30th October 1922 in Civil Suit No. 16 of 1916.

Mr. *G. L. Subhedar*, for the Appellants.

Mr. *M. Bhawanishankar*, for the Respondent.

JUDGMENT.—The preliminary decree in Suit No. 16 of 1916 on the file of the Additional District Judge, Nagpur, was based on two mortgages, one of Rs. 6,000, dated the 21st June 1904, and the other of Rs. 1,090, dated the 29th October 1908. The arbitrator had decided that Rs. 19,233-8-0 were due and were to be re-paid in 32 yearly instalments of Rs. 600 payable on *Baisakh Suddi* 15 each year, commencing in 1326 *Fasli* and ending in 1357 *Fasli*, the last instalment being of Rs. 633-8-0, interest at Re. 1-12-0 per cent. being payable on defaulted instalment. In default of the payment on any three instalments the whole amount became due, and on such default the property was liable to foreclosure. The award is filed and the decree asked for is on the award. There being minors in the case the Court sanctioned the award and passed a decree in its terms on 7th October 1916. On the 1st of March 1921 the decree was made final. An appeal was made to this Court, First Appeal No 31 of 1921. It seems that the original plaintiffs assigned their decree by a registered instrument on the 5th February 1920 to *Mst.* Tulsabai, and she got her name entered on the record on the 19th August 1920. This Court in its judgment states:—

> "The whole case put shortly is that the defendants pleaded in the lower Court that the claim in suit has been adjusted in part by a lawful agreement, but they were not allowed to give any evidence of that agreement, which they are clearly entitled to do."

The final decree was set aside and the case was remanded for fresh decision. It was then found that the defendants' allegations with regard to the agreement with Tulsabai were not proved and that she was entitled to get a final decree in her favour, and that in default of payment the decretal amount by the 26th October 1922 the decree was to be made final. It was made final on the 30th of that month. Certain *sir* fields were covered by the decree and from these the defendants were ejected. They then applied for restoration to possession of the *sir* land on the ground that they became occupancy-tenants of that land on the passing of the decree. Sanction of the Revenue Officer to the two original mortgages mortgaging the *sir* had been taken, but it was contended that this did not cover the decree passed on the award nor yet the assignment. We have two appeals before us arising out of the same case, the present and First Appeal No. 18 of 1923.

The defendants contend in the memorandum of appeal that there was an agreement between Ganpatrao and *Mst.* Tulsabai under which *Mst.* Tulsabai was to pay Rs. 22,900 to the original decree-holder and get an assignment of the decree from him and was to be paid Rs. 2,000 by the appellant No. 1 Ganpatrao and the balance by instalments, and that she was not to apply for a decree absolute until there was default in payment of three instalments. They further contend that in the absence of sanction to transfer cultivating rights in the *sir* fields neither the award dated 1st August 1916 nor the assignment dated 5th February 1920 could validly transfer such rights to R. S. Deshpande or to *Mst.* Tulsabai, and that, therefore, the final decree in so far as it purported to transfer cultivating rights in the *sir* fields to the respondent was invalid and inoperative since the appellants became ex-proprietary occupancy tenants thereof.

In First Appeal No. 18 of 1923, which is filed by Tulsabai, an order of the Additional District Judge passed on an application for restoration of the judgment-debtor in suit No. 16 of 1916 is attacked. The Judge there held that the case was governed by the principle enunciated in the case of *Narain Ganesh Ghatate* v. *Baliram* (1), a deci-

(1) 48 Ind. Cas. 141; 14 N. L. R. 165 at pp. 172, 173 and 175; 24 M. L. T. 345; 28 C. L. J. 447: (1918) M. W. N. 885; 23 C. W. N. 297; 21 Bom. L. R. 53; 46 C. 76; 45 I. A. 172. (P. C.)

sion of the Privy Council, and that the award in the present case was a fresh origin of the rights between the parties and, therefore, the sanction accorded by the Revenue Officer to the transfer of the cultivating rights in the *sir* land was inoperative and did not apply to the award, and that plaintiff's title to the cultivating rights in the *sir* land is vitiated by the decree passed in terms of the award which superseded previous mortgage rights. The Judge held that the assignment decree did not require any sanction of the Revenue Officer The judgment-debtor's application was sanctioned and he was ordered to be restored to possession of the *sir* land with crops from which he was ejected in execution of the decree.

The facts in *Narain Ganesh Ghatate* v. *Baliram* (1) are not quite on all fours with those in the present case. In that case, by two deeds dated 1881 and 1884, certain *malguzari* villages in the Bhandara district were mortgaged with all rights and appurtenances, including the right to occupy and cultivate the *sir* lands. In 1899 the mortgagee obtained a decree *nisi* for foreclosure, which expressly included the cultivating rights in the mortgaged *sir* lands. While proceedings for an order absolute on the above decree were pending, in 1905 the parties referred the whole case for disposal by the Board of Conciliation, acting as arbitrators. This Board made an award in 1905, whereby the amount payable and mode of payment were set out, and it was declared that in default of payment the creditor should be entitled to enforce the whole of his rights under the deeds of 1881 and 1884 against certain of the mortgaged villages specified in the award, the rest of the mortgaged villages being released from liability The award was filed in Court and a decree *nisi* for foreclosure was made in accordance with its terms in September 1905. Default in payment having occurred, a final decree was made in June 1910. Dealing with the question as to the bearing of section 45 of the Central Provinces Tenancy Act, 1898, on the case, it was held by this Court that the arbitration award of February 1905 superseded and extinguished the foreclosure decree of January 1989, wherein the deeds of 1881 and 1884 had merged ; that, therefore, the foreclosure decree absolute of 16th June 1910, whereby the judgment-debtors lost their proprietary rights in the *sir* lands, was not based on a document duly registered before the date (21st October 1898) on which the Tenancy Act came into force ; and hence, that sub-section (6) of section 45 did not apply, and notwithstanding the contract award and decree to the contrary, the judgement-debtors had become occupancy tenants of the foreclosed *sir* lands.

In that case it is clear that the decree *nisi* had been obtained on the mortgage and then the matter was taken to the Conciliation Board which not only reduced the amount claimed but released from the claim a portion of the property mortgaged. The case here is that the arbitrator was apparently appointed to determine what amount was due on the mortgage-deeds of 1904 and 1908. By his award he released none of the property mortgaged. There had been certain changes, tenancy land becoming *khudkasht*, and these were mentioned in the award. There can be no doubt that if the suit had been based on the two mortgage-deeds, without the intervention of the award on default of payment, the cultivating rights in the mortgaged *sir* would have gone to the mortgagee ; and we have to consider whether, in view of the principle enunciated by their Lordships of the Privy Council in *Narain Ganesh Ghatate* v. *Baliram* (1), the facts of the present case are distinguishable from the facts there.

Their Lordships in their judgment, regarding the case they were dealing with, write : —

> " It is a question of construction, not incapable of being argued and even decided either way, but their Lordships see no reason to differ from the decision appealed against."

Though it has been frankly admitted by the plaintiff's learned Counsel that if the award is the document on which the rights of the parties started he was bound by the decision in *Narain Ganesh Ghatate* v. *Baliram*, still he contended that there were other facts which prevented defendants from succeeding in their appeal and which entitled the plaintiff to cultivating possession of the hypothecated *sir*. This stand is taken on the preliminary decree which contained express mention of cultivat-

ing rights in *sir*. Plaintiff got possession of the *sir* on 30th November 1922. It is argued that when the contractual rights have been merged into a decree, they cease ; and that the case is governed by the decree and the rights of parties must be regulated by the decree. *Sundar Koer* v. *Rai Sham Krishun* (2), a decision of the Privy Council, is quoted in support of this argument. It is contended that the Court executing the decree, must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. This principle seems firmly established : see the cases of *Kalipada Sarkar* v. *Hari Mohan Dalal* (3), *Ramnath Mulchand* v. *Gajanan Pandurang Limaye* (4), *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (5), *Suradhani Dutta* v. *Sitoo Sheikh* (6), *Balaji Vithoba* v. *Balkrishna Raoji* (7), *Kodulal Agarwala* v. *Behari Kurmi* (8), and *Parkhit* v. *Chamra* and *Jagbandhu* (9). It is further contended that the defendants having failed to appeal from the preliminary decree cannot, under the provisions of section 97 of the Civil Procedure Code, dispute the correctness of that decree in any appeal which may be preferred from the final decree. For the defendants no attempt is made to challenge the decision come to by the lower Court that the decree was assigned to *Mst.* Tulsabai in her own right, but it is contended that though they may not be able, under section 97, Civil Procedure Code, to challenge the correctness of the preliminary decree they can challenge anything that happened between the passing of the preliminary decree and the final decree, and that an executing Court can amend a decree. We are referred to *Brijratan* v. *Jayanarain* (10) in support of this proposition, but that case does not lay down that an executing Court can amend or vary a decree.

(2) 34 C 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 804; 11 C. W. N. 249; 17 M. L. J 48; 2 M. L. T. 75; 34 I. A. 9 (P C.)
(3) 35 Ind. Cas. 856; 44 C. 627; 24 C.L.J. 375; 21 C. W. N. 1104.
(4) 62 Ind. Cas. 96; 45 B. 946 ; 23 Bom. L. R. 806.
(5) 27 M. 118.
(6) 71 Ind. Cas. 378; 21 C W. N. 280; (1922) A. I. R. (Cal) 311 ; 38 C. L J. 17.
(7) 9 C. P. L. R. 186.
(8) 14 C. P. L. R. 92.
(9) 15 C. P. L. R. 134.
(10) 7 Ind. Cas. 876 ; 37 C. 649 at. p. 67.

M. Subramania Aiyar v. *Vaithinatha Aiyar* (11) is a case which lays down that a decree passed after the death of the defendant and before his legal representative was brought on the record is a nullity. The next case quoted, *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (12) is not applicable, Another case quoted, *viz.*, *Jogeshwar Atha* v. *Ganga Bishnu* (13), does not apply to execution proceedings.

It is further contended that the failure of the defendants to object in the face of an award to transfer cultivating rights did not estop him within the meaning of section 115 of the Evidence Act, and we are referred to *Govind* v. *Mt. Chandrabhaga* (14), *Jagwant Singh* v. *Silan Singh* (15) and *Jhunka Prasad* v. *Nathu* (16) with reference to this question. We think that as the award upon which the case is based flowed from the mortgages of 1904, and 1908, documents in which the sanction of the Revenue Officer had been obtained for the transfer of cultivating rights in the *sir*, it cannot fairly be said that the award itself created the present rights of the parties. That award was admittedly framed on the mortgages, and it seems that all the arbitrator had to decide was what sum was then due and in what period of time it was to be paid. It is not denied that the sanction given to a mortgagor's cultivating rights in *sir* would validate a decree as regards such rights in a suit brought on the mortgage, and we cannot see how, facts being as they are, the intervention of the award could prevent the plaintiff getting what the defendants agreed to give him. We think that the lower Court is right in finding that sanction of no officer was necessary to the assignment of the decree to *Mt.* Tulsibai. The assignment gave her the rights of the then plaintiffs in the suit. We further think that the defendants are precluded by section 97 of the Civil Procedure Code from questioning the correctness of the preliminary decree, and are opinion that an executing Court has not the power to enlarge, modify or change a decree.

(11) 31 Ind. Cas. 198 ; 38 M. 682.
(12) 81 Ind. Cas. 181 43 C. 217; 19 C. W. N. 1228.
(13) 8 C. W. N. 478.
(14) 34 Ind. Cas. 675; 12 N. L. R. 100.
(15) 21 A. 285 A. W. N. (1899) 66; 9 Ind. Dec. (N. S.) 891.
(16) 18 Ind. Cas. 960; 35 A. 203; 11 A. L J. 293.

The result is we think that the appeal of the defendants must stand dismissed with costs, and that the order of restoration must be set aside and the cultivating possession of the *sir* land in the suit should be, as stated in the final decree, made over to the plaintiff in execution of that decree. The defendants will pay the plaintiff's costs of the defendant's appeal, while the plaintiff will get her costs in her appeal from the defendants.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 406 OF 1921.

October 11, 1923.

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

V. N. P. KUMARASWAMI NADAR—APPELLANT

versus

VENKATASAMI KOUNDAN AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 68—Official Receiver disallowing creditor's claim—Proceedings instituted by creditor against order—Official Receiver, whether necessary party—District Court, whether bound to take fresh evidence.

The Official Receiver is an officer of Court and there is no provision in the Insolvency Act which makes it obligatory on the District Court to have the Official Receiver made a formal party to proceedings under the Act, and the fact that he is not impleaded does not vitiate any order passed therein. [p. 858, col. 1.]

There is no provision in the Insolvency Act laying down any obligation on the District Court to take fresh evidence in matters brought before it although it would be open to the Court to take such evidence if it thinks desirable to do so. [p. 858, col. 2.]

Chinnameera Rowther v. *Kumarachakravarti Aiyangar*, 56 Ind. Cas. 966, distinguished

In certain insolvency proceedings the Official Receiver allows the claim of a creditor only in part. The creditor applied to the District Judge praying that the whole of his claim be allowed. The District Judge granted the prayer and another creditor appealed to the High Court against the order :

Held, that inasmuch as the creditors were made parties and notice had been given to all of them, it was open to them to appear themselves before the District Court or to have moved the Official Receiver to represent the whole party of creditors before the Court and to state their objections and the proof tendered and that, therefore, it was not necessary to make the Official Receiver a formal party to the proceedings ; [p. 858, col. 2.]

(2) that as the District Judge was merely considering the correctness of the order of the Official Receiver there was no objection to his acting on the evidence given before that officer. [p. 858, col. 2.]

Appeal against the order of the District Court of Madura in C. M. P. No. 231 of 1920, in Claim No. 22 of 1918 (on the file of the Official Receiver), in I. P. No. 12 of 1914 on the file of the District Court of Madura.

Mr. *K. S. Chamlakesa Aiyangar*, for the Appellant.

Mr. *K. V. Venkatasubramania Aiyar*, for the Respondents.

JUDGMENT.—This appeal arises from an application made by the 7th creditor in the Insolvency proceedings of one Tirumula Goundan. The 7th creditor claimed to prove for Rs. 7,000. The Official Receiver allowed the claim in part but disallowed it in respect of the amount claimed under the Promissory-Note Ex. B. The creditor then applied to the District Judge under section 68 of the Insolvency Act against the order of the Official Receiver and prayed that the whole of his claim may be allowed. The learned District Judge, after considering the circumstances of the case and the evidence, has granted him his prayer, and the present appeal is by the 15th respondent, one of the other creditors.

Two points have been taken before us as vitiating the order of the District Judge altogether. The first is that the order was passed without making the Official Receiver a formal party to the application before the District Judge The creditors apparently were all made parties and notice had been given to all the creditors including the 15th respondent, the appellant now before us. He appeared before the District Judge and opposed the claim of the 7th creditor. Apparently, the Official Receiver was not made a formal party respondent to the application before the District Judge but we do not think that that can be treated as in

any way materially affecting the order of the District Judge. It was open to any of the creditors either to appear themselves as the 15th creditor did to oppose the proof tendered by the 7th creditor before the District Court or to have moved the Official Receiver to represent the whole party of creditors before that Court and to state their objections to the proof tendered. The Official Receiver is after all an officer of the Court and there is no provision in the Insolvency Act, so far as we can see, which makes it obligatory on the District Court to have the Official Receiver made a formal party to these proceedings. If the Official Receiver wanted to be heard, there would have been no difficulty whatsoever in the matter as we have no doubt that the District Judge would have heard him. The Official Receiver has been made a party to this appeal before us, but he has not come here and complained that he has been prejudiced in any way by his not being heard on this matter in the lower Court. Reliance has been placed on *Mangaluri Sivaramayya* v. *Singamahanti Bhujanga Rao* reported in (1), by the appellant's Vakil in favour of his contention. But there we notice that the Official Receiver was directed to execute a document in favour of the creditor who required that the whole of the assets of the Insolvent should be transferred to him in accordance with an agreement which he entered into with the insolvent before the Insolvency. Whether in such a case as that the Official Receiver should be formally made a party and his objections heard or not, we need not consider here, for, in the present case, we see no reason why the Official Receiver should have been made a formal party as, in the circumstances of this case, it was as already stated, open to him to have come up and stated any objections that he might have had to the proof tendered. We may state that he knew of the proceedings that were going on in the Insolvency Court itself. In these circumstances, the first objection is not a valid one and is overruled.

The next objection is that the District Judge acted upon some statements made by the parties before the Official Receiver. Here, again, the District Judge was considering the propriety of the action of the Official Receiver which he had taken, as the evidence that was laid before him and the question which the District Judge had to decide was whether on that evidence, the order of the Official Receiver was a right one and should be supported. The case cited by the appellant's Vakil, *Chinnameera Rawuthar* v. *Kumara Chakravarthi Aiyangar* (2) had reference to an application under section 36 of the old Insolvency Act and related to the annulment of a document which the Official Receiver had applied to the Court to annul. The Official Receiver was himself the applicant and it was held that any statement taken by him could not be treated as evidence because the matter itself was being tried before the District Court as a matter between the alienee on the one side and the Official Receiver on the other. Such is not the position here at all. Here the District Judge is merely considering the correctness of the order of the Official Receiver, and in such a case as this we do not see any objection to the District Judge acting on the evidence given before the Official Receiver. Nor is there any provision in the Act itself for necessitating the District Court to take fresh evidence in such matters. We do not say that it would not have been open to the District Court to take such evidence, if it thought desirable to do so, but there is no provision laying down any obligation or the District Court to do so. In these circumstances, the two objections that have been raised to the order of the lower Court fail.

On the merits, the only argument addressed to us is that, as in a previous annulment proceeding this creditor had given up his interest in the land so far as his mortgage was concerned and agreed to treat himself as an unsecured creditor for the amount of consideration which, he should prove like any other creditor, his claim must be looked upon with suspicion. What the exact reason for his doing so was we do not know. But the fact that he did so cannot be taken as conclusive on the question that the money was not due as a personal debt.

No other ground has been alleged against the order of the District Judge. We, therefore, confirm that order and dismiss this appeal with costs of the 7th creditor to be paid by the appellant, the 15th creditor.

S. D. *Appeal dismissed.*

(1) 80 Ind. Cas. 708 ; 18 M. L. J. 200 ; 39 M. 593.

(2) 36 Ind. Cas. 906.

JAGANNATH MOTILAL *v.* BALA PROSAD ARJUNDAS

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL FROM ORDER NO. 89 OF 1923.

August 3, 1923.

Present :—Sir Lancelot Sanderson, Kt., K. C., Chief Justice, and Mr. Justice Richardson.

JAGANNATH MOTILAL—APPELLANT

versus

BALA PROSAD ARJUNDAS—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XI, r. 21—Order directing discovery—Procedure—Order of dismissal, when should be made.

The terms of O. XI, r. 21 of the Civil Procedure Code contemplate two orders being made: (1) an order for the answer to the interrogatories or for the discovery or inspection of documents, as the case may be, within a specified time, and (2) upon the failure to comply with such an order, a further order dismissing the suit. [p. 861, col. 2.]

It is desirable that this course should ordinarily be followed and an order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. [p. 861, col. 2.]

Appeal against the order of Mr. Justice Greaves, dated 14th May 1923 in Original Civil Suit No. 1563 of 1921.

Mr. *N. N. Sircar* and Mr. *R. N. Banerjee*, for the Appellant.

Mr. *S. N. Banerjee* and Mr. *K. P. Khaitan*, for Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiffs from an order made by my learned brother Mr. Justice Greaves on the 14th of May 1923.

The order was: "It is ordered that the further and better affidavit of documents filed by the plaintiff firm after the expiration of the time granted by the said order by taken off the file: And it is further ordered that this suit be and the same is hereby dismissed for want of prosecution."

The facts which it is necessary for me to mention for the purpose of my judgment are as follows:—

On the 2nd of August 1921, an order was made that the plaintiffs in this suit should file an affidavit of documents within ten days, such affidavit to be made by their *gomasta*. The affidavit was not filed within ten days, and it was not until the 3rd of January 1922 that the plaintiffs filed the affidavit sworn by the plaintiffs *gomasta*. On the 8th of February 1923, the defendants made an application for a further and better affidavit of documents by the plaintiffs and on the 14th of February the learned Judge made the following order:—

"It is ordered that within ten days from the date hereof the plaintiff firm do file a further and better affidavit to be made by all their members accounting for the various letters received by them from the defendant firm and specifically disclosing the entries in their account-books showing the names of the sellers of the goods referred to in the said petition, the dates on which such goods were purchased and the prices thereof: And it is further ordered that in default of the plaintiff firm filing such affidavit within the time aforesaid this suit do stand dismissed with costs on scale No. 2".

This order was not complied with. The further and better affidavit was not filed within the time specified by the order, namely, ten days, and no affidavit of documents, made by all the members of the firm, was ever filed. But on the 13th of March 1923 a further affidavit was filed: that was sworn by Motilal, one of the members of the plaintiff firm, on the 16th of March.

Certain correspondence took place which is to be found at pages 4, 5, 6 and 7 of the paper-book. On the 14th of March 1923 the plaintiff's Solicitors wrote as follows:—

"Please note that we have filed our clients' further affidavit of documents." It is to be noted that that was written a day after the affidavit was filed.

Then the defendant's Attorneys wrote as follows:

'Yours of yesterday received by us today.

" Please let us know when you have filed your clients' further affidavit of documents."

To that no answer was sent, and apparently nothing was done by the defendants until the 24th of April when the defendant's Attorneys

wrote to the Registrar with reference to this matter, as follows, After referring to the order of the 14th of February 1923, they proceeded—"The plaintiff firm did not file any affidavit of documents within that time. On the 15th March last we received a letter from Messrs. Pugh & Co., the Attorneys for the plaintiff firm, informing us that the further and better affidavit of documents has been filed to which we sent an immediate reply asking them to let us know as to when they filed the affidavit of documents to which no reply has yet been received. From your office we came to learn and subsequently we saw that the affidavit has been filed and on the back of the said affidavit it is noted as follows, " Pursuant to order " of 14th February 1923 out of time.

" no steps taken"
Pugh & Co.
12—3—23.

" Requisition given
G. Sanyal
12—3—23."

" out of time
no steps taken
13—3—23."

(Then comes the final note)

" File 13—3—23."

That last note, as I understand was initialled by the Master.

The letter then proceeded :

" We do not understand, how the said affidavit can be filed on the 13th March last when the order directs that it is to be filed within 10 days from the 14th and in default the suit do stand dismissed with costs and we do not know how your office received that affidavit, as the order of the 14th of February last has been drawn up, completed, served on Messrs. Pugh & Co. and then filed in your office.

" Under the circumstances we shall be much obliged if you will kindly take the affiidavit off the file and place the suit in the special List of suits."

The reply of the Registrar was as follows :

" With reference to your letter of the 24th instant asking that a further affidavit of documents filed by Messrs. Pugh & Co. on behalf of the plaintiff firm should be taken off the file as having been filed after the expiry of the time granted by the peremptory order of the 14th February last, I write to inform you that owing to the endorsement made by Messrs. Pugh & Co., that no steps have been taken and made on the 12th March and owing to the fact that the order itself was not signed until the 16th March and not filed till the 19th March the Ledger-keeper certified that the affidavit was out of time and that no steps have been taken and hence the order was given by the Master on the 13th that the affidavit be filed. The affidavit has obviously been wrongly filed but I am unable to take it off the file or to place the case in the special list of suits, unless Messrs. Pugh & Co consent or unless you obtain an order for that purpose."

Having received that letter from the Registrar the defendants gave notice of an application on the 5th of May as follows : " Take notice that an application will be made before the Sitting Judge in Chambers on the 8th May 1923 on the part of the defendant firm above-named for an order that the further and better affidavit of documents improperly filed on the 13th March 1923 be taken off the file and this suit be struck out".

This matter came before the learned Judge on the 14th of May ; he had before him an affidavit sworn by the *gomasta* of the plaintiff firm in which he set out that none of the partners of the plaintiff firm was in Calcutta but that Motilal who had sworn the affidavit was in the Native State of Alwar and he had swron it in Alwar and he had sent it down to Calcutta where it was received on the 12th March and filed on the 13th March, alleging that there had been no negligence ; and then it was further alleged that, in asmuch as no steps had been taken by the defendant firm, the plaintiff firm was entitled to file the said affidavit.

The learned Judge, on the 14th of May 1923, made the order, which I have already read, and this appeal has been filed against that order of the 14th of May.

It was pointed out during the course of the argument that the second order of the learned Judge, which he made at the instance of the defendants, was really a superfluous order, inasmuch as the first order provided that if the affidavit were not filed within the time

specified in the order of 14th February the suit should stand dismissed with costs and inasmuch as the affidavit was not filed within the time specified the suit was in fact dismissed ; in other words, that the order of the 14th of February became, on the 25th of February, a final order dismissing the suit.

It was argued by the learned Counsel on behalf of the plaintiffs that the order of the 14th of February was no more than an interlocutory order ; and that, inasmuch as the plaintiffs had appealed from the final order of the 5th of May, the plaintiffs were entitled to challenge the propriety of the order of the 14th of February, 1923, as well as the order of the 5th May.

In my judgment, that argument should not be accepted. In my opinion the order of the 14th of February became, on the 25th February, a final order dismissing the suit. It was open to the plaintiffs to appeal from that order if they so desired, and I suppose it was also open to them to make an application upon proper materials to the learned Judge to review his judgment by way of extending the time for the filing of the affidavit. The appeal with which we are now dealing, was filed on the 4th of June, 1923 and was limited to the order of the 14th May ; and, therefore, as far as the order of the 14th of February was concerned, the appeal was long out of time even if it could be considered as an appeal against the order of the 14th of February.

The second point which the learned Counsel for the plaintiffs urged was that the learned Judge had no jurisdiction to make the order of the 14th of February in the form in which it stands, and that it must be regarded as an order which was made entirely without jurisdiction, and, therefore, is a nullity.

The order was made in pursuance of the provisions of O. XI, r. 21, Civil Procedure Code, which run as follows.—" Where any party fails " to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall if a plaintiff, be liable to "have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the" Court for an order to that effect, and an order may be made accordingly.

There was no appeal by the plaintiffs from the order of the 14th February and in m judgment it is not necessary for the purpose of the disposal of this case to decide whether the learned Judge should have made the order of the 14th of February, 1923 in the form in which it stands. At present I am not prepared to hold that it was made without jurisdiction. It may be that the learned Judge was satisfied on the 14th of February 1923 that the plaintiffs were endeavouring to avoid giving a fair and proper discovery of documents. I am inclined to think that he must have been of that opinion first because of the premptory nature of the order that the affidavit of documents should be made within ten days, secondly, because he directed that all the members of the plaintiff firm should make an affidavit and, thirdly, because of the matters which he specified that the plaintiff firm should disclose. I desire to make it clear, however, that I do not decide the question in this case whether the learned Judge had jurisdiction to make the order of the 14th of February in the form in which it stands. At the same time, I think it is desirable to add that, in my judgment, the terms of O. XI, r. 21 contemplate two orders being made. *First*, an order for the answer to the interrogatories or for the discovery or inspection of documents, as the case may be, within a specified time and, *secondly*, upon the failure to comply with such an order, a further order dismissing the suit. This is in accordance with the English practice, as to which reference may be made to Daniell's Chancery Forms (sixth Edition) p. 1027, the form being No. 1932 which order is made in pursuance of the English O. XXXI, r. 21, which is similar to O. XI, r. 21 in all material respects. It is desirable, in my judgment, that this course should ordinarily be followed, and it should be noted that an order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. It must, therefore, be assumed that, when the learned Judge made the second order, namely, that of the 5th of May 1923, the learned Judge was satisfied that the plaintiffs, by not conforming to the order which he had made on the 14th of February, were endeavouring to avoid giving a fair and proper discovery.

That being so, in my judgment the learned Judge had jurisdiction to dismiss the suit, and, having regard to the facts of the case, I am not prepared to say that the learned Judge was wrong in the exercise of his discretion in dismissing the suit.

The last point which the learned Counsel for the plaintiffs urged was that this Court should exercise the jurisdiction which is given under section 5 of the Limitation Act, and extend the time for appealing from the order of the 14th February, 1923. In order that the provisions of that section should be available, it would be necessary for the plaintiffs to show that they had sufficient cause for not preferring the appeal within the time specified. I cannot see any grounds which would bring the case within the scope of that section. The terms of the order of the 14th of February were perfectly plain: and, I do not find that the defendants did anything to mislead the plaintiffs. As far as the Court is concerned, it is true that the Master directed the further affidavit to be filed; but it has been explained by the Registrar that that would not have been done but for the endorsement which was put on the affidavit by the Attorneys acting for the plaintiffs.

Consequently, in my judgment, for the reasons, which I have mentioned, this appeal must be dismissed with costs.

Richardson, J. —I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 3 OF 1923.

October 31, 1923.

Present:—Mr. Prideaux, A. J. C.

LAXMAN—APPELLANT

versus

Mt. BHULABAI AND OTHERS—RESPONDENTS.

Hindu Law—Adoption—Suit by reversioner to contest adoption—Burden of proof.

In a suit by a Hindu reversioner for a declaration that the defendant was not validly adopted by the last male holder of the property, the burden of proving the *factum* and validity of the adoption lies on the defendant.

Asharfi Kunwar v. *Rup Chand*, 30 A. 197; A. W. N. (1908) 79, 5 A. L. J. 200, dissented from. *Rajagopala Reddy* v. *Nattu Govinda Reddy*, 19 Ind. Cas. 342; 34 M. 329; 9 M. L. T. 128; 21 M. L. J. 445, relied on.

Appeal against the decree of the District Judge, Wardha, in Civil Appeal No. 47 of 1922, decided on the 10th October, 1922.

Mr. *V. R. Pandit, B. A.*, for the Appellant.

Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—One Raghu died leaving his widow Bhulabai, the 1st defendant. The plaintiff, Laxman, says that he is the reversionary heir to Raghu and brings his suit for a declaration that defendant No. 2 was not adopted by Bhulabai to her husbad Raghu, and if adopted, the adoption was invalid under Hindu Law. The trial Court placed the burden of proving the adoption on the defendants and held that defendant No. 2 was not the adopted son of Raghu and that Raghu did not authorise his wife to make the adoption after his death. A decree was passed in plaintiff's favour declaring the adoption illegal and not binding on the plaintiff.

On appeal by the defendants the District Judge, Wardha, held, following *Asharfi Kunwar* v. *Rup Chand* (1), that the burden of proving that the alleged adoption is invalid and never took place was upon the plaintiff and has,

(1) 30 A. 197; (A. W. N. 1908) 79; 5 A. L. J. 200.

therefore, set aside the decree of the first Court and remanded the case. Hence the present appeal.

The Allahabad case quoted has been dissented from in *Rajgopala Reddy* v. *Sadasiva Reddy* (2) a case in which the Allahabad ruling was considered. What I have to decide here is whether the Allahabad or the Madras ruling should be followed. I lean towards the Madras view, for it seems to me that there is no difference between a case like the present where plaintiff can only sue for a declaration and one where the reversioner seeks to enforce his right to possession. There is no doubt that if a plaintiff is entitled to claim immediate possession and asks for it, it would lie on those setting up an adoption in defence to prove it; and in the present case I think that once the plaintiff is established to be the reversioner, it lies on the defendants to establish the adoption. In this case here both sides have adduced evidence, the question of the burden of proof is of secondary importance but the burden, to start with, should be as I have above indicated.

With these remarks I set aside the decree of the lower Appellate Court and remand the case to that Court for a fresh consideration and a decision on the merits No refund certificate will issue and costs will abide the result.

Z. K. *Case remanded.*

(2) 9 Ind. Cas. 342; 34 M. 329; 9 M. L. T. 128; 21 M. L. J. 445.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 733 OF 1922.

January 9, 1924.

Present:—Mr. Justice Stuart and Mr. Justice Mukerji.

YAQUB ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus.

DHAN SINGH—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 87, 88—Commutation of rent—Suit to recover arrears of rent—Court, whether bound by entry in Revenue papers.

In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake; and where there is a binding order of some competent authority, such as an order by the Settlement Officer under ss. 87 and 88 of the U. P. Land Revenue Act, or under ss. 13 to 16 of the Agra Tenancy Act, the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have those rates altered, but a Court trying a suit for arrears of rent has no authority in the matter. [p. 861, col. 2.]

Second appeal from the decree of the District Judge of Bulandshahr, dated the 23rd March 1922.

Messrs. *Abu Ali* and *Iqbal Ahmad*, for the Appellants.

Mr. *St. C. Thompson*, for the Respondents.

JUDGMENT.

Stuart, J.—This appeal raises a question of some importance. The facts are as follows:—

The plaintiffs-appellants are, according to the statements in the plaints, residents of Bulandshahr City. They own *Zemindari* in the village of Bahlimpura. The defendant-respondent is an occupancy tenant in Bahlimpura holding 8 *bighas* and 3 *biswas* in occupancy tenancy. The plaintiffs sued the defendant for the rent of 1327 *Fasli*, that is to say 1919—20, and calculated the rental on a grain basis according to which it amounted to about Rs. 160 which worked out to Rs. 20 a *bigha*. In the plaint it was admitted that the entry in the revenue papers showed that the defendant was liable only to pay Rs. 61 as cash rent and the plaint contained the argument—plaints in Revenue Courts frequently are argumentative—that a mistake had been made and that, somehow or another, the rent had been commuted from grain rent to cash rent without the knowledge of the plaintiffs or their ancestors. The argument continued that the rent had formerly been a grain rent and that it should remain as a grain rent. The defendant replied that in the progress of a recent Settlement the Assistant Settlement Officer had commuted the rent from grain rent to a cash rent on the 29th August 1918 and that he had tendered the rent as fixed by the Assistant Settlement Officer to the *zemindars*

who had refused to accept it. The Assistant Collector who heard the case was not satisfied with the entry in the *patwari's* papers which show Rs. 61 as the amount of rent fixed upon this occupancy holding at the time of the Settlement but went into the question as to how that rental had come to be fixed. He ascertained that the rental had formerly been a grain rental but that the Assistant Settlement Officer had, under the provisions of section 88, Local Act III of 1901, commuted the grain rent into a cash rent. He considered, however, that that order of the Assistant Settlement Officer was null and void because upon enquiry it was ascertained that by a mistake not of the defendant but of some clerk in the Settlement Office notice had not issued to the plaintiffs in this case that these proceedings were in progress. He accordingly decreed the higher rental against the defendant. The defendant appealed to the District Judge who took the view that the rate of rent to be allowed was the rate fixed by the Assistant Settlement Officer.

We are not concerned with the decision of the point whether the plaintiffs-appellants were or were not prejudiced by the omission to give them notice of these proceedings. We consider it exceedingly unlikely that they had no knowledge of the proceedings for, on facts before us, the Settlement authorities were commuting grain rents not only in respect of this holding but in respect of many others in the village. Ordinarily, these absentees would have an agent in the village who would generally be fully conversant with the proceedings of the Settlement Department. Further, the Settlement arrived at must have been put before them for acceptance. No attempt was made by the Assistant Collector to ascertain whether they had or had not been prejudiced in reality. The view which he took was that the Assistant Settlement Officer's order was *ultra vires* and that he should not decree the the suit according to the recorded rates but was obliged to go back to what had occurred before those rates were recorded and put the matter right. In other words, he arrogated to himself the functions of a Court of Revision over the Assistant Settlement Officer. In our opinion the matter is very clear in a case like this. In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake, and where there is a binding order of competent authority, such as an order by the Settlement Officer under sections 87 and 88, Local Act III of 1901 or under sections 43 to 46, Local Act II of 1901, the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have those rates altered, but the Court trying a suit for arrears of rent has no authority in the matter. This is sufficient to dispose of the appeal which, in my opinion, should be dismissed with costs on the higher scale.

Mukerji, J.:—I wish to add a few words, having regard to the importance of the question involved. The argument addressed by the learned Counsel for the appellants to us seemed to take it for granted that the proceedings before the Settlement Officer were in the nature of a regular suit and that, therefore, the order passed could not bind a party who was not formally before the Settlement Officer. If we peruse carefully sections 87 to 90 of the Land Revenue Act of 1901 we shall see that no such procedure as that of a suit is necessary. Section 88 of the aforesaid Act lays down that an occupancy tenant among other tenants may apply for a commutation of rent. Section 89 says that when such an application is made it would be the duty of the Settlement Officer to commute the rent. Unless he has been specially authorised to refuse any such application, he cannot refuse it. He has to proceed as directed in section 87 of the Revenue Act. That section authorises the Settlement Officer to fix rent even on his own motion. Nowhere is it laid down that a tenant making an application should name any person as the opposite party to whom notice has to be formally sent. It would be the duty of the Settlement Officer or his Assistant Officer to issue notice to the parties concerned and to hear those who, according to his idea, may be interested in the matter. In the circumstances, the order of the Settlement Officer or his Assistant unless reversed in appeal is final, although no person whatsoever may have been informed of the proceedings. I am speaking of an extreme case.

BAYA *v.* BHAURAO

The result is that the judgment of the Court below is perfectly right and I agree in the order proposed by my learned brother.

By the Court :—The appeal is dismissed with costs on the higher scale.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 362-B OF 1922.

November 23, 1923.

Present :—Mr. Kinkhede, A. J. C.

BAYA—APPELLANT

versus

BHAURAO—RESPONDENT.

Evidence Act (I of 1872), s. 63 (3)—Secondary evidence—Will—Copy prepared by Sub-Registrar—Hindu Law—Will—Revocation, what amounts to—Animus revocandi, *proof of.*

A Will was submitted for registration, but as the Sub-Registrar had doubts as to its execution he referred the matter to the District Registrar. The latter required a copy of the Will to be submitted to him. The Sub-Registrar prepared a copy of the Will and submitted it to the Registrar. The Will was not registered and in a suit relating to the Will the copy of the Will submitted by the Sub-Registrar to the Registrar was sought to be proved as secondary evidence of the Will ;

Held, that the copy was admissible under section 63 (3) of the Evidence Act.

The Will of a Hindu may be revoked by parol and where definite authority is given by him to destroy the Will with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

Maharajah Pertab Narain Singh v. *Maharanee Sabhao Koeer*, 3 C. 626 ; 1 C. L. R. 113 ; 4 I. A. 228 ; 3 Sar. P. C. J. 740 ; 3 Suth. P. C. J. 458 ; Rafique and Jackson's P. C. No. 46 ; 1 I. J. 679 ; 1 Ind. Dec. (N.S.) 983 P. C.; *Venkayyamma* v. *Venkatarammayama*, 25 M. 678 ; 4 Bom. L. R. 657 ; 7 C. W. N. 1 ; 12 M. L. J 209 ; 29 I. A. 156 (P.C.), relied on.

There must, however, be very cogent evidence to prove the *animus revocandi* which is so essential for the purpose of revocation.

Appeal against the decree of the 2nd Additional District Judge, East Berar Amraoti, in Civil Appeal No. 190 of 1921 decided on the 26th April 1922.

Mr. *M. R. Dixit*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT. One Paikaji held certain fields amongst other property. He died on 25th July 1912 leaving behind a widow by name Sakhu and a daughter by name Baya. He had a separated brother Ganpat whose son was one Doma, father of the plaintiff, Bhaurao. Bhaurao's case is that Paikaji executed a Will on 16th March 1912 whereby, amongst other dispositions, he bequeathed field Survey No. 18/2 of *mouza* Khadak Sawanga to him subject to the life interest of Sakhu. Sakhu died sometime in December 1920. The present suit was instituted on 8th April 1921 after the plaintiff's father had unsuccessfully contested the right of Baya to have mutation of names in her own favour on the ground that he was joint with Paikaji. The defence of Baya was that Paikaji did not execute any Will and that even if it was executed it was revoked and that Paikaji did not intend to act up, or give effect, to it. The story is that the Will was presented by Paikaji for registration but the Sub-Registrar did not register it as he thought that Paikaji and his wife were executants by reason of the provision in the Will that the property was to go to the legatee after the deaths of Paikaji and his wife. But that as his wife Sakhu was against any disposition of property by Will, Paikaji, on her desire and request, revoked it, and he being ill asked his wife to get it back from the Sub-Registrar's office, and thus decided not to get it registered. The defendant also relied on the circumstances that the document remained unclaimed in the Sub-Registaar's office, and that none of the heirs and legatees cared to enforce it so long, as indicative of the intention against giving effect to it. The Court of the first instance, with a view to ascertain the facts connected with the presentation, non-registration and return of the document, called for the record from the Sub-Registrar's office and examined one Maruti Balkrishna who was in charge of the office in connection with the record which he produced. Similarly, the Additional District Judge also had to send for the correspondence that passed between the Sub-Registrar and also the District Regis-

trar in connection with the registration, etc., of the Will. The Court of the first instance framed the following two issues which are material for the purposes of this appeal : —

1 Whether the deceased Paikaji executed any Will on 16th March 1912 and bequeathed 18|2 to plaintiff ?

2 Whether the Will was revoked as alleged by defendant ?

As the original Will was not available, the same having been returned to the defendant's mother, the Court of the first instance thought that the copy which was prepared by the Sub-Registrar for the purpose of being forwarded to the District Registrar for orders, was not admissible in evidence to prove the disposition and, consequently, the finding on issue No. 1 was that Paikaji executed a Will on 16th March 1912 but that it could not be definitely found that he willed 18|2 in plaintiff's favour. As regards issue No. 2 it held, on the evidence of D. Ws. 3, 4 and 5, that when the notice from the Sub-Registrar was brought to Paikaji, he would not go to appear before the Sub-Registrar to have the Will registered; and the Court inferred that after his wife's exhortation he changed his mind and did not wish to give effect to what he put in black and white, and concluded that the document dated 16th March 1912 was " a scrap of paper " and found that the Will was revoked. The suit was accordingly dismissed by the Munsif of Yeotmal, who tried it.

In appeal the matter came up before Mr. R. M. Bhagade, 2nd Additional District Judge, who in a well considered judgment has upset both the findings and decreed the claim. His conclusions may be summarized as under :—

(1) That the original Will was produced by Paikaji but by reason of his non-appearance before the Sub-Registrar for getting it registered in spite of notice it remained unregistered and unclaimed and was, therefore, returned by the Sub-Registrar under the orders of the District Registrar to Paikaji's widow Sakhu on her application after the death Paikaji.

(2) That the Sub-Registrar having entertained doubts as to whether Paikaji or his wife should be treated as executants of the Will he made reference to the District Registrar and that a copy of the Will was ordered to be submitted, before the District Registrar could pass any orders upon the reference and that the Sab-Registrar's endorsement submitting the copy, which he made in the discharge of his official duty, that is, in compliance with the District Registrar's orders, was a true copy compared with the original. That such a copy was secondary evidence under section 63, clause (3), of the Evidence Act and particularly, as the original was proved to have gone into the possession of defendant's mother, the secondary evidence was admissible. As this evidence was held admissible, he concluded that the disposition with respect of Survey No. 18|2 in favour of plaintiff was capable of being proved with the help of the copy and of the oral evidence given in support of it. That the evidence of alleged revocation was insufficient to show that the Will was really revoked, and that Paikaji really did nothing to revoke the Will and that the Will was not merely a scrap of paper as held by the Munsif. Against this decision the present appeal has been preferred and two points have been urged : (1) as to the admissibility of the copy, and (2) as to the revocation of the Will.

As the judgment of the Additional District Judge was an upsetting judgment I thought it desirable to go through the evidence at the stage of arguments addressed to me. After carefully considering the evidence and the probabilities of the case I am satisfied that the decision of the Additional District Judge on both the points is not incorrect. The circumstances point to a definite intention of Paikaji to make a disposition of his property by which he thought he would not only secure enjoyment of the estate to his widow for her life, but also provide his daughter, brother's son's son, and the presiding deity of one temple. Such a disposition is not inconsistent with the notions of a Hindu. It does not disinherit the natural heirs and there is nothing unusal about it. Not only do the plaintiff's witnesses support the disposition but even the defendant's witnesses who say that they had accompanied Paikaji to the Sub-Registrar's office also corroborate the plaintiff's evidence. Paikaji did not merely stop at the stage of intention but actually translated his intention into action by having the formal instrument of the Will drawn up, signed and attested He seems to have also thought that the lodging or depositing of the instrument with the Sub-

Registrar would make his intention to act up to it clearer still. The Registrar, in all probability, mistook his intention and considered that his wife's presence was necessary. It is equally possible that by intending to get it registered by the Registrar he wanted to leave no room for doubt as to his intention in the matter. The original document having been returned to the defendant's mother the true copy prepared by the Sub-Registrar was admissible under section 63 (3) of the Evidence Act.

As regards the plea of revocation on the ground that the deceased Paikaji did not get the Will registered, suffice it to say that it is not always the case that registration is resorted to only in respect of documents which are made cumpulsorily registrable by law. Wills executed by Hindus are not compulsorily registrable instruments. We cannot, therefore, impute to Paikaji an intention to treat the instrument as inoperative in case it remained unregistered. If the Registrar had not erroneously thought that it was an instrument not by himself alone but by himself and his wife and had he either admitted it to registration or accepted a deposit of it then and there on 16th March 1912 when it was presented to him by Paikaji, there would have been no trouble in the matter. It is the improper action of the Sub-Registrar which has created all this trouble. The District Registrar's orders which he sought for his guidance simply gave him direction to proceed according to law and did not throw much light on the question. It is clear from the evidence on record that the Sub-Registrar sent out a notice to Paikaji to attend before him but he did not care to attend. Exhibit P-2 which is an extract from the minute book shows that on 1st May 1912 he issued notice to both Paikaji and his wife calling upon them both to appear before him for making statements, but neither both nor any one of them appeared till 16th July 1912, and that the registration was refused on that date If the alleged exhortation by his wife and her aversion was the immediate cause of Paikaji's refusing to act up to the disposition, the Sub-Registrar had presented him with a very good opportunity by asking them both to attend before him to do so. The evidence of D. W. 4 that Paikaji died 15 days after notice does not appear to be correct because he died on 25th July 1912 nearly three months after the date of notice. The evidence of other witnesses Nos. 3 and 5 clearly shows that the notice was brought for service 8 days after *Akshayatritiva* which fell on 20th April 1912, which is more or less consistent with the date 1st May 1912 mentioned in Exhibit P-2. It is, therefore, more likely that the notice was served sometime in the early part of May 1912. As the evidence shows, Paikaji was not so very ill at that time as to be incapable of attending before the Sub-Registrar. According to D. W. 5 the notice was brought to his *baithak* and was refused by Paikaji there. According to this witness it was after the execution of the Will that there was a dispute between Paikaji and his wife and so he cancelled it. Witness adds, "Paikaji received a notice from the Registration Office. He did not go there and said that he did not give effect to it and so he would not register it." He does not speak of any altercation or exhortation by the wife on the occasion of the service of the notice as is deposed to by other witnesses. He does not also speak to his illness being an excuse for the refusal to take notice. Witness No. 1 for defendant speaks of Diwaker, D. W. 3, having been sent for to read the notice. D. W. 2 says "a postman brought a notice. It was about signing a document which was executed by Paikaji. Paikaji said he was ill and so he refused it and said that he would bring back the document he had executed. At that time his wife said, why should he execute a document when he had daughter. Paikaji kept quiet saying that she would know everything." According to this witness Paikaji when asked to sign the notice, "said that he was very ill and would not, therefore, sign and he died two months afterwards. That Paikaji's daughter was there. Paikaji said nothing at all about the nature of document or where it was." D. W. 3 says that he was called and so he went over to read the notice. Apparently he read it and knew that it was a notice about the registration of the Will which Paikaji had executed. He says "Paikaji's wife got angry and he said that he would not take notice as he did not like to registrer it. His wife was getting angry and he said that he would bring back document or she should do after him". He says that Baya was there when the notice was brought. According to this witness Pai-

kaji refused the notice but said nothing to him (peon). According to D. W. 4 during the illness of Paikaji notice was received while the witness was there. The notice did not mention the nature of the document. Paikaji's wife is said to have "asked Paikaji about the document" and he said that "he had willed away estate." Whereupon the wife said "why should he have executed it when he had a daughter." Paikaji said "if he felt better he would bring it back or else she should bring it back after his death. The witness says "no one suggested to Paikaji that it may be written on the notice" that the document was not to be registered." This witness has put the stamp of falsehood on the story told by every one of the witnesses by saying that Paikaji died 8 or 15 days after that. On the strength of this sort of evidence no Judge could be expected to return a finding in favour of revocation of the will. I think Mr Bhagade's conclusion, that this was insufficient, is perfectly correct and sound.

It has been held in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koore* (1) and *Venkayamma* v. *Venkat Ramanna Yemma* (2) that the Will of a Hindu may be revoked by parol, and where definite authority is given by him to destroy his Will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed. There must be very cogent evidence to prove the *animus revocandi* which is so very essential for the purpose of revocation. At the time when the notice was brought to Paikaji, if he had made up his mind to revoke the Will, then there was nothing to prevent Paikaji who was himself literate and who had also the *Patwari* (D. W. 3) by his side to help him, and a Marwadi friend (D. W. 5) to advise him, from making the obvious endorsement on the notice that the will was cancelled and he did not therefore want to have it registered. The evidence about the authorisation of his wife to take back the Will has rightly been treated as discrepant and unreliable by the lower Appellate Court. The learned Additional District Judge's finding, that, in the present case, what Paikaji seems to have done is merely to have said to his wife that he would not go to have the document registered, and that this declaration does not show that the Will was really revoked, is sufficient for the dismissal of the second appeal.

In this view of the case I hold that the claim had been rightly decreed against the defendant. The present appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 3 C. 626 ; 1 C L. R. 113 ; 4 I. A. 228 ; 3 Sar P. C. J. 740 ; 3 Suth P. C. J. 458 ; Ratique and Jacksons P C. No. 46; 1 Ind. Jur. 679; 1 Ind. Dec. (N. S.) 988 (P. C.)

(2) 25 M. 678 ; 4 Bom. L. R. 657 ; 7 C. W. N. 1 ; 12 M. L. J. 299 ; 29 I. A. 156 ; 8 Sar. P. C. J. 286 (P. C.)

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 725 OF 1922.

July 16, 1923.

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

TULSIDAS KESHOWDAS—PLAINTIFFS
versus
HASHIM AND OTHERS—DEFENDANTS.

Mortgage—Interest at rate of one per cent. per mensem, whether penal—Post diem *interest when allowed—Surety, liabilities of—Liability, how far extends—Failure of creditor to sue, whether discharges surety—Preliminary decree, effect of.*

Interest at the rate of one per cent. per mensem on a mortgage-security is not penal and may be allowed.

Where a mortgage-deed does not expressly provide for payment of *post diem* interest but its provisions, taken as a whole, without exclusive attention to any one of them stipulate that interest is to run without any limitation as to the period of its currency, *post diem* interest ought not to be refused. [p. 870, col. 2.]

In the absence of anything to show that his liability was otherwise limited, a surety for payment of interest is liable to pay the same until the debt is naturally satisfied and not only for the time mentioned in a deed for payment of the principal amount.

The fact that *post diem* interest is recoverable from a mortgagor under the terms of the mortgage-deed and not by way of damages does not necessarily make the liability of the surety to pay interest co-extensive with that of the mortgagors. [p. 870, col. 2.]

The surety must never be charged beyond the precise terms of his engagement. [p. 870, col. 2.]

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The mere forbearance on the part of the plaintiff to sue does not discharge the surety of his liability. [p. 871, col. 1.]

A preliminary decree operates as merger with regard to the liability to pay future interest and releases a surety from his liability under the deed. [p. 871, col. 2.]

Mr. *Thakursing Lalsing*, for Plaintiff.

Mr. *Ghulam Hussain*, for Defendants 1 to 3.

Mr. *Kewalram Jethanand*, for Defendants No. 4.

JUDGMENT.—This is a suit for recovery of Rs. 12,000 claimed as principal and Rs. 3,860 as interest due on a mortgage-bond dated the 10th of June 1918, executed by defendants Nos. 1 and 2 and one Ramzan, since deceased, as principal-debtors and by defendant No. 4 in his capacity as surety for the payment of only the interest due on the bond. The legal representatives of Ramzan have been impleaded as defendants No. 3.

The only defence raised on behalf of defendants Nos. 1, 2 and 3 is that the rate of one per cent. interest per mensem claimed by the plaintiff is penal and should be relieved against.

On behalf of defendant No. 4 it has been contended that under the terms of the mortgage-deed he had guaranteed the payment of interest for one year only as the deed provides for repayment of the principal amount at the expiry of one year; that interest for that period having been paid by the mortgagors he is relieved of any further liability under the deed; that the deed does not provide for payment of interest after the period of one year and, therefore, defendant No. 4 is not liable for *post diem* interest which can only be allowed by way of damages; that the plaintiff had consented to allow time for payment to the mortgagors and that the plaintiff had further failed to give notice to the defendant No. 4 of the failure of the mortgagors to pay interest regularly and that he is, therefore, discharged from his liability as surety.

The points which arise for decision are as follows:—1. Is the interest claimed by the plaintiff penal, and should it be reduced?

2. Is the defendant No. 4 liable as surety for payment of interest, and, if so, for what period?

3. General.

No evidence has been called on behalf of the defendants. The plaintiff, Ex. 4, and Ghulam Hussein Ex. 6, the attesting witness to the mortgage-deed, have proved payment of consideration and the due execution of the deed by defendants Nos 1, 2 and 4 and the deceased Ramzan.

The decision of the both the points in issue depends on the construction of the mortgage-deed, Ex. 3. The deed provides for re-payment of the sum of Rs. 12,000 within twelve months from the date of the deed, and contains the following covenant for payment of interest:—

> "We also promise to pay interest on the said sum of Rs. 12,000 at the rate of twelve annas per cent. and such interest to commence from the date hereof, and to be paid every month till payment of the said principal sum, but should we fail to pay interest for any three months, we shall be charged interest at the rate of one per cent. per mensem."

The covenant with regard to the liability of the defendant No. 4 is contained in one single para. which is as follows:—"That Haji Suleman Umer agrees to pay interest in case the mortgagors fail to pay the same regularly."

It is true that the clause for payment of interest at the enhanced rate of one per cent. per mensem does not provide in clear terms that such interest is to run from the date of default. Taking the document as a whole, the intention of the parties appears to be to provide for the enhanced rate of interest from the date of default and not from the date of the loan. The plaintiff has claimed interest at the higher rate from the date of default and not from the date of the loan. Assuming, however, that the interest of one per cent. per mensem is intended to run from the date of the loan and is as such by way of penalty, the interest of one per cent. per mensem on a mortgage-security is not so high as to entitle the defendants to relief. In *Ramsunder Koer* v. *Rai Sham Krishin* (1), their Lordships of the Privy Council did not interfere with the finding of the High Court awarding the agreed enhanced rate of Rs. 1-8-0 per cent. per mensem simple interest

(1) 34 I. A. 9; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 48; 2 M. L. T. 75; 31 C. 150; 4 A. L. J. 109; 5 C. L. J. 106 (P. C.).

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on a mortgage bond. In *Ram Bhujawan Prasad Singh* v. *Nathuram* (2), their Lordships of the Privy Council reduced the rate of interest charged by the plaintiff to one per cent. per mensem in a suit based upon a mortgage of property of a joint Hindu family at a high rate of interest where the co-parceners had contended that there was no legal necessity for the high rate of interest charged.

The rate of one per cent. per mensem as interest does not appear to me to be unreasonable and I allow interest at that rate from the date of default.

The mortgage-deed, Ex. 3, is very badly drafted. It is contended that, in so far as the deed provides for payment of the principal sum of Rs. 12,000 within twelve months, *post diem* interest cannot be claimed as interest provided for under the terms of the deed but as damages for dentention of money, and, therefore, there is no liability on the surety defendant No. 4 to pay the amount of such damages. In *Mathuradas* v. *Raja Narainda Bahadur* (3), their Lordships of the Privy Council held, on the construction of a mortgage-deed which provided for payment of the principal sum and interest within a year of the date of the deed, that interest after the expiry of the year could be claimed under the deed and not merely by way of damages for breach of contract. At page 145 of the report their Lordships have remarked as follows : – " The construction of the High Court ascribes to parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken and to seek for damages which lie in the discretion of a jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not frequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract especially when such a contract is of a very common kind and suitable to the ordinary expectations of persons entering into mortgage transactions."

In *Binder Singh* v. *Gangasarai Sahu* (4), their Lordships of the Privy Council held that, where the provisions of a mortgage-deed, taken as a whole, without exclusive attention to any one of them stipulate that interest is to run without any limitation as to the period of its currency, *post diem* interest ought not to be refused. Reference may also be made to the case of *Manager Vithaba Timap Shanbhog* v. *Vigneshwar Ganap Hedge* (5), The mortgage-deed, Ex. 3, contains a proviso on the part of the mortgagor to pay interest "till payment of the said principal" and not till the expiry of one year. The deed further provides for the mortgage-amount being realized from the sale of the property and for recovery of the balance of the amount, if any, with interest thereon from the person and other property of the mortgagors. Reading the document as a whole, there is no doubt that *post diem* interest is recoverable from the mortgagors up to payment of the principal amount under the terms of Ex. 3 and not as damages for breach of the contract.

The fact that *post diem* interest is recoverable from the mortgagors under the terms of the mortgage-deed and not by way of damages, does not, however, necessarily make the liability of the surety to pay interest co-extensive with that of the mortgagors.

The surety who is a favoured debtor must never be charged beyond the precise terms of his engagement. (Halsbury Vol. 15. paras. 909 and 914). The clause in question is somewhat vague and indefinite. If oral evidence had been given to indicate the surrounding circumstances, or to show the position of the parties, I should have welcomed it. It is probable that the surety never intended to make himself liable for payment of interest after the expiry of one year from the date of the deed. No evidence, however, has been offered on his behalf, and I must interpret the clause in Ex. 3 as it is, according to the rigid rules of evidence though they may present an appearance of artificiality

(2) 71 Ind. Cas. 933 ; 50 I. A. 14 , 4 P. L. T. 29 ; (1923) A. I. R. (P. C.) 37 ; 32 M. L. T. 129 ; 44 M. L. J. 615 ; 25 Bom. L. R. 568 ; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 18 L. W. 767 ; 1 P. L. R. 445 ; 28 C. W. N. 446 (P. C.).

(3) 23 I. A. 138 ; 19 A. 39 ; 1 C. W. N. 52 ; 6 M. L. J. 211 ; 7 Sar. P. C. J. 88 ; 9 Ind. Dec. (N.S.) 25.

(1) 25 I. A. 9 ; 20 A. 171 ; 2 C. W. N. 129 ; 7 Sar. P. C. J. 273 ; 9 Ind. Dec. (N. S.) 471 (P. C.)

(5) 22 B. 107 ; 11 Ind. Dec. (N. S.) 653.

and even inconsistency in any particular case as pointed out by Viscount Birkenhead in *Rutherford* v. *Richardson* (6). Though a surety's liability will not be unduly extended, nevertheless it comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee. In *King* v. *Greenbil* (7) by an indenture dated the 13th February 1834 made between J. G. the plaintiff and the defendant J. G. mortgaged certain property to the plaintiff for securing £ 600 with a provisio for re-conveyance to J.G., if he should pay the principal and interest by the 13th February 1835, and the defendant covenanted with the plaintiffs "that the defendant and J. G. or one of them would during the continuance of their mortgage-security pay the plaintiff the interest to become due in respect, of the loan by two even half yearly instalments on the 13th of August and the 13th of February. It was held that the defendants liability continued till the principal sum was paid and was not limited to the 13th of February 1835. At p. 335 Tindal, C. J., has stated as follows :—"For the defendant, it is contended that his liability is limited to these two half yearly payments, while the plaintiff contends that the defendant 1's liability for the interest is kept on foot until the debt is naturally satisfied and that the mortgage-security continues all that time, and certainly that seems to be much more reasonable construction. Is it likely that a party who looked for security from his defendant would be satisfied with so bad a contract as now suggested? The recital does not allude to the defendant's consenting to be a security up to a particular time and no longer." The present case is more or less similar to that of King v. Greenbill. I have given due consideration to the words "if the mortgagor fails to pay the same regularly", but I do not attach any greater importance to the word "regularly" than to imply that to mean "as it becomes due".

There is no evidence that the plaintiff consented to allow time to the mortgagors to pay the amount. The mere forbearance on the part of the plaintiff to sue will not discharge the defendant No. 4 : Cf. section 137 of the Indian Contract Act. No authorities have been cited at the bar to show that there was any obligation on the plaintiff to give notice to the defendant No 4 of the failure of the mortgagors to pay the money or interest due thereon. Defendant No. 4 is not discharged from his liability by such failure.

I am of opinion that the liabilty of the defendant no. 4 is not limited to the period of one year only. The plaintiff is entitled to recover the amount of interest on the principal sum up to six months from the date of the preliminary decree, when the principal sum is payable by the defendants 1 to 3. The preliminary decree operates as a merger with regard to the liability to pay future interest and releases the surety from his liability under the deed. *Feber* v. *Earl of Lathom, Gye*, third party (8). In clause 3 of paragraph 6 of the plaint, the plaintiff has not claimed interest on the deficiency of the sale proceeds. Ex. 3 expressly provides such for deficiency and interest being recovered from the mortgagors, and the clause as to payment of interest by surety can not be extended to interest due on such deficiency,

My findings, therefore, are on issue No. 1 that the plaintiff is entitled to the rate of one per cent. per mensem from the date of default as against the defendants Nos. 1 to 3 and that the amount claimed by him as interest up to date of suit is properly calculated. On issue No 2 that the defendant is liable to pay interest accruing due up to the date fixed by the preliminary decree for payment of the principal amount.

With regard to costs, I am of opinion that, under the peculiar circumstances of this case, I should allow to the plaintiff only the institution fee paid on the plaint and no further costs. The plaintiff delayed instituting the suit for a considerable time, and though the plaint was filed on 1st August 1922, the suit did not come on for hearing till July 1923 owing to the dilatoriness of the plaintiff, the plaintiff having thereby gained advantage of getting interest at one per cent. per mensem by such delay.

My finding on issue No. 3, therefore, is that the plaintiff is entitled to the usual preliminary mortgage decree for Rs. 15,860 costs of the suit limited to the institution

(6) (1923) A. C. 1 at p. 5 , 92 L. J. P. I. , 128 L. T. 309 ; 67 S. J. 78 ; 39 T. L. R. 12

(7) (1843) 12 L. J. C. P. 333; 6 Man. & G. 59 ; 6 Scott. (N. R.) 869 7 Jur. 604 ; 134 E. R. 908.

(8) (1897) 77 L. J. 168.

and interest at the rate of one per cent. per mensem from the date of the suit to the date of the final decree as against defendants No. 1 to 3 and thereafter at 6 per cent. per annum, and to a decree for Rs. 3,860 and further interest on Rs. 12,000 at the rate of one per cent. per mensem from the date of suit to the date fixed by the preliminary decree for payment of the principal amount, the said amount to be recoverable from defendant No. 4. In the event of the sale proceeds of the mortgaged property being insufficient to meet the amount payable to the plaintiff up to the date of the final decree, the plaintiff to have liberty to apply for a personal decree against defendants Nos. 1 and 2 and for a decree against the property of the deceased Ramzan in the hands of defendant No. 3.

S. D. *Suit decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL NO. 156 OF 1922.

December 4, 1923.

Present:—Mr. Baker, J. C.

RAMBUX AND ANOTHER—APPELLANTS
versus
MOTI AND OTHERS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 11—Question of title—Jurisdiction of Small Cause Court—Berar Land Revenue Act, s. 220—Suit for declaration of grazing rights, whether cognisable by Civil Court.

A Small Cause Court has no jurisdiction to determine questions of title, and a pronouncement made by a Small Cause Court on a question of title cannot affect the entries in the Revenue Records.

A correction of the Record of Rights means an actual alteration of the entries therein.

A suit for a declaration that certain land is reserved for grazing village cattle and that the *malgusar* has no right to let it out does not fall under any of the heads of s. 220 of the Berar Land Revenue Act, and is, therefore, cognisable by a Civil Court.

Appeal against the decision of the District Judge, Hoshangabad, in Civil Appeal No. 112 of 1921, decided on the 24th December 1921.

Mr. *M. Gupta*, for the Appellants.

Mr. *J. Sen*, for the Respondents.

JUDGMENT.—The plaintiffs, who are tenants in the village of Bor, sued for a declaration that fields Nos. 8 and 60 of that village are reserved for grazing the village cattle and that the defendant No. 3, who is a *Malguzar* had no right to let them to defendants 1 and 2. The Munsif of Sohagpur held that the field No. 8 could not be let out in contravention of the custom embodied in the *wajib-ul-arz* and that the defendants Nos. 1 and 2 have no claim to it. They did not claim field No. 60.

On appeal the District Judge of Hoshangabad held that the Record of Rights shows that field No. 8, was set aside for grazing purposes; that there had been no correction of the entry, and that the decision of the first Court was correct, and he consequently dismissed the appeal.

Defendants 1 and 2 make this second appeal.

The principal contention put forward is that the entry in the *wajib-ul-arz* is superseded by the orders of the Revenue Officers, actual correction not being necessary, and that the suit is not cognizable by a Civil Court under the provisions of section 220 of the Land Revenue Act. It is also pleaded that the suit is barred by limitation.

It is undisputed that the land is recorded in the *wajib-ul-arz* as grazing land, not to be brought under cultivation. It appears that an application was made by the residents of the village to the Revenue authorities against the letting of the land to the present defendants, but the Revenue Officers said they could do nothing as the land had been declared by the Munsif of Sohagpur, sitting as a Judge in a Small Cause suit, to be held under ordinary tenancy. The application was accordingly rejected and no correction was made in village records.

The land was entered as grazing land in the last Settlement under sections 78 and 79 of the Land Revenue Act and no suit was brought under section 80 of the Act to have the entry altered. The land is not shown in the defendants' *patta*; the village records show the land to be grazing land and no correction in the Record of Rights has been made under section 46 of the Land Revenue Act. The Small

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Cause Court had no jurisdiction to determine the question of title and the view of the Revenue authorities appears to be founded on a misconception. In any case, no action has been taken by them to make the correction, nor could any such correction be made on a pronouncement by a Small Cause Court.

Applications were put in by the plaintiffs under section 219 of the Land Revenue Act to eject the defendants, but no action has been taken. The only ground for holding the entry in the Record of Rights to be incorrect is apparently a decision by a Court having no jurisdiction. No question of limitation arises because the only order passed by the Revenue authorities was one declining to interfere. As to the argument regarding jurisdiction, the present case does not fall under any of the heads under section 220 of the Land Revenue Act, since the plaintiffs do not ask for any correction of the Record of Rights or for any ruling in respect of any of the matters referred to in that section. There has, therefore, been no correction of the Record of Rights, and the land which has been expressly declared to be common land, cannot be let out to defendants. Correction of the Record of Rights must mean an actual alteration of the entries therein.

The view of the lower Courts is, therefore, correct. The appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 744 OF 1922.

October 30, 1923.

Present :—Mr. Justice Sulaiman.

BANS LOCHAN RAI—PLAINTIFF—APPELLANT

versus

JAGANNATH LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienations by—Reversioner, whether bound to challenge all alienations in one suit.

There is no law which compels a reversioner of a deceased Hindu to bring one common suit to challenge all alienations made by the widow of the deceased, where such alienations are in respect of different rights and in favour of different parties. He can, if he so chooses, get one of several transfers made by the widow set aside, leaving the others unchallenged.

Second appeal against the decree of the District Judge of Ghazipur, dated the 17th February 1922.

Mr. *Ambika Prasad*, for the Appellant.

Messrs. *Haribans Sahai* and *S. N. Verma*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for declaration and recovery of possession of certain plots of land.

Musammat Soukali, a Hindu widow in possession, executed a permanent lease on the 28th of April 1902 of four *sir* plots in favour of *Musammat* Bhola Kunwar. There was another person who also joined in the deed, but as he did not actually become the heir of the estate it is immaterial to consider this circumstance. In 1913 *Musammat* Soukali executed a sale-deed of her rights in the same plots in favour of Bhawani Din. In 1916 Bhawani Din transferred his rights to Ram Naresh and others. On the 23rd May 1920 the widow died.

The present plaintiffs, who are the reversioners to the estate, instituted this suit alleging that the lease in question was a fictitious document and, in the alternative, that it was not binding on them as subsequent heirs after the death of the widow. They also sought a decree for possession in case they were found to be out of possession.

There was some question raised in the Court below as to whether the whole estate had been transferred by *Musammat* Soukali in 1913 or not. It was suggested on behalf of the plaintiffs that a small fractional share was left out. This point has been decided against the plaintiff by the learned District Judge, and they have not sought to challenge it before me. It may, therefore, be taken for granted that in 1902 *Musammat* Soukali executed a permanent lease of the four plots in question and then, some eleven years afterwards, she purported to transfer whatever she had left in those plots, along with other properties, to Bhawani Din

The learned District Judge had dismissed the suit on the technical ground that, so long

as the plaintiff had not got the subsequent sale-deed of 1913 set aside they had no *locus standi* to bring this suit in respect of the previous lease. This was the view which also had found favour with the Court of first instance.

I am quite unable to agree in this view. There are two points which have been entirely overlooked by both the Courts below. The first is, that the plaintiff had a separate cause of action with respect to these two separate deeds which where in favour of different sets of persons. There is no law which compels a reversioner to bring one common suit to challenge all alienations made by a Hindu widow even though such alienations are in respect of different rights and in favour of different parties. Twelve years have not yet expired since the death of the widow and it cannot even be suggested that the reversioner's right to have the subsequent sale-deed set aside has in any way been extinguished. As a matter of fact, on behalf of the appellant a certified copy of the judgment was tendered before me as showing that, on a subsequent date, a suit for cancellation of the subsequent sale-deed was actually decreed. I have not admitted this copy because, for the purposes of this appeal, the point is immaterial.

The second ground is, that it is open to the reversioners to get only one of several transfers made by a Hindu widow set aside leaving aside the several transfers if they so choose to act. So far as the defendants, who are the representatives of the permanent lessee, are concerned, if it is established that the transfer in their favour was without legal necessity and was not binding on the reversioners they would have to give up possession of the lands. The position of the reversioners would then be that they would obtain possession of these lands and hold them at least as against the defendants. If they succeed to get the subsequent sale-deed set aside they would then become absolute owners. If, however, they fail to do that or omit to institute a suit, then at best their liability would only be to pay the rent reserved in the permanent lease to Bhawani Din or his representatives.

I cannot see how the suit can be thrown out on the technical ground that the plaintiffs did not, before instituting the present suit, institute another suit for setting aside a transfer which had taken place eleven years afterwards and which was in favour of persons who are no parties to the suit. In my opinion the ground on which the suit has been dismissed was wholly unjustified. No other question has been decided by the learned District Judge. The finding of the Court of first instance as regards the rights of defendant No. 8 have in no way been challenged.

I accordingly allow this appeal, set aside the decree of the lower Appellate Court and remand the case for disposal according to law.

It has been brought to my notice that Raja Ram, respondent No. 5, was not properly served and no further steps were taken as against him. It has also been pointed out that Tilakdhar, respondent No. 6, is dead and no attempt has been made to bring his legal representatives on the record. If any of these persons did not form members of a Hindu joint family of which the surviving members are already on the record, it is quite clear that, so far as the interest of that person in the lease is concerned, it will remain absolutely unaffected by the present decree. The decree of the Court below shall stand as regards their interests.

Costs of the appeal will be costs in the cause and will abide the result.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE 809 OF 1923.

January 22, 1924.

Present: —Mr. Justice Suhrawardy and Mr Justice Page.

F. D. BELLOW—PETITIONER.
versus
T. ELKE—OPPOSITE PARTY.

Calcutta Rent Act (III of 1920) s. 15—Standardisation of rent, application for—Applicant ceasing to be tenant, effect of—Abatement—New tenant, whether necessary party—Procedure

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There is nothing in the Calcutta Rent Act which indicates that a proceeding regularly started under the Act comes to a determination as soon as the relationship of landlord and tenant between the parties has ceased.

The Calcutta Rent Act does not make it obligatory upon an applicant for standardisation of rent to make all persons interested in the litigation parties to the proceeding, except the landlord.

Where an applicant for standardisation of rent ceases to be the tenant before the proceeding is terminated and the premises are let to a new tenant the latter, if he so chooses, may make an application to the Rent Collector to be heard at the time of the hearing of the case.

Rule against the order of the Controller of Rent, Calcutta in Standard Rent Case No. 673 of 1922.

Babu *Mahendra Nath Roy* (with him Babu *Lalit Mohan Sanyal*) for the Petitioner.

Babu *Bepin Chandra Mallik*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—In this Rule we are asked to revise the order of the Rent Controller dated the 6th July 1923 in Standard Rent Case No. 673 of 1922 dismissing the application of the petitioner under section 15 of the Calcutta Rent Act, III of 1920. The facts are that the petitioner was a tenant under the opposite party in respect of premises No. 24, Royd Street, for 6 months from the 5th August 1922. On the 31st October 1922 the petitioner applied to the Rent Controller to have the standard rent fixed. The case was adjourned from time to time and it took eight months to come to a hearing. On the 30th June 1923 the petitioner was evicted under a decree of the Calcutta Small Cause Court. That decree was passed on the 14th May 1923 on the ground that the tenant had not paid rent and was an insolvent. On the 6th July 1923 the petitioner's application under the Rent Act was dismissed. The ground upon which the application has been dismissed is that the petitioner having ceased to be a tenant in respect of the premises for which he had applied for standardisation of the rent, the case could not go on. No authority has been cited for this view, but the learned Rent Controller has felt himself bound by a certain ruling of the President of the Improvement Trust Tribunal who under the Act has been vested with revisional authority over the Rent Controller.

Under the Act a tenant is empowered to apply to the Rent Controller to have the standard rent of a premises fixed. It is conceded by the learned Vakil for the opposite party that there is nothing in the Act which indicates that the proceedings under it come to a determination as soon as the relationship of landlord and tenant between the parties has ceased. But it is argued that, in consideration of the general scheme of the Act, it must be so. I am unable to accede to this proposition. I find on a close scrutiny of the Act nothing in it to justify the dropping of a proceeding which has been started regularly under the Act because one of the parties was not at the date of the hearing occupying the position which he did at the commencement of the case. In my opinion, when a case has been regularly started, there must be some direct provision in law to disqualify it from being carried to the end. Reference has been made to certain provisions of the Act. Section 8 has been referred to as indicating that when there is an enhancement of rent on the application of the landlord he cannot recover it until after the expiration of one month after the landlord served on the tenant a notice in writing of his intention to increase the rent. I do not think that this provision lends support to the contention of the landlord. Then reliance has been placed upon section 14 which provides that when a tenant has over-paid the landlord and the rent is subsequently reduced he may recover the amount from the landlord and may deduct it from any rent payable within six months. It is contended that this indicates that the relationship of landlord and tenant must continue even after the Rent Controller has fixed the rent. It may be so, but that section provides that this is one of the modes of recovering monies paid to the landlord more than what was due to him, as it is especially mentioned that this remedy is without prejudice to any other method of recovery. A person who has ceased to be a tenant has under the general law a right to recover any over-payment made to the landlord.

In support of my view reference may be made to section 15, clause (4), which says that before exercising any of the

powers conferred upon him by this Act the Controller shall give notice of his intention to the landlord and tenant if any." The words "if any" indicate that it is possible that when the time comes for the Rent Controller to give notice of his intention under the Act one of the parties may have ceased to be either a landlord or a tenant.

It is also argued on behalf of the opposite party that the application before the Rent Controller was not maintainable inasmuch as the new tenant who was brought on the premises after the petitioner had left it ought to have been made a party because any decision in this case will be binding upon him. I do not see much force in this contention. The Act does not make it obligatory upon the applicant for standardisation of rent to make all persons interested in the litigation parties to the proceeding except the landlord; and this view finds support from section 15, clause (4), of the Act which provides that the Rent Controller shall duly consider any application received by him from any person interested. The new tenant, if he so chooses, may make an application to the Rent Controller to be heard at the time of the hearing of this case. I may also refer, in this connection, to the provisions of O. I, r. 9, Civil Procedure Code which provides against this dismissal of a case for want of proper parties.

I may add that a copy of this Rule was also served on the Rent Controller and he has submitted his observations. He seems to be now of opinion that he was not right in dismissing the case. He has, however, followed a decision of the President of the Tribunal which he considers to be binding upon him. He has asked us to express an opinion as to how far he is bound by the ruling of the President. In this case it is not necessary for us to decide that question.

In the result this Rule should, in my opinion, be made absolute, the order of the Rent Controller dated the 6th July 1923, set aside and the case sent back to him for a re-hearing according to law. Costs will abide the result. I assess the hearing fee in this Court at two gold mohurs.

Page, J.—I am of the same opinion. On the 30th October 1922, the petitioner applied to the Rent Controller that the rent of the premises of which he was then a tenant might be standardised under section 15 of the Calcutta Rent Act. On the 19th June 1923 the hearing of the application was adjourned until the 6th July 1923 Meanwhile, on the 14h May, a decree was passed by the Court of Small Causes ejecting the petitioner from the premises and on the 30th June he vacated the premises. When the case was called for hearing on the 6th July 1923 the Rent Controller dismissed the application on the ground that the applicant was no longer tenant of the premises. The question which we have to determine is, whether or not he had jurisdiction to make that order. The determination of this issue does not appear to me to present any real difficulty. It is true that an application for standardisation of rent under section 15, must needs be made by a landlord or by a tenant of the premises in question. In this case the application was made by the tenant. There is nothing in the Act which provides that the application shall become inoperative, although properly made in the first instance, because subsequent to the making of the application but before the rent was standardised, a change of tenant has taken place. In this case it would not appear upon the evidence as placed before us, that the petitioner had any right to recover the difference between the rent which he had paid and the standard rent which under the application might be assessed because the last payment of rent which was made by the petitioner was in February 1923, in respect of the period ending with the 31st January 1923, and under section 14, sub-section (1), of the Act it is provided that "where any sum has after the commencement of the Act been paid on account of rent being a sum which is by reason of the provisions of this Act irrecoverable, such sum shall at any time within a period of six months from the date of payment be recovered by the tenant by whom it was paid from the landlord receiving the payment." But we are invited to decide this issue irrespective of the rights which accrued or may accrue under the Rent Act to the petitioner. In my opinion, under circumstances, such as those in this case, the Controller is under an obligation to grant a certificate certifying the standard rent; and for this reason that, if in such circumstances

the Rent Controller does not proceed to certify the rent and neither the landlord nor the subsequent tenant applies for standardisation under section 15, no standard rent will be fixed, and a tenant who might have applied, while still a tenant, for a certificate of standardisation because he was desirous of recovering rent over-paid which was irrecoverable under the Act, would be deprived of an opportunity of making a claim to recover that rent overpaid because no standard rent in fact was fixed. On the other hand, it is urged on behalf of the opposite party that, if a person who at the time when he made the application for standardisation was a tenant, but who before the certificate was issued by the Controller had ceased to be a tenant, was entitled after he had ceased to be a tenant to call upon the Rent Controller to fix the rent, the result might be that the tenant of the premises at the time when the rent was standardised would have no voice or opportunity of placing before the tribunal facts he thought material for the purpose of standardisation of the rent. In my opinion, there is no substance in this contention because, under section 15, sub-section (4), of the Act, the Rent Controller "before exercising any of the powers conferred on him by this Act shall give notice of his intention to the landlord and tenant, if any, and shall duly consider any application received by him from any person interested within such period as shall be specified in the notice." It would be open on this application from the present tenant, if he elected so to do to apply to the Rent Controller to be heard on the question as to what was the right sum to be fixed for the standard rent. In these circumstances, it seems to me that if the contention of the opposite party was held to be valid, injustice might result to persons who were tenants at the time when they made the application for standardisation of rent, whereas, if the Rent Controller, in such circumstances as those prevailing in this case, were to continue the proceedings and to certify standard rent no hardship, so far as I can see, would result to any body. In these circumstances, in my opinion, this Rule should be made absolute in the sense in which my learned brother has stated.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 785 OF 1922.

November 22, 1923.

Present.—Mr. Justice Kanhaiya Lal.

KANHAIYA LAL—PLAINTIFF—APPELLANT

versus

Musammat AZMATUNNISA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross appeals—Cross-objection, whether can be filed in connection with cross-appeal.

A party who has filed an appeal from one part of a decree can file a cross-objection in regard to another part of the decree in connection with a cross-appeal filed by the other party.

Ramji Das v. *Ajudhia Prasad*, 25 A. 628; A. W. N. (1903) p. 160, *Hoolas Koeree* v. *Bibee Sufechun*, 8 W. R. 379, distinguished.

Second appeal against the decree of the Additional Judge of Cawnpore, dated the 14th of February 1922.

Messrs. *Iqbal Ahmad* and *Mangal Prasad Bhargava*, for the Appellant.

Mr. *S. Raza Ali*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is, whether a party who has filed an appeal from one part of the decree can file a cross-objection in regard to another part of the decree in connection with the cross-appeal filed by the other party. The lower Appellate Court has found that he cannot do so. It has relied in support of that view on the decision in *Ramji Das* v. *Ajudhia Prasad* (1). In that case the cross-objection was filed after the appeal was dismissed and the subject-matter of the appeal and the cross-objection was the same. That was clearly a case in which the decision of the appeal operated as a bar to the entertainment of the cross-objection. The same matter can not obviously be agitated both in an appeal and in a cross-objection. O. XLI, r. 22 of the Code of Civil Procedure provides that any respondent can not only support the decree on any of the grounds decided against him in the Court below but can take any cross-objection to the decree, which he could have taken

(1) 25 A. 628; A. W. N. (1903) 160.

by way of appeal, provided he has filed such objection within a certain period therein mentioned, although he may not have appealed from that part of the decree, which the cross objection is intended to cover. There is nothing in that provision to prevent a party from filing an appeal from one part of the decree and contenting himself with filing a cross-objection about another part of the decree in a cross-appeal filed by the other side before the former appeal has been decided. The appeal and the cross-appeal in the present case came up for hearing along with the cross-objection on the same date. In fact, they were heard together and disposed of by the same judgment. The lower Appellate Court was not justified in refusing to entertain the cross-objection because the appeal had not till then been heard and the appeal and the cross-objection related to different matters.

The learned Counsel for the defendant-respondent has referred to a decision in *Hoolas Koeree* v. *Bibee Sufeehun* (2) but that decision proceeded on several grounds, any one of which would have been fatal to the entertainment of the cross-objection. The cross-objection sought to be filed in that case was an oral objection, unaccompanied by a written memorandum of the grounds of such objection or by the Court-fee required by Law to be paid thereon. The language of section 348 of the Code of Civil Procedure (Act VIII of 1859) then in force was moreover not the same as that of O. XLI, r. 22 of the present Code. The latter clearly lays down that the omission to file an appeal from any part of the decree shall be no bar to the filing of a cross-objection about that part, much less mere filing of an appeal about one part bar the filing of a cross-objection about another and a separate part of the decree, though the subsequent decision of the former in some cases directly or indirectly affect the decision of the latter.

This appeal must, therefore, be allowed and the case remanded to the lower Appellate Court with a direction to re-admit the cross-objection under its original number and dispose of it in the manner provided by law. The costs here and hitherto will abide the result.

Appeal allowed.

(2) 8 W. R. 379.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 63 of 1922.

November 5, 1923.

Present: -Mr. Wazir Hasan, A. J. C.

SAMI DAYAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TIRBHAWAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17, cl (b)—Family Settlement—Acknowledgment of antecedent title—Registration.

A deed of compromise which merely recognises the antecedent title of the parties and defines their interest in the property, is in the nature of a family settlement and is exempt from the provisions of s. 17, cl (b) of the Registration Act.

Umrao Singh v. *Lachman Singh*, 10 Ind. Cas. 285, 33 A. 344; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 34 O. C. 133; 38 I. A. 104; (1911) 2 M. W. N. 242 (P. C.); *Lala Cudh Beharee Lal* v. *Ranee Mewa Koonwar*, 3 Agra H. C. R. 84; *Khunni Lal* v. *Gobind Krishna, Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. J. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.). *Satroban Lal* v. *Nageshar Prasad*, 35 Ind. Cas. 770; 19 O. C. 75; 3 O. L. J. 399, referred to.

Mr. *Bisheshar Nath Srivastava*, for the Appellants.

Mr. *Ram Chandra*, for the Respondents 1, 3, 5 and 8. Respondents, 2, 4, 6 and 7 served, called out, absent.

JUDGMENT.—This is the plaintiffs appeal. One Surajbali was the owner of the properties in suit. He died on the 4th May 1919. He was married twice. By his first wife was born Sami Dayal, plaintiff No. 1 in this suit. Badri Narain is the son of Sami Dayal and is plaintiff No. 2. Bindeshri Prasad is the son of Badri Narain and is plaintiff No. 3. By his second wife were born his sons Tirbhawan, Lallu Sumran and Hirde Narain. Hirde Narain is dead. The other three are the defendants Nos. 1 to 3. Parmeswar, defendant No 4, is his son. Mangli Prasad, defendant No. 5, is the son of defendant No. 1, Rampher, defendant No. 6 and Ram Pargat, defendant No. 7,

are the sons of defendant No. 2. Mata Prasad, defendant No. 8, is the son of defendant No. 3. The suit out of which this appeal has arisen was a claim for partition of the properties which belonged to Surajbali and were stated specifically in the lists attached to the plaint. The plaintiffs claimed a half share in those properties, admitting the title to the other half of the defendants to the suit. The ground on which one half share was claimed by the plaintiffs was that there existed a custom in the family according to which the distribution of patrimony was regulated amongst the descendants of the propositus by the number of the wives of the deceased ; in other words, the descendants of the first wife, according to that custom, would be entitled to one half and the descendants ofithe second wife would be entitled to the other half, it being immaterial what the number of the descendants of either of the two wives is.

On the 7th June 1919, three applications were made by the defendant No. 1, for mutation of names in respect of the properties of Surajbali, stating that all the descendants of Surajbali were entitled to those properties in accordance with the Hindu Law. This, of course, had the effect of making the plaintiff No. 1's share olny one-fifth in the properties of his father, the remaining four-fifths would on the same ground belong to the defendants Nos. 1 to 4 in equal shares (Exs. A1, A4 and A7) On the 26th June 1919, plaintiff No. 1 filed objections in respect of these applications for mutation. By these objections he set up the custom already mentioned (Exs. A2, A5 and A8). Thus a controversy arose amongst these persons as to the distribution of the inheritance which had devolved on them either by survivorship or by right of inheritance in the estate of their deceased father. On the 17th July 1919, however, the dispute was settled by amicable settlement. Three petitions of compromise were filed before the Naib Tehsildar, who had the seizin of the mutation proceedings. The parties to each of these petitions were plaintiff No. 1 and the defendants Nos. 1 to 4 (Exs. A3, A6 and A9). Three days before the final order was recorded by the Naib Tahsildar, the plaintiff No. 1 repudiated the compromise. In what terms this repudiation was made there is not much on the record to tell. All that we find is a cursory reference in the Tahsildar's report dated the 31st July 1919 (Ex. 8). In this report it is said that Sami Dayal objected to the compromise on the ground that he had been deceived into it. Mutation was, however, ordered in accordance with the terms of the compromise by the Sub-Divisional Officer on the 11th December 1919 (Ex. A10).

According to this compromise, the property was divided according to the Hindu Law in equal shares amongst all the sons of Surajbali, deceased, and 15 *bighas* of land were allotted to the plaintiff No. 1 in excess of that share. The object of the present suit is to get rid of the compromise and to enforce the partition in accordance with the alleged custom.

As to the compromise, the plaintiffs' case was stated in paragraph 8 of the plaint. Substantially, it is a case of fraud and misrepresentation The evidence on the point is very scanty indeed. The plaintiff No. 1 went into the witness-box and supported his case. His version is that the settlement arrived at between the parties was one allowing a half share to him in accordance with the custom, the other half being allotted to the defendants and that they were to receive 15 *bighas* of land in excess of the share so allotted to them. He is an illiterate person. The contents of the petition of compromise were not read over to him and he affixed his thumb impression to it without knowing its contents and under the impression that those contents were of the compromise as were settled in the manner stated by him. The learned Subordinate Judge has disbelieved the story given by the plaintiff No. 1. On the other hand, we have the evidence of the defendant No. 1, in support of the defence which is that the plaintiff No. 1 agreed to the compromise with full knowledge of its terms as disclosed in the petitions. In the circumstances, it is not possible to accept the evidence of either of the two most interested persons in the litigation as sufficient for finding out the truth of the matter. The only evidence which can be characterised as of an independent character is that of the Naib Registration Qanungo, the official who acted as a reader to the Naib Tahsildar in the mutation proceedings when they were pending before him. I will quote here a passage from the statement of this witness. "The parties to the compromise were

told the contents of the compromise which were read to them by me and I asked them whether they agreed to the terms in them. This was done in the presence of the Naib Tahsildar aforesaid. All the parties to the compromise said that they agreed to the terms of the compromise and then their signatures were obtained by way of verification to the said compromise ....The plaintiff No. 1 was present at the time. He made his thumb impression on the back of the petitions of compromise by way of verification." This statement as to the events that happened in respect of these petitions of compromise has been accepted as true by the learned Subordinate Judge and I find no reason to disagree with him on this point. I must hold that the case of fraud and misrepresentation in respect of the compromise fails.

It was argued by the learned Advocate for the appellants that the petitions of compromise were inadmissible in evidence because they were not registered, while they were documents which required to be registered by section 17 (b) of the Registration Act. There is no doubt that these petitions are clearly settlements of dispute which had arisen amongst the descendants of Suraj bali in the Revenue Court in respect of the distribution of the properties belonging to him. On the side of the plaintiff a claim was set up for a half share in those properties on the basis of a custom. On the side of the defendants the alleged custom was denied and distribution was claimed according to the Hindu Law. The controversy was brought to a close by an acknowledgment on the part of the parties of the rights of each other in the estate of their deceased father to the extent and in the manner indicated in the petitions of compromise. But for the allotment of 15 *bighas* of land to the plaintiff No. 1 the distribution was in accordance with the case of the defendants. The allotment might have been made under a belief that the plaintiff being the eldest member of the family was by some arrangement entitled to a slightly greater consideration than that accorded to the other members of the family. It is true that, merely describing these petitions as family settlement or merely holding that in their nature they are family settlement, would not exempt them from the provisions of section 17(b) of the Indian Registration Act if they fall within the terms of that section. This was pointed out by their Lordships of the Privy Council in the case of *Umrao Singh* v. *Lachman Singh* (1). The present petitions, however, are clearly of a nature which purports or operates neither to create, assign or extinguish any right, title or interest in present or in future in immoveable property, nor had they "declared" any such right, title or interest. The true nature of such a settlement was described by their Lordships of the Privy Council in the case *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (2) and again in the case of *Khunnu Lal* v. *Gobind Kishna Narain* (3) as being acknowledgment of an antecedent title. In this connection, I may usefully refer also to a decision of a Bench of this Court in the case of *Satrohan Lal* v. *Nageshar Prasad* (4). The present case is a striking illustration of such an acknowledgment. All the sons of Surajbali, who are parties to this litigation, are entitled to the inheritance in the estate of their deceased father. The only question in controversy was the definition of the interest of each in that inheritance. This definition was made by making the acknowledgment contained in the petitions of compromise. I am, therefore, of opinion that the petitions did not require registration and were rightly admitted in evidence by the learned Subordinate Judge.

On the question of custom, the learned Subordinate Judge has found that the custom set up by the plaintiffs was not established. I have heard the arguments of the learned Advocate for the appellants challenging the propriety of this finding but in view of the opinion which I have formed on the question of compromise I did not hear the respondents' reply on the point of custom.

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

S. D. *Appeal dismissed.*

(1) 10 Ind. Cas. 285 ; 33 A. 344 ; 15 C. W. N. 497 ; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507 ; 13 Bom. L. R. 404 21 M. L. J. 637 ; 14 O. C. 133 ; 38 I. A. 104, (1911) 2 M. W. N. 242 (P. C.).

(2) 3 Agra H. C. R. 84.

(3) 10 Ind. Cas. 477 ; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575 ; 13 Bom. L. R. 427; 10 M. L. T. 25 ; (1911) M. W. N. 432 ; 21 M. L. J. 645 ; 38 I. A. 87 (P. C.).

(4) 35 Ind. Cas. 770; 19 O. C. 75 ; 3 O. L. J. 339.

MOHAMMAD TAQI KHAN *v.* DORI

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 346 OF 1922.

November 20, 1923.

Present :—Mr. Justice Kanhaya Lal.

MOHAMMAD TAQI KHAN—PLAINTIFF—APPELLANT

versus

DORI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenant using plot in abadi *for temporary purpose, whether entitled to build on it.*

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord, though he may have been using it for a long time for temporary purposes, for instance, as a threshing floor.

Chatterpal v. *Gajadhar Upadhia*, 25 I. C. 59, followed.

Second appeal against the decree of the District Judge of Pilibhit, dated the 9th of December 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

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

JUDGMENT.—In this case certain issues were remitted by this Court on the 21st of June 1923. The effect of the findings on those issues is that the plaintiff is entitled to a decree for possession of the disputed land and for the removal of the construction made thereon by the defendants. The people of the village have evidently been using the land as a threshing floor for some time past. It was recorded as *kharmangat* or threshing floor in the *khasra* prepared at the last Settlement. They had, however, no right to construct an enclosure thereon and thereby to appropriate the whole land to their exclusive use. As held in *Chatterpal* v. *Gajadhar Upadhya* (1), a tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord, though he may have been using it for temporary purposes for a long time.

The appeal is, therefore, allowed and the claim of the plaintiff decreed for possession of the disputed land and for the removal of the structures built thereon by the defendants with costs here and hitherto. The defendants will be entitled to remove the materials of the construction which they have made. The right of the defendants to use the land as a threshing floor in common with the other tenants of the village will remain unaffected. The defendants will bear their own costs throughout.

Z. K. *Appeal allowed.*

(1) 25 Ind. Cas. 59.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 226, 303 OF 1922.

February 20, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

IN NO. 226 OF 1922.

SUKHDEODAS REKHABDAS—DEFENDANT—APPELLANT

versus

TRIKUMDAS CALLIANJI—AND OTHERS PLAINTIFFS—RESPONDENTS.

IN NO. 303 OF 1922.

BAHADUR MULL RAMPURIA—DEFENDANT—APPELLANT

versus

TRICUMDAS CALLIANJI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (M.), O. XXXVIII, r. 5—Attachment before judgment, application for, form of—Affidavit containing necessary allegations—Contingent debt, whether can be attached—Garnishee, whether can appeal against garnishee order—Appeal—Appellate Court, whether can take cognisance of fact which occurred during pendency of appeal.

When a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal, the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the Appellate Court to decide at the hearing of the appeal.

A debt in order to be attachable need not be ascertained but must be accruing or have accrued, that is to say, a *debitum in praesenti solvendum in futuro.*

Driscoll v. *Manchester Insurance Committee*, (1915) 3. K. B. 499 at p. 516 ; 85 L. J. K. B. 83 ; 113 L. J. 683 , 79 J. P. 553 ; 13 L. G. R. 1156 ; 59 S. J. 597 ; 31 T. L. R. 532, relied on.

SUKHDEODAS REKHABDAS *v.* TRIKUMDAS CALLIANJI

Defendant first party sold certain property to defendants second party and a sum of three lakhs was left with the vendees to pay off a mortgage on the property. It was stipulated that if the mortgage amount turned out to be less than three lakhs the balance should be paid to the vendor. Plaintiff filed a suit against the defendants to recover a certain amount which he alleged was the balance of the unpaid purchase-money in respect of the same property which he had sold to defendant first party. He made an application under O. XXXVIII, r. 5 of the Civil Procedure Code for attachment before judgment of the sum of three lakhs which was in the hands of the defendants second party. The application did not contain the allegations necessary to bring it under O. XXXVIII, r. 5, but the affidavit accompanying it contained the requisite averments. The trial Court granted the application. Both sets of defendants appealed ;

Held (1) that although the application was not in proper form the defect was cured by the affidavit accompanying the application ;

(2) that as the defendants second party were prevented by the order complained of from paying the money even to the mortgagees and were likely to be prejudiced by the order, their appeal was maintainable ;

(3) that the interest of defendant first party in the sum of three lakhs in the hands of defendants second party was a merely contingent interest which was not liable to attachment under section 60 (m) of the Civil Procedure Code, and the order of the trial Court must, therefore, be set aside.

Syud Tuffuzzool Hossein Khan v. *Rughoonath Pershad*, 14 M. I. A. 40 at p. 50 ; 7 B. L. R. 186 ; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701 ; *Haridas Acharyia Chowdhury* v. *Baroda Kishore Achariya Choudhury*, 27 C. 38 ; 4 C. W. N. 87 ; 14 Ind. Dec. (N. S.) 26; *Sher Singh* v. *Sri Ram*, 30 A. 246 ; 5 A. L. J. 251 ; A. W. N. (1908) 101 ; 4 M. L. T. 10, relied on.

An Appellate Court can take cognisance of a fact which has occurred since the order appealed against was passed and which materially affects the rights of the parties to the appeal.

Appeals against the orders of the Subordinate Judge, 3rd Court, Hooghly, dated the 7th June 1922.

Babu *Mahendra Nath Roy* (with him Babus *Santimoy Mazumdar* and *Satish Chandra Sen*), for the Appellants in M. A. 226.

Dr. *Dwarka Nath Mitter* (with him Babus *Mohesh Chandra Banerjee*, *Bankim Chandra Mukerjee*), for the Respondents.

Babu *Banktn Chandra Mukerjee*, for the Appellants in M. A. 303.

Sir *Benode Mitter* (with him Babu *Mohesh Chandra Banerjee*), for the Respondents.

The facts of the case will appear from the judgment.

JUDGMENT.—These two appeals are directed against an order passed by the Court below under O. XXXVIII, r. 5, Civil Procedure Code, attaching before judgment a sum of 3 lacs of rupees alleged to be due to defendant No. 1 from defendants Nos. 2 to 4. The facts of the case relevant to the present enquiry may be shortly stated thus :—The defendant No 1 sold to defendants Nos. 2 to 4 (who may be shortly called the Rampurias) a certain mill called Callian Cotton Mills for Rs. 5 lacs by an Indenture dated the 21st July 1921. The mill was under mortgage to one Manik Lal Mansukbhai and the sale was subject to the mortgage. On the same day an agreement was entered into between defendant No. 1 and the Rampurias under which the Rampurias bound themselves to pay half the charge which was estimated at Rs. 3 lacs and if the amount they had to pay to the mortgagee was less than that sum, or nothing at all, they would pay to defendant No. 1 the said sum of Rs. 3 lacs or the balance thereof less the sum paid to the mortgagee and if the sum payable to the mortgagee exceeded Rs. 3 lacs the purchasers would bear the excess. Previous to the sale, Manik Lal had brought a suit on his mortgage against the plaintiff and others and the Rampurias were subsequently added as defendants. The defendants have pleaded payment and the suit is still pending. Subsequent to the sale, the plaintiff instituted a suit against the defendant No. 1 and the Rampurias for recovery of the alleged balance of the consideration money of the sale of the said Mill by the plaintiff to defendant No. 1 and for the further relief that the amount found to be due to plaintiff from the defendant be declared a charge on the said Mill as the lien of an unpaid vendor. In this suit, which is pending in the 3rd Court of the Subordinate Judge at Hooghly, the plaintiff applied to attach before judgment the sum of Rs. 3 lacs above-mentioned in the hands of the Rampuria defendants. On 7th June 1922, the Court below allowed the application and ordered the attachment. On 12th June the order was served on the Rampuria defendants and on

24th June they applied for a reconsideration of the order on the ground that it was passed in their absence and that it was an improper order. That application was rejected. The defendants have, therefore, preferred these two appeals against the order of the 7th June, 1922, Appeal No. 226 being by the first defendant Sukhdeo Das Rekhabdas and Appeal No. 303 by the Rampuria defendants. Both the appeals raise the same questions and are treated as analogous.

A preliminary objection has been taken by Sir Benode Mitter who appears for the plaintiff in Appeal No. 303 to the competency of the appeal by the Rampuria defendants. It is argued that a garnishee cannot appeal against a garnishee order under the Civil Procedure Code; he acquires a *locus standi* when the debt is sold in execution of the decree and the claim is sought to be enforced against him. It is not necessary to consider this question in the abstract, for in the present case the appellants are also defendants in the suit. It may safely be said that, when a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the Appellate Court to decide at the hearing of the appeal. It is urged by the learned Counsel that the Rampuria defendants are not affected by the order complained against, for, if the debt is not due by them, the order does not touch them and, if it is due, the order is a just and proper one and they cannot object to the payment of the money to any one to whom the Court directs them to pay. We do not think that this contention is well-founded. According to the plaintiffs' case these defendants have retained this sum of Rs. 3 lacs for payment to the mortgagee if any amount is found due to him. The order of attachment that has been served upon them prohibits them from paying that amount to any one, the effect of the order being that, in the event of the mortgagee securing a decree in his suit, the defendants will be unable to satisfy it and probably thereby prevent the sale of the Mill and of their other properties in execution of that decree. We accordingly hold that the appeal by defendants Nos. 2 to 4 is maintainable as they are parties to the suit and are thus affected by the order appealed from. It seems to us, however, that this question is not of much practical importance as the appeal by the defendant No. 1 whose right of appeal is unquestionable, will decide the same questions as are raised in the appeal by defendants Nos. 2 to 4.

The points raised in these appeals are, first, that the application made for attachment before judgment does not disclose facts on which an order under O. XXXVIII, r. 5 can be passed and, secondly, that the money which has been attached is not a debt due to the defendant No. 1 within the meaning of O. XXI, r. 46. There are other minor objections taken which will be noticed in the course of the judgment.

With reference to the first question, no doubt, the petition filed by the plaintiff on 31st March 1922 does not contain the allegations necessary to bring it under O. XXXVIII, r. 5, but the affidavit accompanying it sworn by the plaintiff contains the requisite averments and we do not think that this contention is of much substance.

The second point, however, is more substantial and requires close examination. The indenture by which the defendant No. 1 sold the Mill to the Rampuria defendants recites the consideration as Rs. 5 lacs subject to the mortgage of Manik Lal Mansukhbhai. It is, on the face of it, a sale of the equity of redemption for Rs. 5 lacs. There is an agreement of the same date by which the Rampurias agree to pay to the defendant No. 1 any sum that may be left in their hands after satisfying the mortgage-decree if it is not for more than Rs. 3 lacs. On the documents placed before us, it is evident that this agreement, though contemporaneous, did not form a part consideration of the sale of the property which was only the equity of redemption. It is significant that no mention of it is made in the deed of conveyance. Our attention has been drawn to a statement made by defendant No. 4 in an affidavit that the Rampurias have purchased the property for Rs. 8 lacs. It may be assumed to be correct in one sense, namely, that that is the value of the entire interest in the property without the encumbrance. Besides, such a statement cannot vary or supersede the contract embodied in solemn deeds. We are, therefore, of opinion that the sum of Rs. 3 lacs does not form a part of the consideration of the

sale and the defendant No. 1 has no interest in it under the contract of sale.

It is argued by the appellants that the sum attached is not a debt as it is indefinite, unascertained and contingent on the happening of an event in the future. In our judgment this contention ought to succeed. It is not an amount in which the defendant No. 1 has a vested interest *in praesenti* of which the payment is deferred to a future time. In *O'Driscoll* v. *Manchester Insurance Committee* (1) Bankes, L. J., quotes with approval the law on the subject stated in the Annual Practice— "But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not." The law, as we gather from authorities, is that a debt, in order to be attachable, need not be ascertained but must be accruing or have accrued, *a debitum in praesenti solvendum in futuro*. Looking at the facts of the present case in the light of the law as above stated, we are of opinion that the interest of the defendant No. 1 has not yet accrued in the money attached or in any portion of it and is not, therefore, an attachable debt. Reference may be made in this connection to the case of *Hutt* v. *Shaw* (2), where a certain sum of money was deposited with a stockbroker as 'cover' for any loss upon speculations in stocks and shares. It was held that it was not a debt due or accruing to the judgment-debtor, Lord Esher, M. R., observes:— "This sum was not in the hands of Shaw to be re-paid on demand. When the Garnishee Order Nisi was served the accounts were not settled." The present case is stronger in favour of the garnishee than Hutt's case. There the money belonged to the judgment-debtor and he had deposited it with the garnishee as 'cover' for certain speculative transactions. In the case before us, as we have observed, neither the sum of Rs. 3 lacs nor any portion of it belongs to the defendant No. 1 nor has he any present interest in it. On the facts of this case, the same considerations on which unaccrued maintenance or unearned salary is held unattachable ought to apply and the principle of law on which the cases *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3), *Haridas Acharjya Choudhury* v. *Baroda Kishore Acharjya Chowdhury* (4), and *Oher Singh* v. *Sriram* (5), were decided should govern the present case. The conclusion we have arrived at is, that the defendant No. 1 has at the most a contingent claim in this sum of Rs. 3 lacs which is not liable to attachment under section 60, clause (m), Civil Procedure Code. We observe that the learned Subordinate Judge has not considered this question, though it was raised before him, and we have not the advantage of his view on the point.

The order of attachment is also defective in other ways. In the first place, it restrains the Rampurias from paying the amount to any one not even excepting the mortgagee. This is in contravention of the terms of the contract between them and the defendant No. 1 and the plaintiff as an attaching creditor cannot have a right which the defendant No. 1 did not possess. Further, the agreement provides that the Rampuria defendants will contest the claim of the mortgagee up to the final Court of Appeal as the defendant No. 1 may direct, at the cost and expense of the latter. They will presumably be entitled to reimburse themselves from any sum that may be available to the defendant No. 1 out of the sum of Rs. 3 lacs. So, in no event, will the entire sum of Rs. 3 lacs be available to the defendant No. 1.

We may mention that the mortgagee Manick Lal has claimed a sum of Rs. 3 lacs and 17 thousand due on his mortgage in the suit brought by him. The plaintiff as a defendant in that suit pleaded payment of the entire amount and the other defendants also have taken the same defence. Subsequent to the order of attachment from which this appeal arises, the plaintiff filed an application in Manick Lal's suit not only withdrawing his defence but also praying that a decree for the amount claimed might be passed in favour of Manick Lal. Sir Benode Mitter for the

(1) (1915) 3 K. B. 499 at p. 516; 85 L. J. K. B. 83; 113 L. J. 683; 79 J. p. 553; 13 L. G. R. 1156; 59 S. J. 597; 31 P. L. R. 532

(2) (1887) 3 T. L. R. 354.

(3) 14 M. I. A. 40 at p. 50; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

(4) 27 C. 38; 4 C. W. N. 87; 14 Ind. Dec. (N.S.) 26.

(5) 30 A. 246; 5 A. L. J. 251; A. W. N. (1908) 101; 4 M. L. T. 10.

plaintiff urges that as a Court of Appeal we are not entitled to take notice of this fact which has happened subsequent to the order appealed from. In the view we take on other points it is not necessary for us to consider this question but we are inclined to the view that we are justified in taking cognizance of a fact which materially affects the rights of the parties to an appeal.

In accordance with the above observations the appeals are allowed and the order of the Court below, dated the 7th June 1922, is set aside. The attachment made under that order is withdrawn. The appellants are entitled to their costs in this Court which we assess at 5 gold mohurs in each appeal.

Z. K. *Appeals allowed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 33 OF 1923.

November 14, 1923.

Present :—Sir Dawson Miller, Kt., K. C., Chief Justice, and Justice Sir B. K. Mullick, Kt.

KHUB LAL UPADHYA—PLAINTIFF —APPELLANT

versus

JHABSI KANDU AND OTHERS— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. II, r. 4—Mortgage—Redemption suit—Persons claiming paramount title, whether can be joined as defendants.

Although it is, as a general rule, desirable in mortgage-suits to exclude all issues between the parties except those immediately concerned with the mortgage-suit itself, the Court may, in certain cases, if it thinks fit, allow other issues to be determined in such a suit, even if they depend upon separate causes of action. Under O. II, r. 4, of the Civil Procedure Code a plaintiff in a redemption suit may ask to be put in possession of the mortgaged property, and where the defendants raising a paramount title are those in possession of the property and likely hereafter, if their differences are not settled by the mortgage-suit, to resist the possession of the plaintiff, it would, in many cases, be very convenient to allow the issues which have been raised, to be determined in the mortgage-suit so that after determination of those issues the plaintiff may know whether he will or will not get undisturbed possession of the property instead of having to bring a separate suit later on.

Hare Krishna Bhowmik v. *Robert Watson & Co.*, 8 C. W. N. 365 ; *Zahirraza* v. *Madhusudan Dass*, 45 Ind. Cas. 601 , 4 P. L. W. 117 ; *Bhaga Chowdhury* v . *Chuni Lal Marwari*, 5 C. L. J. 95 , 11 C. W. N. 284, relied on.

Letters Patent Appeal against the decision of Mr. Justice Ross.

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

Mr. *L. N. Singh*, for the Respondents.

JUDGMENT.

Dawson Miller, C. J.—This is an appeal on behalf of the plaintiff under the Letters Patent from a decision of Mr. Justice Ross overruling the decision of the District Judge.

The suit was instituted by the plaintiff to redeem a *zarpeshgi* mortgage granted to the defendants Nos. 1 to 9 in the suit in the year 1898. The facts which gave rise to the subject-matter of the present appeal may be shortly stated. In *mauza* Kiritpur Yusufpur there was a separate *patti* consisting of a 2-annas 6-pies share. One-third of this belonged to two persons named Ambica Singh and Jagdam Singh, the remainder being held by other co-sharers with whom we are not concerned. In 1895 the two persons named granted a *zarpeshgi* mortgage of their one-third share to certain persons who are now represented by the defendants Nos. 1 to 9 and they entered into possession. The plaintiff subsequently purchased the whole proprietary interest in the 2-annas 6-pies *patti* including the one-third share the subject of the mortgage. In 1918 the plaintiff brought the present suit seeking to redeem the mortgage and obtain possession of the property upon paying the sum found due on taking an account. In addition to the *zarpeshgidars* certain other persons, now the defendants Nos. 10 to 14, were impleaded as defendants although no specific relief was claimed as against them. With regard to them it was alleged in the plaint that they had been recorded by the *zarpeshgidars* as tenants of certain lands in the direct possession of the *zarpeshgidars* although in fact they had acquired no interest therein as tenants and that the entries so

KHUB LAL UPADHYA v. JHABSI KANDU

recorded were false These defendants may be referred to as the tenant defendants There was no particular reason why in a suit for redemption the Court should determine any issue relating to the status of the tenants defendants. Any right they might assert as tenants might properly have been determined in a subsequent suit. On the other hand, if they appeared and contested the allegations set out in the plaint, as in fact they did and set up a paramount title and if issues were framed with their concurrence as in fact happened I hardly think that they could afterwards object to this course if the issues should be decided against them. The fifth issue framed was to this effect:—

"Have the defendants Nos. 12 to 16" (now re-numbered the defendants Nos. 10 to 14) "any concern with the lands in suit and have they got any title to the same."

The Munsif before whom the case came for trial found in favour of the plaintiff's claim for redemption and ordered the *zarpeshgidar* defendants to make over possession to the plaintiff of the mortgaged property free from all incumbrances if within three months the entire mortgage-money should be paid. He also found with regard to the fifth issue that the tenant defendants had no rights in the lands claimed by them and he decided the issue against them.

The tenant defendants appealed to the District Judge who dismissed the appeal. He was of opinion that the tenant defendants were properly impleaded under the provisions of O. XXXIV, r. 1 of the Civil Procedure Code as persons having an interest or claiming to have an interest in the mortgage-security. He was further of opinion that the plaintiff was right in making the tenant defendants parties thus avoiding multiplicity of suits, and that the trial Court was competent to decide the issue. On the merits, he agreed with the conclusions arrived at by the trial Court.

From this decision a second appeal was preferred to this Court and was heard before Mr. Justice Ross. The learned Judge overruled the decision of the District Judge, being of opinion that the tenant defendants were not proper parties to a suit instituted by the plaintiff against other defendants to redeem a *zarpeshgi* mortgage and that the issues which were raised between the plaintiff and the tenant defendants were not germane to the issues in the present suit. The learned Judge was apparently much impressed by a series of cases in which it has been laid down that, in a mortgage-suit questions which may be raised by the defendants asserting a paramount title to the mortgaged-property are not proper questions to have determined in a mortgage-suit and no doubt, in so far as a rule exists to that effect, it is a very salutary rule because it is obvious that the matters which have to be decided in a mortgage-suit are entirely separate from any questions which may arise between the plaintiff in the suit and defendants who may be asserting a paramount title and if the two matters are allowed to be tried together embarrasment and great inconvenience may arise. In fact it is provided by O. II, r. 4 of the Civil Procedure Code that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except in certain cases which are not material to the present dispute and there is a proviso to that rule which lays down that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put in possession of the mortgaged-property. Although it is, as a general rule, desirable in mortgage-suits to exclude all issues between the parties except those immediately concerned with the mortgage-suit itself I do not think that it can for a moment be doubted that the Court may, in certain cases, if it should think fit, allow other issues to be determined in such a suit even if they should depend upon separate causes of action, and in fact it seems to me quite clear on reading O. II r. 4, that the Court may, in proper cases, grant leave for that to be done. In the present case I cannot help thinking that if leave had been specifically asked from the Court to allow the issue arising between the present respondents and the plaintiff to be determined in this suit that such leave would have been granted. No formal application such as that referred to in O. II, r. 4, was made but the respondents as defendants did by their written statement set up a claim to be in possession of some of the mortgaged-property as *kashtkars* asserting that they had been brought on the land by the predecessor-in-title of the

plaintiff and had been in possession for a period of over 12 years. It appears, therefore, that they were claiming to be in actual possession of some of the mortgaged property and, looking at the proviso to r. 4 of O. II, it is clear that the plaintiff in a suit for redemption may ask to be put in possession of the mortgaged property. Where the defendants raising a paramount title are those in possession and likely hereafter, if their differences are not settled by the mortgage-suit, to resist the possession of a successful plaintiff in a mortgage-suit, it would in my opinion, in many cases, be very convenient to allow the issues which have been raised to be determined in the mortgage-suit so that, after determination of those issues, the plaintiff will know whether he may or may not get undisturbed possession of the property instead of having to bring a separate suit later on, and in a case like the present I can see nothing embarrassing in allowing these issues to be determined. In any case, it was a matter which was within the discretion of the Court and although, as I have said, no formal request was made for the leave of the Court, nevertheless where both parties are at arm's length, where both parties are setting up varying title to the mortgaged property, one claiming to be in possession and the other claiming that he has no right or title to be there it seems to me that that is just the sort of case in which the Court might well grant leave, and if the parties raise issues such as that which was raised in the present case and the Court acquiesces in that course and allows those issues to be tried, I think it may well be said that the issues were raised with the leave of the Court. But assuming even that there was some irregularity in allowing the question of the status of the defendants to be determined in the present suit then that was an irregularity merely and, on turning to section 99 of the Civil Procedure Code, it seems clear that an irregularity such as that which I have indicated is no ground at all for setting aside the decision of the lower Court on appeal unless the irregularity is one which affects either the merits of the case or the jurisdiction of the Court. It has not been suggested in this case, nor could it be successfully contended, that by deciding the point in question in this suit the merits of the case were in any way affected. The parties had every opportunity of giving evidence on the point, they gave evidence, and that evidence was considered and a decision was come to. Further, as I have already indicated, it seems to me that there is nothing in the irregularity, if indeed it be an irregularity, which affects the jurisdiction of the Court, because, as I have already pointed out, under O. 2 r. 4 it is quite clear that the Court would, if it so chose and granted leave, have jurisdiction to determine a question such as this. In these circumstances, it seems to me that the decision of the learned Judge of this Court cannot be supported and should be set aside. If authority were needed for the proposition which I have just stated, it will be found in many cases, three of which alone I need refer to:—*Hare Krishna Bhowmik* v. *Robert Watson & Co.* (1) *Zakirraza* v. *Madhusudan Dass* (2) a decision of this Court, and *Bhaja Chowdhury* v. *Chuni Lal Marwari* (3). In my opinion the appeal must be allowed, the decision of the learned Judge of this Court must be reversed and the decree of the District Judge should be restored. The plaintiff in this suit is entitled to his costs of this appeal and of the appeal before Mr. Justice Ross.

Mullick, J.—I agree.

Z. K. *Appeal allowed.*

(1) 8 C. W. N 365.
(2) 15 Ind. Cas. 691; 4 P. L. W. 417.
(3) 5 C. L. J. 95; 11 C. W. N. 284.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 623 OF 1921.

October 26, 1923.

Present:—Mr. Prideaux, A. J. C.

Mt SARASWATIBAI—APPELLANT
versus
YADORAO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O XXI rr, 58, 63—Claim proceedings—Title suit—Burden of proof—Appeal—Appellate Court, failure of, to mention particular document in judgment, effect of.

SARASWATIBAI *v.* YADORAO

Where a title-suit is instituted after a summary rejection of an objection under O. XXI, r. 58 of the Civil Procedure Code, the onus to establish that the transaction on which the suit is based was *bona fide* and for good consideration, lies on the plaintiff.

Narain Ganesh Ghatate v. *Ganpat Rao*, 2 N. L. R. 87 ; *Ghunsham Das* v. *Umapershad*, 50 Ind. Cas. 264 ; 15 N. L. R. 68 ; 17 A. L. J. 410 ; 36 M. L. J. 483 ; 21 Bom. L. R. 172 ; 23 C. W. N. 817 ; (1919) M. W. N. 513 ; 10 L. W. 511 ; 1 N. P. L. R. (P. C.) 86 (P. C.) followed.

Where evidence has been adduced by both sides, the question of the burden of proof is of little importance.

The mere fact that a lower Appellate Court has not mentioned a particular document in its judgment, does not justify an inference that it did not take the document into consideration.

Appeal from the decree of the District Judge, Wardha, in Civil appeal No. 18 of 1921, decided on 31st August 1921.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the respondents.

JUDGMENT.—The plaintiff in the present case asks for a declaration that the *malik makbuza* field No. 120 of *mouza* Salod Hirapur is the property of the plaintiff and is not liable to attachment and sale in execution of the Civil Court decree obtained by defendant No. 1 against the defendants Nos. 2 to 4. The plaintiff claimed the property by right of purchase from one Krishnaroa under a sale deed, dated the 12th April 1917, for Rs. 500, while the contesting defendant pleaded that the sale was *benami* for Tukaram and was obtained in order to save the property from his creditors. Plaintiff's story is that the field was really purchased for her by her widowed sister *Mst.* Mainabai. The first Court held that the field was so purchased by *Mst.* Mainabai with her separate funds, and not only Tukaram had no interest in it but he was never in possession of the same since the date of the purchase.

On appeal the lower Appellate Court placed before itself the proper points for consideration, *viz.*, whether the field was purchased by Tukaram *benami* or whether it was purchased by *Mst.* Mainabai for and in the name of the plaintiff *Mst.* Saraswatibai and who has been in possession of the said fields since the date of the sale-deed. The Court finds that neither Tukaram's minor son Purshottam or his wife *Mst.* Saraswatibai, the plaintiff, had separate funds of their own, nor had *Mst.* Mainabai any such funds, and that they could not, therefore, pay the consideration of the several documents, such as a mortgaged-deed, a deed of lease and several sale-deeds obtained in their names. The defence that one Mahadeo, a servant of Tukaram, the plaintiff's husband, had been cultivating the field in suit as *bataidar* was held not established. It was further held that Tukaram was in possession of the land in suit ever since the date of the purchase. The decree of the trial Court was reversed and the claim was dismissed. Hence the present appeal.

The first point argued here is that as the objection filed against the attachment was dismissed for default no investigations into its merits were made: *Bhimrao* v. *Martand* (1), and that, therefore, the burden of proof has been wrongly laid on the plaintiff. I am not pressed by this argument. It was held in *Narayan Ganesh Ghatate* v. *Bhioraj* (2) that if a plaintiff has failed in proceedings under section 278, Civil Procedure Code, the burden of proving in the suit that his purchase of the property was *bona fide* and for good consideration lies on the plaintiff ; and their Lordships of the Privy Council in *Seth Ghunsham Das* v. *Umapershad* (3) lay down that when a suit is instituted after the summary rejection of a claim under section 278 of the Civil Procedure Code, 1882, the onus to establish that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. In a case like the present, where evidence has been adduced by both sides, the question of the burden of proof is of little importance. All the evidence, oral and documentary, has been considered and a result arrived at after such consideration.

It is said that the learned District Judge has failed to properly comprehend the evidence of certain witnesses and has failed to consider the copy Ex, P-1 *Jamabandi* for 1918-19

(1) 45 Ind. Cas. 102 ; 14 N. L. R. 66.
(2) 2 N. L. R. 87.
(3) 50 Ind. Cas. 264 ; 15 M. L. R. 61 ; 17 A. L. J. 410 ; 36 M. L. J. 483 ; 21 Bom L. R. 472 ; 23 C. W. N. 817 ; (1919) M. W. N. 513 ; 10 L. W. 511 ; 1 U. P. L. R. (P. C.) 86 (P. C.)

as regards possession. The District Judge may not have mentioned the *Jamabandi* in his judgment, but it does not, therefore, follow that he did not take it into consideration. After all, the findings that Mst. Mainabai had not sufficient money to enter into this transaction of sale and that it was entered into by Tukaram on his own account are questions of pure fact. So is the finding that Tukaram was in possession ; and, however wrong such a finding may be, it cannot be a subject of second appeal, and a perusal of the lower Appellate Court's judgment shows me that the Judge had dealt with all the essential points in deciding the case. He has also analysed the evidence and it cannot be said that findings which determine the suit are not warranted by the evidence on record. It seems to me that the appeal is concluded by findings of fact against the appellant and for these reasons, I dismiss this appeal with costs. The appellant will pay the respondents's costs.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 48 OF 1923.

December 4, 1923.

Present : —Justice Sir Jwala Prasad, Kt., and Mr. Justice Foster.

NAGISHWAR BUX RAI—APPELLANT
versus
BISSESWAR DAYAL SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 17, O. IX, r. 13—Ex parte decree, application to set aside —Due service of summons—Burden of proof—Summons delivered to defendant—Acknowledgment, refusal to give—Procedure—Appeal—New point, whether can be taken.

When a defendant applies to set aside an *ex parte* decree on the ground that the summons was not duly served on him, the *onus* is on him to establish the absence of due service. [p. 891, col. 1.]

Where service of summons has been effected by delivering it to the defendant personally, the service is complete, and no irregularity by the process-server or other ministerial officer of the Court such as the omission of the process-server to obtain the signature of the defendant or to affix a copy of the summons to the door of his house will invalidate it. [p. 891, col. 2.]

Gopaldas Girdhari Lal v. *Seyad Ishu*, 46 I. C. 277, relied on.

Per Foster J.—Where a defendant upon whom a summons has been served retains the copy that is put into his hands and refuses to give an acknowledgment, he makes it impossible for the peon to affix that copy to the door of his house, and the requirements of r. 17 of O. V of the Civil Procedure Code are complied with. [p. 892, col. 2.]

Although a point of law may be taken in appeal for the first time, it is subject to the rule that the evidence on the record should be complete and no further evidence should be necessary to substantiate the point. [p. 891, col. 1.]

Appeal from an order of the Subordinate Judge, Palamau, dated the 11th January 1923.

Messrs. *C. C. Das*, *S. C. Dey* and *N. K. Prasad*, for the Appellant.

Mr. *Permeshwar Dayal*, for Mr. *Devaki Prasad Sinha*, for the Respondent.

Jwala Prasad, J.—This is an appeal from an order of the Subordinate Judge of Palamau, dated the 11th January 1923, refusing to set aside an *ex parte* decree passed against the defendant.

The main contention of the appellant upon which he seeks to have the decree set aside has been in this Court that the summons of the suit was not "duly served" upon him. This ground of objection was not clearly and definitely taken in the application made by the appellant to have the *ex parte* decree set aside nor does it appear to have been conspicuously brought out in the evidence at the trial of the case in the Court below. The grounds upon which the petition to set aside the *ex parte* decree was founded were as follows :—

(1) That the petitioner had no knowledge of the institution of the suit by the opposite party nor did he receive any summons in the suit nor did any peon go to him with the summons, and

(2) that the opposite party, by taking surreptitious proceedings, fraudulently and cunningly obtained the *ex parte* decree which caused serious loss to the petitioner.

NAGISHWAR BUX RAI *v.* BISSESWAR DAYAL SINGH

These allegations were denied *seriatim* by the respondent in his petition of the 23rd November 1922. It was there alleged that the appellant had full knowledge of the suit and had received the summons but did not atttend the Court. The opposite party further asserted that the summons was duly served. Both parties went into evidence. The peon who is said to have served the summons was examined as a witness on behalf of the respondent. He stated that he made over the summons and a copy of the plaint to the defendant who was personally known to him and asked him to give a receipt, but the defendant refused to do so. Thereupon he asked the *Chaukidar* to witness the service and the *Chaukidar* gave his thumb impression on the back of the summons (Exhibit C). The learned Subordinate Judge accepted the evidence of the peon and held that the summons with the copy of the plaint was handed over to the defendant who declined to give a receipt for the same. He disbelieved the defendant's story of his absence from his place of residence on the day the summons is said to have been served. Upon the aforesaid finding, he dismissed the application of the appellant and refused to set aside the decree.

The learned Counsel on behalf of the appellant has criticised the evidence of the peon and has asked us to reject it as being unreliable. We have considered the entire proceedings connected with the suit from the time that it was launched in Court on the 9th May 1922 up to the time that the *ex parte* decree was passed. We have also considered the evidence adduced on behalf of the applicant. We have not the least doubt that the appellant knew of the institution of the suit aginst him. The suit was originally instituted against his father after a preliminary dispute between him and the plaintiff in a Criminal Court arising out of the mortgage transaction in question. The original defendant, however, died and in his place the appellant, his son, was substituted on the 17th of of June 1922. At that time the *Am Mukhtear* of the appellant's father was Munshi Nauranglal and it was upon the information given by him that the peon reported of the death of the original defendant Bhagwat Bux Rai. Therefore the *Am Mukhtear*, whose duty it was to look after the litigation of the estate in Courts, knew of the institution of the suit and he must have in the regular course of his duty informed the appellant, who succeeded to the estate on the death of his father, of the suit brought against him. There are circumstances which lend support to the evidence of the peon that the service was *bona fide* and that the denial of the appellant of all knowledge of the suit is untrue. Therefore, we are not prepared to differ from the estimate of the evidence made by the trial Court who had the advantage of seeing the witnesses before it, and accordingly we accept its finding of fact that the summons with a copy of the plaint was delivered to the appellant and he refused to give a receipt for the same. Therefore, the issue upon which the parties went to trial in the Court below must be found against the appellant.

The learned Counsel on behalf of the appellant, however, contends that the determination of that issue does not settle the case, inasmuch as upon the facts elicited during the trial of the case it is apparent that the summons was not "duly served" and, consequently, it is urged that the appellant is entitled to have the decree set aside under O. IX, r. 13 of the Civil Procedure Code. That rule lays down that an *ex-parte* decree shall be set aside upon the defendant (1) satisfying the Court that the "summons was not duly served" or (2) "that he was prevented by any sufficient cause from appearing when the suit was called on for hearing." The latter ground has been concluded by the finding of the Court below referred to above which we have accepted as a correct finding.

The question now raised for the first time before us by the appellant is, therefore, confined to the first ground. We have now to see whether the defendant has satisfied the Court that the summons was not "duly served." To appreciate this ground on behalf of the appellant the learned Counsel for the appellant has referred to the provisions contained in O. V, r. 17 of the Civil Procedure Code. It is said that after the defendant refused to sign the receipt of the summons it was an incumbent duty of the peon to "affix a copy of the summons on the outer door or some other conspicious part of the house in which the defendant ordinarily resides or carries on business, etc." The

learned Counsel says that as the peon does not say that he affixed a copy of the summons upon the house of the defendant, the summons was not "duly served."

O. IX, r. 13 requires the applicant to satisfy that the summons was not "duly served", and the onus is, therefore, upon the appellant. It was, therefore, for the appellant to elicit from the peon, who has been examined on behalf of the respondent, as to whether he did or did not affix a copy of the summons on the house of the defendant as required by r. 17. No attempt seems to have been made by the appellant to substantiate this ground by evidence. The evidence offered by him on this point is *nil*. Although a point of law may be taken in appeal for the first time, yet it is subject to the well recognized rule that the evidence on the record is complete and no further evidence is necessary to substantiate the point. There is no evidence of the requirement of r. 17 not having been complied with by the peon and it is therefore not open to the appellant to take this point in appeal for the first time.

Assuming that the peon did not affix a copy of the summons on the house of the defendant, it is a question of grave doubt as to whether the personal service such as in the present case, can be impunged as defective and illegal on the ground of irregularity alleged by the appellant. Various authorities have been cited on both sides in this case in support of their respective contentions and these are *Maruti* v. *Vithu* (1), *Rajendro Nath Sanyal* v. *Jan Meah* (2), *Gopaldas Girdharilal* v. *Sayad Islu* (3), *Diwan Chand* v. *Parbati* (4), *Kassim Ibrahim Saleji* v. *Joharmull Khemka* (5), and *Kistler* v. *Tettmar* (6). The cases referred to above only lead to the conclusion that there has been a sharp divergence of opinion upon the point raised. Stanyon, J., Acting Judicial Commissioner of Nagpur, in the case of *Gopaldas Girdharilal* v. *Sayad Islu* (3) held that, where the service of summons has been by delivering or tendering of it to the defendant personally the service is complete, and no irregularity by the process-server or other ministerial officer of the Court such as the omission of the process-server to obtain the signature of the defendant could undo it. He would support his view upon the maxim *quod fieri non debet factum valet*.

Mr. Justice Broadway of the Punjab Chief Court, on the other hand, took a directly opposite view in the case of *Diwan Chand* v. *Parbati* (4).

The other cases are not very directly on the point but they seen to hold that the provisions relating to service of summons should be strictly complied with.

Now, the mode of service of summons has been prescribed by rr. 10 to 20 of O. V of the Civil Procedure Code. Rule 10 says; "Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court." Rule 12 requires that so far as practicable service shall be made on the defendant in person. Rule 16 requires that when the serving officer delivers or tenders a copy of the summons to the defendant personally he shall require the signature of the defendant to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons. Rule 17 requires that where the defendant or his agent refused to sign the acknowledgment or the serving officer cannot find the defendant and there is no agent to accept service of summons on his behalf, etc., he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business, etc.

The summons in this case was served by delivering a copy of the summons together with a copy of the plaint to the defendant personally (the defendant being personally known to the peon). The defendants refused to grant a receipt therefor, but retained the summons and the copy of the plaint. Therefore, when the defendant took the summons and the plaint, the peon had no

(1) 16 B. 117; 8 Ind. Dec. (N.S.) 553.
(2) 26 C. 101; 2 C. W. N. 574; 13 Ind. Dec. (N.S.) 669.
(3) 46 Ind. Cas. 277.
(4) 48 Ind. Cas. 28; 99 P. R. 1918; 184 P. W. R. 1918.
(5) 34 Ind. Cas. 799; 43 C. 447; 23 C. L. J. 183; 20 C. W. N. 173.
(6) (1905) 1 K. B. 39; 74 L. J. K. B. 1; 92 L. T. 36; 53 W. R. 290; 21 T. L. R. 24.

other copy to affix upon the outer door or other conspicuous part of the house. If the defendant had refused to take the summons and to sign the acknowledgment, in that case the peon would have had a copy of the plaint and the summons to be affixed upon the house of the defendant. The defendant by his conduct rendered it impossible to have the copies affixed on the house and he cannot be permitted to take advantage of his own wrong and to plead that the omission rendered the service invalid. Now, under the supreme Court Rules in England, "a writ is personally served by giving to and leaving with the defendant a copy of the writ and showing him the original, if within reasonable time he demands to see it." *Thomson* v. *Phoney* (7), (Halsbury's Laws of England, volume XXIII, page 115). This is what was exactly done in the present case. The defendant was in his house and copies of the summons and the plaint were given to and left with him in his hands. Therefore, the requirements of r. 17 were complied with.

Even if there was any irregularity, I do not think that the substantial and direct service on the person of the defendant as is prescribed by r. 10 of O. V is so vitiated as to hold that the summons was not "duly served" and thus to entitle the defendant to have the *ex parte* decree set aside under O. IX, r. 13. We find that, upon the report of the peon the serving officer, the Court recorded an order that the summons on the defendant was personally served. This order was in accordance with r. 19 of O. V of the Civil Procedure Code which requires that when summons is returned under r. 17 the Court shall satisfy itself by making such inquiry as it thinks fit and "shall either declare that the summons has been duly served or order such service as it thinks fit." The report of the peon is very clear in its terms to show what transpired and that report was accepted by the Court below as a full compliance with the requirements of the law. This shows that the summons was served in this particular case in accordance with the practice prevailing in the Court below relating to personal service.

For all these reasons, I am of opinion that upon the merits also the contention of the learned Counsel that the summons was not duly served must fail. The result is that the appeal is dismissed with costs.

Foster, J.—I agree with the findings of fact which have been arrived at, but I am of opinion that the provisions of rr. 17 and 19 of O. V of the Civil Procedure Code are not rigid. Where a defendant upon whom a summons has been served retains the copy that is put into his hands and refuses to give an acknowledgment, he makes it impossible for the peon to affix that copy to the house. The alternative would be that, in anticipation of such contumacious conduct on the part of the defendant, there should be sent out in every case a spare copy for affixing to the house and for complying with the provisions of rule 17. That I do not think was ever intended to be a rule of procedure. The difficulty was in fact, foreseen when the present Civil Procedure Code was being prepared and it was suggested at that time that a proviso should be added the purport of which was that, where the defendant or his agent refuses to sign the acknowledgment and retains the copy of the summons delivered to him, the Court may direct that the summons shall be deemed to have been duly served. That proposal was not, however, adopted and the only conclusion I can gather is that the high authorities who superintended the drafting of the Code regarded it as unnecessary, and it appears to me to be by no means a strained interpretation of the law to consider that r. 19 enables a Court, in such circumstances as I am referring to, to declare that the summons has been duly served after holding that this mode of service shall suffice. Having this view, I agree that the appeal should be dismissed.

Z. K. *Appeal dismissed.*

(7) (1832) 1 Dowl. 441 at p. 443.

GADODIA AND CO. *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 277 OF 1920.

November 21, 1924.

Present:—Sir Grimwood Mears, Kt., K. C., Chief Justice, and Mr. Justice Piggott.

Messrs. L. N. GADODIA AND CO.—PLAINTIFFS—APPELLANTS

versus

THE GREAT INDIAN PENINSULA RAILWAY COMPANY, BOMBAY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890) ss. 72, 76—Risk Note, Form B.—Goods carried at owner's risk for portion of route and at Railway risk for remainder—Goods destroyed in transit over latter route—Damages, suit for—Burden of proof.

Plaintiff consigned certain goods for carriage to the defendant Company and paid freight for a certain section of the route at the owner's risk rate and for the rest of the route at the ordinary rate. He signed an Owner's Risk Note for the entire route, but it was found that the Company had not published an owner's risk rate for the latter portion of the route. The goods were destroyed by fire while in transit over the portion of the route for which freight had been paid at the ordinary rate. In a suit by the plaintiff to recover the value of the goods :

Held, (1) that the mere fact that the plaintiff had signed an Owner's Risk Note for the entire route did not make the note applicable to that portion of the route over which the ordinary freight had been paid ;

(2) that the burden lay on the defendant Company of proving that they had exercised the ordinary amount of care with respect to the goods.

First appeal from the decree of the Subordinate Judge of Cawnpore, dated the 24th July, 1920.

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

Mr. *L. P. Zutshi*, for the Respondents.

JUDGMENT.—On the 30th of April 1919, the plaintiff through his agent tendered to the defendant Company 5 bales of cotton tussore to be carried from Sholapore to Cawnpore.

Over some portions of their railway the defendant Company carry goods at a reduced or "owner's risk" rate. It appears quite clearly that whilst the Company had an established owner's risk rate from Sholapore to Itarsi, they had published no such rate between Itarsi and Cawnpore and no consignors of goods between these two latter stations could require the Company to carry them at owner's risk. The goods would go *via* Itarsi to Cawnpore. The consignor signed an Owner's Risk Note by which he agreed to hold the Company free from responsibility in a number of contingencies. The Subordinate Judge has found that in fact the consignor paid a total sum made up of the reduced rate from Sholapore to Itarsi and of the oridinary rate from Itarsi to Cawnpore. The figures are not mathematically exact but are so near as to justify the conclusion of the learned Subordinate Judge. Then, on the 13th of May 1919, the goods were proceeding on their journey between Itarsi and Cawnpore smoke was seem to be issuing from a waggon near the engine. The train was brought to a stand still at station Sanchi, and an endeavour made to put out the fire. It was burning fiercely inside the waggon and in the result the consignor sustained a pecuniary loss by destruction of and damage to his goods to the extent of Rs. 5,136-5-6. He made a claim on the Company who repudiated it on the ground that they were covered by the Owner's Risk Note signed by his agent which purported to cover the entire journey.

To this the consignor replied that, whatever might be the form of the note, the fact was that he paid the ordinary rate on the Itarsi Cawnpore section of the journey and was, therefore, entitled to regard the Railway Company during this portion of the journey, as a bailee. We think the plaintiff's contention is clearly right in the admitted absence of an owner's rate from Itarsi to Cawnpore.

This is the final result of the arguments in this Court but in the Court below the matter was greatly obscured and the trial lengthened by defective pleadings on both sides and by an inability on the part of the Counsel on both sides to forecast the possibility of the Company being found to be bailees. Thus, it happened that the Counsel for the Railway Company failed to provide himself with the necessary evidence to prove the taking of proper care.

The circumstances under which the fire originated are unknown. The waggon was of iron and was a covered one. It was apparently of proper construction, clean and fit for the accomodation of the goods of the plaintiff.

The van contained the plaintiff's goods, also some cases of military stores, some bags of cocoanuts and 12 other boxes. All the goods, except those of the plaintiff, had come from the Madras and Southern Mahratta Railway. It is conceded in this case that if the defendants are entitled to rely on the Owner's Risk Note as governing the Itarsi-Cawnpore journey, they must succeed in the action as the plaintiff has failed to give any such proof as would overset the wide protection given to the Company by that document. If, however, the defendants were carrying the goods between Itarsi and Cawnpore at the ordinary rate then the defendants were bound to put before the Court all materials necessary affirmatively to prove that in the carriage of the plaintiff's goods they had acted with the same degree of care in relation to those goods as a reasonably prudent man would act in relation, to his own. The burden of proof, if the goods were carried at owner's risk, lay on the plaintiff. If the Company were bailees the *onus* shifted to them.

Their proper defence should have been, first, that they were under no liability because of consignment note. Alternatively, if it were held that that note was not applicable that they took of the goods the degree of care described above. That position was, however, as we have said, never clearly in the minds of the legal advisers of the Railway Company in the lower Court and in fact they actually resisted an application made by the plaintiffs on the 14th of July 1920, which, if assented to by them and proper particulars obtained, would in our view in all probability have made their position as bailees safe and supplied the gap in their evidence which still exists. On the 14th July 1920 the plaintiffs were casting about for any evidence which might help them to overcome the provisions of the Owner's Risk Note. On the previous day Pandhari Nath Balwant, a witness for the defendants, had mentioned the presence of "12 other boxes" in the waggon and had said that he did not know what they contained. No one to this day knows what they contained. It was the plain duty of the Railway Company, for their own protection, on learning of the fire to have communicated in May 1919 with the Madras and Southern Mahratta Railway Company and to have made enquiries as to the description, contents, etc., of these boxes if they had not already, as they may have had, these very materials in their possession. These boxes were part of the contents of a waggon in which a fire had mysteriously broken out on their line and the Company ought to have taken every step to ascertain, if they could, the nature of the goods entrusted to them. They did not make enquiries at the time. At all events if they did, the result was not communicated to the Court and, as we have said, they resisted an application which sought to obtain that information from them. Even if immediately after the outbreak of the fire, the Company had ommitted to enquire from the Madras and Southern Mahratta Railway as to the nature of the articles in the 12 boxes, it was the plain duty of their legal advisers, when the Company became defendants in an action a few months later, to tell them that they would, if unprotected by the Risk Note, be bound to give an explanation as to the contents of the other articles in the waggon, and then diligently to pursue that enquiry.

Further, they had in their possession at this time, when the action was commenced, some documents which they had received relative to the boxes from the Madras and Southern Mahrattta Railway. Although they were highly relevant to the action, the defendants say that they destroyed them in the ordinary course of business.

The Railway Company, therefore, produced no evidence as to the general nature of the contents of the boxes. It, would in our opinion, have been sufficient if they had merely proved the consignment or delivery notes of the Madras and Southern Mahratta Railway, which we are told as a matter of practice pass from one line to another on receipt of goods, providing of course that the details on these notes contained nothing to arouse any suspicion that the goods were likely to be dangerous to carry.

They could then have said that they accepted the boxes in accordance with the usual practice, and that there was nothing on the consignment notes, or in the appearance of the boxes, which would cause any one to hesitate to carry them in the ordinary way, or to place them in proximity to other goods. That evidence would have satisfactorily discharged the *onus* which lay upon them, as soon as their position was decided to be that

of bailees, and would have entitled them to succeed in the action. There being this gap in the evidence as to the 12 boxes, we are obliged to hold that the defendants did not produce that quality or amount of evidence which they were bound by law to do in order to prove affirmatively the taking of all due care. Inasmuch, however, as the plaintiff did not plead his cause of action with precision, and in that he alleged negligence on the part of the Railway Company without giving any particulars of such negligence, and also failed in his pleading and at the trial to bring out the alternative position of the Railway Company as bailee, on which point the appeal has succeeded, we, whilst reversing the judgment of the lower Court and decreeing the plaintiff's claim, deprive the plaintiff of all costs in the lower Court. The plaintiff will have in this Court the costs of the appeal with fees on the higher scale.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 182 OF 1922.

September 26, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

INDERPAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THAKUR DIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Lawful and unlawful possession—Adverse possession between co-sharers—Ouster—Assertion of hostile title—Practice—Second Appeal—Question of title—Question of adverse possession—Mixed question of law and fact.

An admitted or proved title subsists all through until complete adverse possession is established. [p. 898, col. 2]

Secretary of State for India v. *Chellikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. M. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 52 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.); *Jai Chand Bahadur* v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814; *Inayat Husain* v. *Ali Husain*, 20 A. 182; A. W. N. (1898) 19; 9 Ind. Dec. (N. S.) 478, referred to.

Possession is either lawful or unlawful and, in the absence of evidence, it must be assumed to be the former. [p. 899, col. 1.]

Hardit Singh v. *Gurmukh Singh*, 59 Ind. Cas. 7; 28 C. L. J. 437; 22 Bom. L. R. 550; 74 P. W. R. 1921 (P. C.) referred to.

Possession is lawful when it is in virtue of a legal title. [p. 899, col. 2.]

Thomas v. *Thomas*, (1855) 2 K. and J. 79; 25 L.J. Ch. 169; 1 Jur. (N. S.) 1160; 4 W. R. 135; 110 R. R. 107; 69 E. R. 701; *Corea* v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 36, referred to.

Between two co-tenants, each has a title to the whole and also to his undivided moiety and each is said to be seized *per my et per tout, i. e.*, each co-tenant has the entire possession as well of every parcel as of the whole. [p. 899, col. 2.]

Kennedy v. *De Trafford* (1897) A. C. 180; 66 L. J. Ch. 671; 76 L. T. 427; 45 W. R. 671; *Hardoon* v. *Belilios*, (1901) A. C. 118; 70 L. J. P. C. 9; 83 L. T. 573; 49 W. R. 209; *In re Biss*, *Biss* v. *Biss* (1903) 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 501, referred to.

Nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to bring out the success of the plea of adverse possession. [p. 900, col. 1.]

Hardit Singh v. *Garmukh Singh*, 59 Ind Cas 7; 28 C. L. J. 437; 22 Bom. L. R. 550; 74 P. W. R. 1921 (P. C.); *Thomas* v. *Thomas*, (1855) 3 K. and J. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 11 O. R. R. 107; 69 E. R 701; *Keech* v. *Sandford*, 2 Wh. & Tud. L. C. (7 Ed.) 693; Sel. Cas. 61; 2 Eq. Cas Abr. 741; *N. Varada Pillay* v. *Jeevarathnammal*, 53 Ind. Cas. 901; 24 C. W. N. 316; (1919) M. W. N. 724; 10 L. W. 679; 38 M. L. J. 313; 18 A. L. J. 274; 43 M, 244; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

The fact that a party has not been in the enjoyment of the rents and profits of the property in suit does not establish a title by adverse possession in the co-tenant who has enjoyed such profits. [p. 900, col. 1.]

In order to establish adverse possession as between co-sharers there must be evidence of an open assertion of hostile title by one of them to the knowledge of the other. [p. 900, col. 2.]

Corea v. *Appuhamy*, (1912) A. C, 230; 81 L. J. P. C. 151; 105 L. J. 36; *Muttunayagam* v. *Brito* (1918) A. C 895; 87 L. J. P. C. 116, *Jogendra Nath Roy* v. *Baldeo Das Marwari*, 35 C. 961; 6 C. L. J. 735; 12 C.W N. 127; *Jang Bahadur* v. *Muhammad Abul Hasan Khan*, 35 Ind. Cas. 743; 30 L. J. 279, referred to.

When a question of title rests on the interpretation of certain documents and the legal inferences to be drawn from them; it is competent to the High Court to entertain it in second Appeal. [p. 897, col. 1.]

Satgur Prasad v. *Raj Kishore Lal*, 55 Ind Cas. 486; 42 A. 152; 22 Bom. L R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 324; 38 M. L. J. 259; 18 A. L. J. 285; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.), referred to.

The question of adverse possession is a mixed question of fact and law can be discussed in Second Appeal referred to. [p. 899, col. 1.]

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Satgur Prasad v. *Raj Kishore Lal*, 55 Ind. Cas. 86 ; 42 A. 152 ; 22 Bom. L. R. 151 ; 2 U. P. L. R. (P. C.) 55 ; (1920) M. W. N. 3 ; 24 C. W. N. 304 ; 38 M. L. J. 250 ; 18 A. L. J. 255 ; 11 L. W. 384 ; 46 I. A. 197 ; 27 M. L. T. 200 (P. C.) ; *Lachmeswar Singh* v. *Manowar Hosein* 19 I. A. 48 ; 19 C. 253 ; 6 Sar. P. C. J. 133 ; 10 Ind. Dec. (N. S.) 614 ; *Ram Gopal* v. *Shams Khaton*, 19 I. A. 228 ; 20 C. 93 ; 6 Sar. P. C. 247 ; 10 Ind. Dec. (N. S.) 63 (P. C).

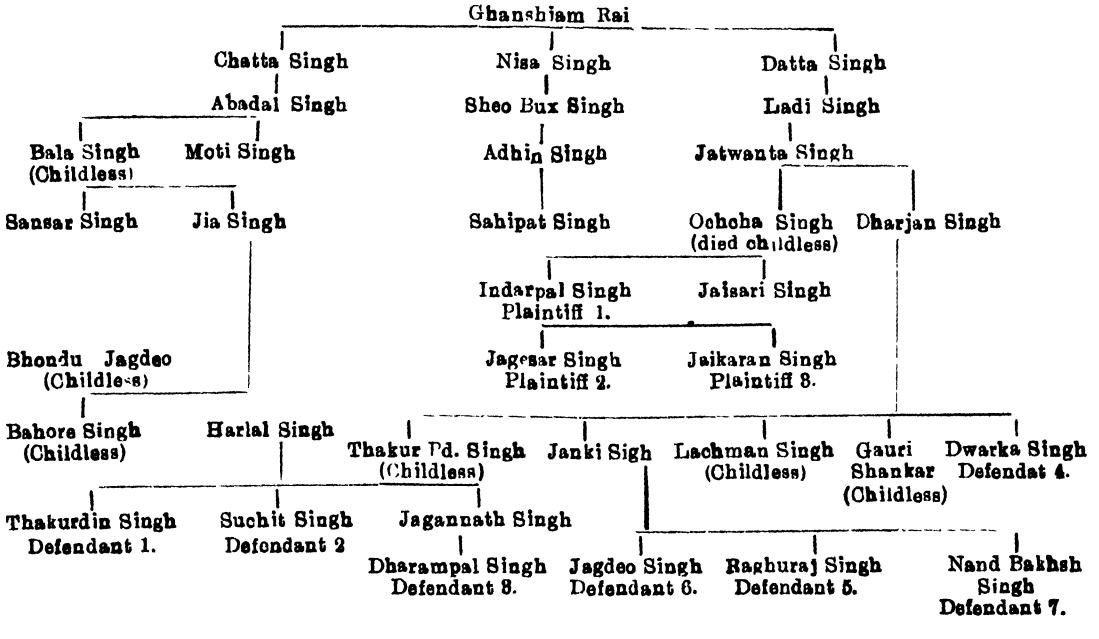
Appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 23rd March 1922.

Mr. *Hyder Husain*, for the Appellants.

Mr. *Niamatullah*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 23rd March 1922, which reversed the decree of the Additional Munsif of the same place, dated the 5th September 1921.

The plaintiffs' claim, which succeeded in the Court of first instance but failed in the Court of Appeal, was for the recovery of possession by partition of one-third share in 25 *bighas* 2 *biswas* of land specified in List B attached to the plaint, situtate in village Khetwar, *pargana* Manjhora, district Fyzabad. The ground of the claim is that the land in dispute was the joint ancestral property of the parties to the suit in which Sahipat Singh, Ochcha Singh and Bahore Singh owned a one-third share each. The plaintiffs are the heirs of Sahipat Singh, defendants No. 1 to 3 of Bahore Singh and the remaining defendants No. 4 to 7 of Ochcha Singh. In the first Regular Settlement a decree for *qabzadari* rights in respect of the lands in suit was obtained in the name of Ochcha Singh as against the *taluqdar* of Ajudhia on the 23rd of May 1869, and in 1870 Bahore Singh obtained a decree in respect of his one-third share against Ochcha Singh. The purpose of the present suit is to obtain separate possession of the one-third share which originally belonged to Sahipat Singh. The pedigree showing the relationship of the persons originally holding title to the lands in suit and of the parties to the present litigation may now be set down here :—



To this claim of the plaintiffs written defence was field by the defendants No. 1, 2, 4 and 5. Sahipat Singh's title and possession were denied, so was the possession of the plaintiffs. Bar of limitation was pleaded. The correctness of the pedigree was also disputed but both the Courts below have found it proved and the concurrent finding has not been challenged by any of the parties to this appeal. The title and the bar of limitation are the points now in dispute.

INDERPAL SINGH *v.* THAKUR DIN SINGH

As regards title, it was urged by the learned Counsel for the appellants that the question has not been decided by the lower Court. On the other hand, the learned Advocate for the respondents urged to the contrary. It is much to be regretted that the matter is left in a moot condition. I, however, do not think it is necessary to decide between these two contentions. If the former contention is correct, I can decide the issue myself even if it involves a pure question of fact under section 103, read with O. 41, r. 25, of the Code of Civil Procedure, *Sri Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1). If the latter contention is right, the question of title in the present case is not one of fact alone. It entirely rests on the interpretation of certain documents and the legal inferences to be drawn from them. This Court is, therefore, competent to determine it: *Satgur Prasad* v. *Raj Kishore Lal* (2).

On the question of title, I am of opinion that the plaintiffs have established it. It appears that on the 15th November 1863 there was a family settlement to which (1) Bahore Singh, (2) Ochcha Singh, (3) Sahipat Singh, (4) Bahadur Singh and (5) Dharjan Singh were parties (Ext. 5). The last two named persons were the co-sharers of Ochcha Singh within his one-third share in the entire property. Amongst the properties dealt with by the settlement is the village Khetwar Khas within which the plots now in suit are admittedly situate. This settlement unequivocally declares the rights of Bahore Singh, Ochcha Singh and Sahipat Singh in equal proportion in the properties which were the subject-matter of the settlement. It follows that the plaintiffs, who are the descendants of Sahipat Singh, have a one-third share in Khetwar Khas. The Regular Settlement came after the arrangement stated above, and it is admitted that in that Settlement a decree for *qabzadari* rights in the plots in suit in village Khetwar Khas was passed in the names of Ochcha Singh on the 23rd May 1869. It is further admitted that that decree was passed against the *taluqdar*. It follows that, between the date of the settlement of the 15th November 1863 and the date of the decree of the 23rd May 1869, the village, in which the property in suit is situate, came to fall within the *taluqa* of Ajudhia. The decree is not before me but the irresistible inference is, that the ex-proprietary rights decreed in favour of Ochcha Singh against the *taluqdar* of Ajudhia must have been founded on his previous title as a proprietor of the village. The Settlement Circular No. 19 of 1861 clearly directed the recognition of ex proprietary rights in favour of the former proprietors in respect of certain classes of lands. In the absence of any evidence to the contrary, I must presume that the decree of the 23rd May 1869 was passed in accordance with the Circular mentioned above. The ex-proprietary title, therefore, in the lands in suit, was merely a residue of the previous proprietary title in the village which was the subject-matter of the settlement of the 15th November 1863. The conclusion, therefore, is that all those who had title to the village in 1863 have title to the ex-proprietary rights which accrued under the decree of the 23rd May 1869. I have already stated that Sahipat Singh, the ancestor of the plaintiffs, was declared to have title in the village to the extent of one-third. He, therefore, had a title to the lands in suit to the same extent and if he had it, it is now admitted that it has devolved on the plaintiffs by right of inheritance.

In the year 1870 Bahore Singh brought a suit against Ochcha Singh for a declaration in respect of his one-third share in the properties in suit. He succeeded (Exts. 6 and 7). In 1917 Bahore Singh's descendants sued Ochcha's representatives for possession of their one-third share by partition. They succeeded again. (Exts. 8, 9, 10 and 11). The judgments in the two litigations mentioned above are clearly admissible in evidence in the present case under section 13 of the Indian Evidence Act, though the appellants were no party to either of them: See the decisions of the Privy Council in the cases of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (3), *Bitto Kunwar* v. *Kesho Prasad* (4) and *Dinomoni Chow-*

(1) 68 Ind. Cas. 588 ; 27 C. W. N. 245 ; 16 L. W. 102; 31 M. L. T. 54; 45 M. 586; (1922) M W. N. 749; 43 M. L. J. 640 (1922) A. I. R. (P. C.) 292; 37 C. L. J. 199 (P. C.).

(2) 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 8; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 285; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200. (P. C).

(3) 22 I A 60 ; 22 C. 533 ; 5 M. L. J. 7 ; 6 Sar. P. C. J. 530 ; 11 Ind. Dec. (N. S.) 355 (P. C.).

(4) 24 I. A. 10; 19 A. 277 ; 7 Sar. P. C. J. 181 ; 1 C. W. N. 265 ; 9 Ind. Dec (N. S.) 181 (P. C.).

dhurani v. *Brojo Mohun Chowdhurani* (5). It is clear, in fact it is not disputed, that the title of Bahore Singh to a one-third share in the property in suit has the same origin as the title of the present plaintiffs, if any, in the same property and to the same extent. It is true, that since the date of the decree of the Settlement Court the name of Ochcha Singh, and after his death, of his descendants has stood in the Revenue Records in respect of the entire holding but that fact cannot adversely affect the proved title of the plaintiffs in the properties in suit. Indeed, having regard to the result of the two litigations referred to above, it is well nigh impossible to come to any conclusion on the plaintiffs' title other than that they have it.

It now remains to decide the question of limitation. The learned Subordinate Judge has unmistakably given a finding in favour of the defendants and it was on the basis of that finding that he reversed the decree of the Court of first instance and dismissed the plaintiffs' claim. In coming to the conclusion that, "the present suit is not within time" he has discussed the question of adverse possession and decided it in favour the defendants. Indeed, his finding that the suit is not within time is founded on his opinion in favour of the defendants on the plea of adverse possession.

The first thing to be observed in this connection is, that the defendants did not put forward the plea of adverse possession in their written statement. All that they said was, that the plaintiffs and their ancestors never remained in possession of the property in suit and that the suit was not within time. On these pleadings the only issue which arose on this part of the case was the one which was framed by the Court of first instance and it was as follows:—"Have the plaintiffs been in possession of the property in suit within limitation?" In discussing this issue the Court of first instance made a pertinent observation that, "it is significant that no adverse possession by the defendants has been set up at any time." Its last finding on the question was as follows: "I, therefore, find that no question of limitation arises now that the property has been found to be joint property." If there were nothing more and the question of title were decided in favour of the plaintiffs, the plea of limitation, as it arose on the pleadings, must also be decided in favour of the plaintiffs. The plaintiffs on proof of their title would be entitled to a decree for possession. Whatever might have been the doubts on the soundness of this legal situation before, they must be deemed, according to my judgment, to have been set at rest by the latest pronouncement of their Lordships of the Privy Council in the case of *Secretary of State* v. *Chellikani Rama Rao* (6). In the case just now mentioned, the High Court held that "though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the Notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within sixty years before the Notification." With reference to this opinion Lord Shaw, in delivering the judgment of the Privy Council, said: "Their Lordships are of opinion that the view thus taken of the law is erroneous." At the end of his judgment his Lordship made the following observation: "But with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowldgement of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms subsisting title. And it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any *onus* on that subject." The result of this decision, therefore, is that an admitted or proved title subsists all through until complete adverse possession is established. In this interpretation of the decision of Lord Shaw, I am supported by a recent decision of a Divisional Bench of the High Court of Allahabad in the case of *Jai Chand Bahadur* v. *Girwar Singh* (7). Indeed, Mr. Justice Walsh

(5) 29 I. A. 24; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 88; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

(6) 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. 485; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(7) 52 Ind. Cas. 866; 41 A. 669; 17 A. L. J. 814.

is strongly of opinion that the effect of Lord Shaw's decision is that the ruling in the case of *Inayat Husain* v. *Ali Husain* (8), requiring a plaintiff having title further to prove his possession within limitation, must be taken to have beeen overruled.

The lower Appellate Court has, however, decided the case on the assumption that the plea of adverse possession has been raised. I think it is necessary to give my own opinion on the finding of the learned Subordinate Judge in respect of that plea. The learned Advocate for the respondents argued, in the first instance, that the finding of the lower Appellate Court in that respect was one of fact and, therefore, not open to any challenge in second appeal. It is certainly startling that such an argument could be seriously put forward at this time of day. The question of adverse possession is a mixed question of fact and law. The facts are ascertained conclusively by the Court of first appeal. The soundness of the conclusions from the facts so ascertained is a matter of law. This has been held repeatedly by the Privy Council: See the cases of *Lachmeswar Singh* v. *Manowar Hossein* (9), *Ram Gopal* v. *Shamskhaton* (10), and the latest case of *Satgur Prasad* v. *Raj Kishore Lal* (2). The primary function of a Court in deciding the issue of adverse possession is to draw legal inferences from proved facts. The legal inference so drawn is clearly a proposition of law. I, therefore, reject the contention that the finding of the learned Subordinate Judge on the question of adverse possession is conclusive in second appeal.

The result of my finding on the question of title already recorded is, that the plaintiffs and the defendants are co-owners in equal shares of the property in suit. This is a cardinal point in subordination to which the decision of the question of adverse possession should be approached. As Lord Buckmaster observed in the case of *Hardit Singh* v. *Gurmukh Singh* (11): "possession may be either lawful or unlawful and in the absence of evidence it must be asumed to be the former." And possession is lawful when it is in virtue of a legal title. In the case of *Thomas* v. *Thomas* (12) Wood, Vice Chancellor, said: "Possession is never considered adverse if it can be referred to a lawful title." This dictum was quoted with approval by Lord Macnaghten in the case of *Corea* v. *Appuhamy* (13). In the case before me it is admitted that the defendants and before them their ancestor, Ochcha Singh, have all along been in possession of the whole of the property in suit and in enjoyment of the profits thereof. In the circumstances, the question to be asked is. 'Has one tenant-in-common legal title to the whole ?' If he has, then the defendants' possession is lawful and, therefore, not adverse. It is well established that one tenant-in-common is not the agent of the other nor is there any fiduciary relation between them: *Kennedy* v. *De Trafford* (14). In a clash of self interest and duty to others the law will compel a person to do his duty: *Hardoon* v. *Belilios* (15), *In re Biss*, *Biss* v. *Biss* (16) and *Griffith* v. *Owen* (17). But one tenant owes no duty to the other tenant-in-common in respect of the interest of the latter in the common property though he has a duty to share the advantages acquired in his character as such with the other tenant: *Keech* v. *Sandford* (18) and the notes thereunder; also see section 90 of the Indian Trust Act (II of 1882). The presumption that the possession of one co-tenant of the entire common property is lawful seems to be founded on the principle that between two tenants-in-common each has a title to the whole and also to his undivided moiety and each is said to be seized *per my et per tout*, that is, each co-tenant has the entire possession as well of every parcel as of the whole." In the case of *Kennedy* v. *De Trafford* (14) Lord Herschell, in speaking of a co-owner called Dod-

(8) 20 A. 182; A. W. N. (1898) 19; 9 Ind. Dec. (N. S.) 478.

(9) 19 I. A. 48; 19 C. 253; 6 Sar P. C. J. 183; 10 Ind. Dec. (N. S.) 614.

(10) 19 I. A. 228; 20 C. 93; 6 Sar. P. C. J. 247; 17 Ind. 38; 10 Ind. Dec. (N. S.) 63 (P. C.)

(11) 59 Ind. Cas. 7; 28 C. L. J. 487; 22 Bom. L. R. 550; 74 P. W. R. 1921 (P. C.)

(12) (1855) 2 K. P. J. 9 at p. 83; 25 L. J. Ch. 159; 71 Jur. (N. S.) 1160; 4 W. R. 185; 110 R. R. 107; 69 E. R. 701.

(13) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. J. 886.

(14 (1897) A. C. 180; 66 L. J. Ch. 671; 76 L. T. 427; 45 W. R. 671.

(15) (1901) A. C. 118; 70 L. J. R. C. 9; 83 L. T. 573; 49 W. R. 209.

(16) (1903) 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T; 403; 51 W. R. 504.

(17) (1907) 1 Ch. 195; 76 L. J. Ch. 92; 96 L. T. 5; 23 T. L. R. 91.

(18) 2 Wh. & Tud L. C. (7th Ed.) 698; Sel. Cas. 61 2 Eq. Cas. Abr. 741.

son, said :—"Dodson was an owner of this property, the owner of an undivided moiety it is true, but each owner of an undivided moiety is none the less truly an owner." I must, therefore, hold that *prima facie* the possession of the defendants of the common property in its entirety was not adverse to the plaintiffs. The defendants had to prove that the possession which was and is not *prima facie* adverse had or has become so in reality. This is a heavy onus which the defendants have to discharge. It is clear on the authorities that the fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property in suit does not establish a title by adverse possession in the co-tenant, that is, the defendants who have enjoyed such profits, the reason of the view being, that it is consistent with the legal title in the co-tenant in possession. It may be doubted whether the old rule of English Law, afterwards abrogated by the Statute 3 & 4 William IV, Ch. 27, section 12, that the possession of one of several co-parceners, joint tenants or tenants-in-common is the possession of the others so as to prevent the Statute of Limitation from affecting them is applicable in India to "shares in an unpartitioned agricultural village:" See the decision of Viscount Cave in the case of *Varada Pillai* v. *Jeevarathnammal* (19). But one thing is perfectly clear that the co-tenant out of possession starts with a presumption in his favour that the possession of the other co-tenant is not adverse but lawful. This is well established by a series of decisions of their Lordships of the Privy Council, and further it is equally well established that nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to bring about the success of the plea of adverse possession : *Corea* v. *Appuhamy* (13), *Hardit Singh* v. *Gurmukh Singh* (11), *Muttunayagam* v. *Brito* (20), and the last decision of Viscount Cave in *Varada Pillai* v. *Jeevarathnammal* (19), already mentioned. In the case of *Jogendra Nath Roy* v. *Baldeo Das* (21), decided by the High Court of Calcutta, a series of cases are noticed in support of the opinion expressed above. From the same principle, it would seem to follow that such overt acts on the part of the tenant in possession as would ordinarily prove the adverse character of the possession as against a stranger will afford no evidence of such character as against the co-tenant, the reason being that those acts will be found to be consistent with the lawful title of the co-tenant in occupation.

The last question to be considered in this connection is, what facts have been found by the learned Subordinate Judge and, finally, whether those facts establish an ouster or an equivalent of ouster in relation to the plaintiffs. With reference to the statement of plaintiff No. 1 himself in the witness-box, the learned Subordinate Judge says : "that the defendants are in possession over the plaintiffs' share from the last 50 years and that the plaintiffs have made demands of their shares since a very long time." Then he proceeds : "this piece of evidence goes to show that the plaintiffs are making demands of this share since nearly 50 years but the defendants are not complying with their demands." From this he infers "the express repudiation of the title of the plaintiffs by the defendants within the knowledge of the former." I have no hesitation in holding that the two facts that the defendants have been in possession all along, and that the plaintiffs made demand for their share for the same period from the defendant and the defendants did not comply with their demand constitute neither ouster nor anything equivalent to an ouster. The whole finding comes to nothing more nor less than this, that the defendants have been in possession and have not paid any share of the profits to the plaintiffs though the plaintiffs have made demands for the same. It has not been found that the non-payment of the profits was accompanied with any assertion of hostile title on the part of the defendants. In order to establish adverse possession as between co sharers there must be evidence of an open assertion of hostile title by one of them to the knowledge of the other. In the words of Lord Macnaghten in *Corea* v. *Appuhamy* (13), already referred to, the defendants' possession was in law the possession of the plaintiffs. It was not possible for them to put an end to that possession by any secret intention in their minds. There must be an ouster or equivalent to an

(19) 53 Ind. Cas. 901 : 24 C. W. N. 346 ; (1919) M. W. N. 724 ; 10 L. W. 679 ; 48 M. L. J. 313 ; 18 A. L. J. 274 ; 43 M. 244 ; 2 U. P. L. R. (P. C.) 64 ; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

(20) (1918) A. C. 895 ; 87 L. J. P. C. 146.

(21) 35 C. 961 ; 6 C. L. J. 785 ; 12 C. W. N. 127.

ouster : See also the cases of *Jang Bahadur* v. *Mahammad Adul Hasan Khan* (22) *Asghar Husain* v. *Akbar Husain* 23and *Ram Manorath* v. *Sant*, (24). I, therefore, hold that the plea of adverse possession fails.

I allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs throughout.

Z. K. *Appeal allowed.*

(22) 95 Ind. Cas. 743 ; 8 O. L. J. 279.
(23) 36 Ind Cas. 743 ; 8 O. L. J. 438.
(24) 7 O. L. J. 8.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 184 OF 1922.

January 23, 1924.

Present :—Mr. Justice Rankin and Mr. Justice Mukerjee.

CHINMATHA NATH PAL CHOUDHURI—APPELLANT—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT—OPPOSITE PARTY.

Court-Fees Act (VII of 1870) s. 19 H.—Probate, application for—Valuation by District Judge—Order, whether final—Appeal—Refusal to exclude properties from valuation—Revision.

Where an applicant for probate refuses to amend the valuation of the estate to the satisfaction of the Collector, and the latter applies to the District Judge asking that an enquiry may be made into the true value of the property, the finding of the District Judge as to the value of the property under sub-section (5) of section 19 H of the Court-Fees Act is final and no appeal lies against it by virtue of the provision contained in sub-section (7) of the section.

Where, however, the applicant alleges that certain properties have been erroneously included in the Schedule, and that they are trust properties and not part of the estate of the deceased and should, therefore, be excluded from the valuation, it is the duty of the District Judge to go into the matter, and his failure to do so amounts to a refusal to exercise a jurisdiction vested in him by law and renders his order open to revision under section 115 of the Civil Procedure Code

Appeal from the Order of the District Judge, Nadia, passed in O. S. No. 11 of 1920, dated the 21st April 1922.

Babu *Surendra Nath Guha*, for the Respondent.—In this case the appellant applied for probate of a Will of his father. In the application for probate a Schedule of property was attached. On the 7th August 1920, the probate was ordered to be granted. Then, about a year afterwards, the Collector's valuation of the properties given in the said schedule was received by the District Judge and thereafter, on the 5th December 1921, the Collector filed a petition before the learned District Judge under section 19 H, clause. (4) of the Court-Fees Act, to hold an enquiry into the true value of the property. Thereafter, the District Judge asked the Munsiff of Ranaghat to hold an enquiry about the true value of the property. The Munsif held an enquiry and in that enquiry the petitioner for probate made an application stating that certain properties given in the said Schedule, were made *debutter* and filed a new Schedule of properties including the *debutter* properties and that the said *debutter* property might be valued separately as no Court-fees were required for obtaining a probate regarding the said *debutter* property and the learned Munsif held that it was beyond the jurisdiction of that Court and submitted a report, holding that the Collector's valuation was correct. The petitioner also filed an application before the District Judge to the effect, that there was no provision in the Probate Act, by which Court-fees were required on *debutter* properties and so Court-fees should not be charged upon the value of the *debutter* properties. The Judge disallowed the prayer of the petitioner and accepted the Collector's valuation. The petitioners also contended that a compromise-decree had been passed in a declaratory suit regarding the said *debutter* properties, during the pendency of the probate proceeding but the learned Judge was of opinion that he could not take notice of that decree. Against the said order this present appeal has been prefered. My preliminary point of objection is that no appeal lies at all from the order of the learned District Judge. The order under section 19 H of the Court-Fees Act is under the final order. The provisions of that section are quite clear. It must be remembered that it is not an order under the Probate and Administration Act but one under section 19 H of the Court Fees Act which, as I have already pointed out, is conclusive. Reads the section. The appeal, therefore, cannot be maintained.

Babu *Tarakaswar Pal Chaudhury*, for the Petitioner.—Although purporting to be an order under the Court-Fees Act, it is really an order disallowing a prayer for amendment of the petition for probate. Probate is to

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be granted to the estate of the deceased and the properties made *debutter*, by a deed of gift were a part of the estate of the deceased and as such an appeal lies under section 86 of the Probate Act. The Judge has every power to do all that he could do under the Civil Procedure Code. He had the power of amendment. In any case, the petition of appeal may be treated as a petition of revision as the lower Courts have manifestly failed to exercise a jurisdiction vested in them. The doctrine of *lis pendens* was not applicable to the present case, as there was no suit pending at the time regarding the said *debutter* properties.

Baba *Surendra Nath Guha* in reply.—This appeal cannot be treated a petition of revision inasmuch as the failure of exercising jurisdiction cannot be made out in this case. It is on that ground alone that order can be revised. The learned Munsif was right in refusing to enter into the question of the nature of the properties in an order under section 19 (H) of the Court-Fees Act. Moreover, it must be remembered that in the declaratory suit the Secretary of State was not a party at all.

JUDGMENT.—The facts of this case may shortly be summarised as follows: On the 12th of April 1920 the appellant applied for probate of the Will of one Braja Nath Pal Choudhuri, deceased. The application was registered on the 14th April 1920 and intimation thereof was sent to the Collector. On the 3rd July 1920 the learned District Judge ordered that the probate of the Will was to be granted to the applicant. On the 15th September 1921 the Collector's valuation was received in the Office of the District Judge. The value according to that valuation was Rs. 41,053-8-0, being much in excess of the value stated in the application filed by the applicant. The applicant not having amended the valuation to the satisfaction of the Collector the Collector, on the 5th December 1921, filed a petition in the Court of the learned District Judge under the provisions of section 19 H. clause (4) of the Court-Fees Act asking that an enquiry might be held into the question of the ture value of the properties. The learned District Judge on the same date made an order purporting to be under clause (5) of section 19 H, of the Court-Fees Act directing an enquiry to be held by the learned Munsit of Ranaghat. When the enquiry was being held by the learned Munsif, it appears that on the 14th February 1922 an application was filed before him by the applicant alleging that certain properties which had been included in the Schedule attached to his original application were properties which he was not claiming under the Will but were properties covered by a deed of gift, and he prayed that these properties might be excluded from the Schedule for the purpose of the valuation that he was going to make. There was a further prayer worded rather curiously to the effect that a fresh valuation might be made in respect of certain properties which were being mentioned in a separate list which the appellant was filling before the learned Munsif inasmuch as he wanted the probate to be in respect of those properties only. The learned Munsif rejected that application. A further application to the same effect, made on the 20th February 1922, was also rejected by the learned Munsif. The learned Munsif was of opinion that inasmuch as he had been asked by the terms of the order by which the enquiry had been directed to make a valuation in respect of the properties which were mentioned in the Schedule attached to the originial application he had no juristion to go into the question of valuation of the properties mentioned in the fresh list filed before him, that is, to the remaining properties after excluding from the list of properties originally mentioned in the Schedule which were alleged to be covered by the deed of gift. He also found that it was not possible to identify the properties in the aforesaid two lists. In this view of the matter, he submitted a report which came in the usual course before the learned District Judge on the 21st April 1922.

It appears that it was argued before the learned District Judge on that day that, inasmuch as those properties which were being claimed as having been declared to be *debutter* or trust properties in a suit between the applicant and his brother, were properties which had been wrongly included in the Schedule attached to the orginal application the valuation of the properties left by the deceased must be reduced by excluding the value of those properties. The learned District Judge thereupon passed the following order: "The petitioner, on the strength of a decree to which Government is not a party and which was made while the present matter was pending, claims exemption for the value of that portion of the estate

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which was there declared to be *debutter* or trust property. The Government pleader contends that this decree cannot now be taken notice of, and he relies on the doctrine of *lis pendens*. This contention appears to be correct and is allowed. The petioner will pay stamp-duty on the total net valuation found above by the 17th May on which date the probate must be produced."

As against this order the present appeal has been filed by the applicant. An objection has been taken on behalf of the respondent to the effect that no appeal lies against this order, inasmuch as it is not an order passed under any of the provisions of the Probate and Administration Act and under section 86 of that Act an appeal only lies from such orders as are passed by the District Judge or District Delegate by virtue of the powers conferred on him by that Act. Now, it appears to us that the order was passed by the learned District Judge under the provisions of section 19 H of the Court-Fees Act. The section clearly lays down the procedure which is to be followed when an application is made by the Collector on the refusal of the applicant for a probate to amend the valuation to his satisfaction and it lays down that if such an application is presented before the District Judge on behalf of the Collector asking that an enquiry may be held into the true value of the property the Court shall hold or cause to be held an enquiry accordingly and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. It further says that the finding of the Court recorded under sub-section (5) shall be final. Now, the learned District Judge, on receipt of the report from the learned Munsif, recorded the finding as quoted above under the provisions of sub-section (5) of section 19 H. of the Court-Fees Act; and by sub-section (7) of that section his finding is final. No appeal lies from this finding, and, therefore, the objection of the respondent as to the maintainability of the appeal must succeed and the appeal must fail.

We have been asked to treat the memorandum of appeal filed in this case as an application for the exercise of our powers in revision under section 115, Civil Procedure Code. [illegible] pears to me that the learned Munsi was asked to hold the enquiry with re this matter was of opinion that by th of the order under which he was holding the enquiry he had no jurisdiction to go into the question as to whether the properties were *debutter* or trust properties or not. It appears to me on the plain words of section 19 H. of the Court-Fees Act that he was to ascertain the value of the property of the deceased. for the purpose of determining the stamp-duty. Now, if those properties were, as a matter of fact, *debutter* or trust properties and were not properties which the applicant was claiming under the Will, the Munsif, in order to make a valuation of the property of the deceased, would be bound to go into that question; and it would be obligatory upon him to enquire whether these properties were *debutter* properties or not. The learned Munsif seems to have acted upon an erroneous view of the law and to have refused to exercise a jurisdiction which undoubtedly he had when he was proceeding under the provisions of sub-section (5) of section 19H.

When the matter came before the learned District Judge he, too, does not appear to have gone into the question at all. He refrained from going into the question upon the ground suggested by the Government pleader before him, that the decree which was produced as showing that the properties were as a matter of fact *debutter* could not be taken notice of by him upon the doctrine of *lis pendens*. Now speaking for myself, I have not been able to understand how the doctrine of *lis pendens* can be said to apply to the present case. The litigation in which that decree had been passed had come to an end the decree no doubt was passed while the present proceedings were pending, and the Secretary of State could not in any sense be said to be bound by it: but the doctrine of *lis pendens* has no application at all. The decree was a piece of evidence which, in the absence of facts and circumstances showing that it was fraudulent or collusive, would show that the applicant was not claiming the properties under the Will. The matter, therefore, was one which deserved consideration and, in any event, the learned District Judge was bound to go into the matter and come to a decision as to whether those [illegible] as should or should not be treated as [illegible] operty of the deceased within the [illegible] of section 19 H of the Court-Fees [illegible] have said he, too, has not gone into [illegible] on and in that respect, I think, he

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has failed to exercise a jurisdiction which was vested in him by law.

In this view of the matter, I would treat the memorandum of appeal as an application under section 115, Civil Procedure Code and would set aside the order passed by the learned District Judge on the 21st April 1922, and remit the matter to him for a further consideration of the question involved.

In this case no order is made as to costs.

The petitioner has paid only Rs. 5 Court-fee on his memorandum of appeal. But as it has been held that the memorandum of appeal is to be treated as an application for revision a Court-fee of Rs. 15 is payable. The petitioner is allowed one week's time to pay the deficit Court-fee of Rs. 5.

Rankin, J : —I agree.

Z. K. *Application allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 488 OF 1922.

November, 22, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

DHANRAJ MISIR—PLAINTIFF—APPELLANT
versus
RAMESHWAR MISIR—DEFENDANT—RESPONDENT.

Custom—Pre-emption—wajib-ul-arz, *entry in—Preference among co-sharers.*

The *wajib-ul-ars* of a village provided that every co-sharer had a right to transfer his share but at the time of transferring it, it was incumbent on him to inform the nearer co-sharers and in case of their refusal the other co-sharers of the village, and in case both these sets of co-sharers refused, then he was entitled to sell it to whomsoever he liked. A later *wajib-ul-arz* provided that when a co-sharer wished to sell his share, a co-sharer who was a near relation, then a co-sharer who is a distant relation, then all co-sharers in the *patti* and then co-sharers in the [illegible] *bardari* and then the other co-sharers of th[illegible] would have priority and preference ;

Held, that under these provisions a neare[illegible] er had a preferential right of pre-emption [illegible] a distant co-sharer.

Second appeal from the decree of the Subordinate Judge of Basti, dated the 7th January 1922.

Mr. *G. Agarwala*, for the Appellant.

Mr. *N. Udadhiya*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. The first Court decreed the claim but on appeal the suit has been dismissed.

Both the Courts below agree that there is a custom of pre-emption in this village. The Court of first instance was further of opinion that under that custom a nearer co-sharer was entitled to a preferential right as against a distant co-sharer. The lower Appellate Court has come to a contrary conclusion.

Two *wajib-ul-arzes* were produced by the plaintiff in support of the alleged custom.

The first one was of 1860 which provided that every co-sharer has a right to transfer his share but at the time of transferring it it is incumbent on him to inform the near co-sharer (*hissedar qaribi*) and in case of his refusal the other co-sharers of the village, and in case both these sets of co-sharers refuse, then he is entitled to sell it to whomsoever he likes.

Reading this clause, there can be no doubt whatsoever that under the custom it was the right of the near co-sharer to have the first offer. If, without any such offer having been made to the near co-sharer in the first instance, property was sold to a distant co-sharer the near co-sharer could obviously urge that the custom had not been complied with. The wording of this *wajib-ul-arz* makes it clear that there was a preference *inter se* between the co-sharers.

The other *wajib-ul-arz* was of the year 1886 which provided that when a co-sharer wishes to sell his share a co-sharer who is a near relation, then a co-sharer who is a distant relation, then all co-sharers in the *patti* and then co-sharers in the *lambardari* and then the other co-sharers of the village shall have a priority and preference. In the case of refusal by them, the co-sharer has a right [illegible] it to any one he likes. This *wajib-ul-*[illegible], in our opinion, gives a preference *inter* [illegible]nen it is read in connection with the [illegible] one, no doubt is left in our minds.

DIPCHAND DOWLAT RAM *v.* PARMANAND CHIMANDAS

The learned Judge of the Court below has in his judgment remarked that the case reported in *Mathura Singh* v. *Ramlal Singh* (1) marks a departure from the rules of law laid down in the previous cases and particularly in the case of *Gurdial* v. *Mathura Singh* (2). That is not correct. The *wajib-ul-arz* in the case reported in *Gurdial* v. *Mathura Singh* (2), clearly provided that in the case of a sale or mortgage the transferor was bound to transfer, first, to a co-sharer in the *patti* and then to *pattidars* of the *mahal*, then to owners of other *mahals*, and in case of their refusal to outsiders. It was then held that if the transferor had not transferred the property to a co-sharer in the *patti* the latter had a right of pre-emption. This was obviously correct. Whereas in the other case the *wajib-ul-arz* was to the effect that *in case of a* transfer of property the *right to claim pre-emption* would be as follows :—

> First to *warisan ek jaddi qaribi* ; then to *hissedars of the patti*, and then to co-sharers in the village.

It was held that that evidence was insufficient to prove the plaintiff's case that in case of a transfer to a co-sharer there was a preferential right in a nearer co-sharer. It is noteworthy that the wording of that *wajib-ul-arz* referred to a case where a transfer had taken place, and provided for a right to claim pre-emption.

In the present case we have no doubt in our minds that, having regard to the language of both *wajib-ul-arzes*, there was a right of preference *inter se*.

The learned Vakil for the respondent has urged that in that view of the matter the case ought to go back for a finding as to whether the plaintiff is in fact the near relation of the vendor. The Court of first instance distinctly found that the plaintiff and the defendant vendor were near relations ; and that the evidence of the plaintiff's witnesses was to that effect. When the defendant went up in appeal before the District Judge the point was not clearly taken that the finding was wrong. There is really no satisfactory evidence on behalf of the defendant to rebut the evidence of the plaintiff.

We, therefore, accept the finding of the first Court that the plaintiff is a near relation and a co-sharer and, therefore, comes in the first category, whereas the defendant does not come in that category. This being our view, the appeal must prevail. The decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs.

Z. K. *Appeal allowed.*

(1) 64 Ind. Cas. 86; 19 A. L. J. 908.
(2) 6 Ind. Cas. 920; 7 A. L. J. 610.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 1 OF 1922.

November 30, 1923.

Present :—Mr. Kincaid, J. C. and Mr. Aston, A. J. C.

DIPCHAND DOWLAT RAM—PLAINTIFF —APPELLANT
versus
PARMANAND CHIMANDAS—DEFENDANT —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment, when allowed—Plaintiff, whether can set up fresh claim—Description of defendant, correction of.

A plaintiff should not be allowed by amendment to set up fresh claims barred by limitation. [p. 906, col. 2.]

Weldon v. *Neal*, (1887) 19 Q. B. D. 394 ; 56 L. J. Q. B. 621, 35 W. R. 820, followed.

Steward v. *North Metropolitan Tramways Co.*, (1885) 16 Q. B. D 178 ; *Ludhomal* v. *Secretary of State*, 71 Ind. Cas. 570 ; 13 S. L. R. 1, referred to.

The general rule enacted in O. VI, r. 17, Civil Procedure Code permitting amendment of pleadings to determine the real questions in controversy between the parties is subject to the limitation that the case tried must be consistent with the case originally laid and that the state of facts and equities and grounds of relief originally alleged and pleaded should not be departed from. [p. 906, col. 2.]

Khiaram Pariamad v. *Chattomal Zerathmal*, 20 Ind. Cas. 570 ; 7 S. L. R. 23, followed.

A suit for settlement of partnership accounts was instituted against the firm of P. C. carrying on business by their Managing Partner P. J. Subsequently, the plaintiff applied for permission to amend the description of the defendant, substituting the description carrying on business in the name and style of

at it was a case of mere misdescription of ant who was on the record and fully aware

of the nature of the relief sought and of the *bona fide* mistake made by the plaintiff and that it was a fit case where the plaintiff should be allowed to amend his plaint. [p. 907, col. 2.]

Kisandas Rupchand v. *Kachappa Vithoba* 4 Ind. Cas. 726; 33 A. 644: 11 Bom. L. R. 1012, relied on.

Appeal from the decree of the Additional Judicial Commissioner, Sind, in Suit No. 645 of 1920.

Mr. *Dipchand Chandmal*, for the Appellant.

Mr. *Kalumal Pahlumal*, for the Respondent.

JUDGMENT.—On the 13th July 1920 Dipchand Dowlatram filed a suit for settlement of partnership accounts against the firm of Parmanand Chimandas consisting of more than one partner and carrying on business at Karachi by their managing partner Parmanand Jethanand.

Parmanand Jethanand as managing partner of the defendants filed a written statement stating that the partnership was between plaintiff and himself and not between plaintiff and the firm of Parmanand Chimandas.

Plaintiff thereupon, on 5th November 1920, asked the Court to allow him, under O. VI, r. 17 Civil Procedure Code, to amend the description of defendant substituting the following description, viz;—

"Parmanand Jethanand, Hindu, adult, merchant, residing in Karachi, in the name and style of Permanand Chimandas."

On 10th December 1920 plaintiff applied under O. I, r. 10 and O. VI, r. 17 for leave to amend the description of defendant by substituting the following description, *viz*:—

"Parmanand Jethanand, Hindu, adult, merchant, Karachi, carrying on business at Karachi, in the name and style of Parmanand Chimandas."

The learned Additional Judicial Commissioner was inclined to believe that the plaintiff had made a *bona fide* mistake, the partnership deed being in the possession of the defendant and the plaintiff not being fully aware how the partners were described [illegible] deed, but in view of the fact th[illegible] period of limitation had expired [illegible] the date when the suit was instit[illegible] the application for leave to amen[illegible] felt that an order allowing the plaintiff to amend the plaint would deprive the defendant of a substantial right which had accrued to him and work injustice. He accordingly rejected the application for leave to amend the plaint and dismissed the suit with costs. Against this judgment and decree the plaintiff has filed this appeal.

It is a well know principle of law that plaintiff should not be allowed by amendment to set up fresh claims barred by limitation, *Weldon* v. *Neal* (1). Similarly, in *Steward* v. *North Metropolitan Tramways Co.* (2), a defendant was not allowed to amend in such a manner as to impute responsibility to a third party at a time when the plaintiff's remedy against the third party had become barred by limitation. And it has been held by Facett, A. J. C. of this Court, in *Ludhomal* v. *Secretary of State* (3), that the Court should not allow an amendment which is not necessary for determining the real questions in controversy between the parties and when the application for amendment is really made merely in order to get an advantage over the other side by raising a plea which is an after thought. Again, an Appellate Bench of this Court has pointed out that the general rule enacted in O. VI, r. 17, Civil Procedure Code, permitting amendment of pleadings to determine the real questions in controversy between the parties is subject to the limitation that the case tried must be consistent with the case originally laid and that the state of facts and equities and grounds of relief originally alleged and pleaded should not be departed from: *Khuram Poriomal* v. *Chatomal Tirthmal* (4). On the other hand Pratt, J. C., and Fawcet, A. J. C., in *Nur Khatun* v. *Sumar* (5), drew attention to the fact that under O. VI, r. 17 the Court has very wide powers of granting amendment and that it can, in the exercise of its discretion, grant an amendment so as to enable a plaintiff who has failed on the original cause of action to continue his suit on a cause of action accruing *pendente lite*. In *Balkaran Upa-*

(1) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

[illegible]185) 16 Q. B. D. 178.

[illegible]nd. Cas. 570; 13 S. L. R. 1.

[illegible]nd Cas. 570; 7 S. L. R. 23.

[illegible]nd. Cas. 7; 9 S. L. R. 61.

dhya v. *Gaya Din Kalwar* (6), the Allahabad High Court held that the Court had no power to allow an amendment of the plaint by introducing a new cause of action after the period of limitation in respect of suche ause had expired and in *Janardan Kishore Lal* v. *Shib Pershad Ram* (7), the Calcutta High Court held that no amendment of a plaint could be allowed where the proposed amendment would take away from the defendants, if allowed, a right that they would have, if the plaintiffs had proceeded against them by way of original suit. In the case of *Charan Das* v. *Amir Khan* (8), however, their Lordships of the Privy Council laid down the principle that where there is admittedly a power to allow an amendent of the plaint, though such power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case. The question arises, do such circumstances exist in the present cases? We are of opinion that the answer is in the affirmative. The present case appears to me, in certain respects, very similar to the case of *Kisandas Rupchand* v. *Kachappa Vithoba* (9). There, too, the plaintiff filed a suit on the basis of a partnership. They alleged that, in pursuance of the agreement, they had debited Rs. 4,001 to defendants and prayed for dissolution and accounts. The lower Court held that the plaintiffs did deliver Rs. 4,001 worth of cloth, but came to the conclusion that no partnership was created and held that the suit as framed could not lie. The plaintiffs appealed, contending that the partnership was created, but at the hearing abandoned this plea and prayed for leave to amend by adding a prayer for the recovery of the money. The Bombay High Court allowed the amendment and allowed the plaintiff's claim, holding that the defence of limitation was a defence to which the defendants were never fairly entitled and that the allowance of the amendment only withdrew from them an advantage which they ought never to have received. Batchelor, J., the'npointed out that in *Weldon* v. *Neal* (1), Lord Esher intimated that leave to amend might have been granted if special circumstances had existed to justify it and Beaman, J., observed that the words of O. VI, r. 17 are very wide and that they authorize Courts to allow amendments whenever, in the opinion of the Judges, it is just that this should be done. In the present case the plaintiff does not wish to amend the plaint with regard to the nature of the relief sought. His partner Parmanand Jethanand had, prior to the partnership, traded in the name of Parmanand Chimandas, the name in which the partnership was subsequently carried on. The partnership-deed executed eight years previously in 1912 was in the possession of the defendant and the plaintiff, under the mistaken impression that his partner was not Parmanand Jethanand but Parmanand Chimandas, the name in which Parmanand Jethanand had traded, and that Parmanand Chimandas was a firm consisting of more partners than one, thus described his partner in the plaint. The mistake was a *bona fide* mistake, and the act of the plaintiff in thus describing the defendant amounted, in our opinion, to a mere misdescription. Parmanand Jethanand was on the record. He was fully aware of the nature of the relief sought and aware of the mistake which the plaintiff had made. His contention that the suit against himself is barred by limitation seems to us a defence to which he was never fairly entitled. There is no question of the plaintiff having as an after-thought put forward a new claim barred by limitation inconsistent with his original claim; the relief which he has claimed throughout has been a settlement of accounts. There is no question of the defendant being over reached or surprised. In the circumstances, we are of opinion that this is a fit case where plaintiff should be allowed to amend the plaint in the manner referred to in his application dated 10th December 1920.

We accordingly reverse the judgment and decree and remit the suit for trial. We award 'lant his costs.

Appeal accepted.

(6) 24 Ind. Cas. 255; 36 A. 370 at p. 371; 12 A. L. J. 695.

(7) 36 Ind. Cas. 179; 43 C. 95; 20 C. W. N. 475.

(8) 57 Ind. Cas. 606; 48 C. 110; 30 M. L. J. 195 28 M. L. J. 149; 2 U. P. L. R. (P. C.) 124; 1' 1095; 22 Bom. L. R. 1370; 47 I A. 255 49; 25 C. W N. 289; 3 P. W. R. 1921 (P. C

(9) 4 Ind. Cas. 726; 33 B. 644; 11 Bom.

BHOLA NATH DUTTA *v.* RADHANATH BISWAS

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 397 OF 1923.

February 28, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

BHOLA NATH DUTTA—APPLICANT—APPELLANT
versus
RADHANATH BISWAS AND OTHERS—RESPONDENTS.

Easements—Quasi-easement, what is—Partition of joint property—Right of lateral support—Joint wall—Rights of parties.

The term '*quasi*-easement' is applied to those easements which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession, or ownership, of one or more persons. [p. 909, col. 1.]

The principle is that, on the grant by the owner of an entire property of part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, termed *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant in use for the benefit of the part granted. [p. 909, col. 1.]

As between co-parceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of a Court of Law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted. One of such easements is the right of support, including lateral support, which passes by implication of law to a grantee, and it is applicable to the case of a party wall which is allotted entirely to one of the co-parceners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. [p. 909, col. 2.]

Case-law discussed.

Appeal against the order of the Subordinate Judge, 4th Court, 24 Perganas, dated 20th September 1923.

Babu *Provos Chundra Mitter* (with him Babu *Narayan Chandra Kar*, for Babu *Satyendranath Mitter*), for the Appellant.

Babu *Sarat Chandra Rai Chowdhuri* (with him Babu *Gour Mohan Dutt*), for the Respondents.

JUDGMENT.—This is an appeal against the order of the Court below, dated the 15th September 1923, passed in the execution of a decree. Gopinath Biswas, a brother of the respondent, brought a suit for partition of their family dwelling house which was in the joint occupation of all the co-sharers. There was a decree for partition and a Commissioner was appointed to effect it. By consent of parties, the Commissioner made the allotments by which two contiguous rooms under one roof were allotted to Gopinath and the respondent, respectively. There are walls between the two rooms which fell to the share of Gopinath who had to pay some money to the other co-owners as compensation. Thereafter, Gopinath sold the portion allotted to him to the appellant who applied for execution of the decree. Possession of the room allotted to Gopinath was delivered to the appellant by Court. The appellant, however, was not satisfied with the delivery of the possession of the walls between the two rooms as the beams and rafters of the roof of the respondent's room were resting on them and applied to the Court below to deliver to him 'exclusive possession' of the walls by removing the beams and rafters of the respondent as he said he was going to demolish the walls and rebuild his portion of the house. The learned Subordinate Judge disallowed the appellant's prayer, remarking that the walls form the support of the respondent's roof and that the removal of the walls would mean the collapse of the respondent's room. The learned Judge has given no other reason for rejecting the appellant's application except that it would be a great hardship to the respondent if the appellant was allowed to remove the walls. This appeal is against that order and it is argued that as the respondent has no right to the walls which have been allotted to the appellant the prayer for exclusive possession should not have been refused on the ground of hardship to the respondent.

A point by way of preliminary objection was raised by the respondent, namely, that as full delivery of possession had been effected and certified by the Court the question now raised by the appellant cannot be [illegible] in the execution proceedings though it [illegible] the subject of a separate suit. But [illegible]estion has been raised in execution

of the decree between parties to it, we think it is rightly raised under section 47, Code of Civil Procedure.

The respondent bases his claim to rest his beams and rafters on the appellant's walls on a right which is known in law as a '*quasi*-easement'. "The term '*quasi*-easements' has been applied to those easements, which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession, or ownership, of one or more persons." Peacock on Easements, third Edition, p. 343. Such easements will not come into existence where they are expressly excluded by the terms of the grant or are inconsistent with the intention of the parties. They generally arise on severance of tenements held under sole possession or one ownership or on division of a tenement held under joint ownership or possession. They are conveniences to which the law subjects one part of the property for the benefit of the other part. Such easements, therefore, arise on a partition of joint property as they do in the case of the division of a tenement possessed or owned by a single person under grants by him. The difference in the two cases is that, according to the law obtaining in places where the Indian Easements Act is not in force, while in the former case a division of joint property gives rise to reciprocal easements in favour of co-parceners, in the latter case such rights do not ordinarily accrue to the grantor except by express reservation by the terms of the grant. But the law relating to *quasi*-easements, arising on a division of joint property is based upon the same principle which governs the conveyance of a part of the tenement held by a single owner or possessor. The principle is that on the grant by the owner of an entire property of part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, termed *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant in use for the benefit of the part granted: *Suffield* v. *Brown* (1) *Amutool Rasool* v. *Jhoomuck Singh* (2), *Delhi and London Bank, Ltd.* v. *Hem Lall Dutt* (3). Such easements arise in favour of the grantee on several principles as observed in the case of *Sarojini Debi* v. *Krishna Lall* (4). Applying the above principle, which is well established, to the case of partition of joint property, the law may be thus stated: "As between co-parceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of a Court of Law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted." Peacock on Easements, p 393 *Bolye Chunder Sen* v. *Lalmoni Dasi* (5), *Sarojini* v. *Krishna* (4). One of such easements is the right of support (including lateral support) which passes by implication of law to a grantee: *Dalton* v. *Angus* (6), and it is applicable to the case of a party wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements: *Watson* v. *Gray* (7).

The learned Vakil for the appellant maintains that the easement claimed by the respondent places an onerous burden on his client's property, that it is not a case of absolute necessity and that the respondent may erect a wall on his own property to support his portion of the roof. As we have observed, a *quasi*-easement need not be of absolute necessity but is one which is reasonably necessary, *i.e.*, necessary for the occupation of the severed tenements in the same condition as it was at the time of the transfer. In this connection, reference may be made to section 13 of the Indian Easements Act. Though the Act is not in force in this part of the country, it may serve as a useful guide for ascertaining the rule of law on which the doctrine of lateral support is founded: See the first portions of illustrations (h), (i) and (j) to section 13 and

(1) (1861) 4 De G. J. & S. 185; 33 L. J. C N. R. 340; 10 Jur. (N. S.), 111; 9 L. T. 627; 356; 146 R. R. 267; 46 E. R, 888.

(2) 24 W. R. 345.
(3) 11 C. 883) at p. 853; 7 Ind. Dec. (N. S.) 555.
(4) 72 Ind, Cas. 576; 36 C, L. J. 406; (1923) A. I. R. C. 797; 7 Ind. Dec. (N. S.) 527
(5) 6 App. Cas. 740; 50 L. J. Q. B. 689; 44; 30 W. R. 191; 46 J. P. 132.
(6) 14 Ch. D. 192; 49 L. J. Ch. 248; 42 L. T. R. 488; 44 J. P. 587.

Krishnamarazu v. *Marraju*, (8), *Ratanji* v. *Idalji*, (9), and *Purshotam* v. *Durgoji* (10). No doubt the easement claimed by the respondent to some extent affects appellant's property but that fact is not in itself sufficient to annul a right founded upon a well recognised principle of law whether such right is claimed as one attached to property or under a presumed contractual relation between the grantor and the grantee or among co-parceners. As to the suggestion that the respondent may erect a wall to support his portion of the roof, the same argument may be advanced against all *quasi*-easements which are not easements of necessity, and appears to us to be without substance.

On a consideration of the authorities on the subject and of the facts of the present case, we are of opinion that the easement of lateral support claimed by the respondent arises by necessary implication on a partition of joint property and is well founded in law.

The partition suit was between brothers and it may fairly be presumed that in consenting to the allotments made by the Commissioner, it was not the intention of the respondent to surrender his right to such *quasi*-easements as legally accrued upon a division of the joint property nor at that time was a controversy such as the present within the contemplation of the parties, and the intention of the parties is an important element in such matter. *Sarojini* v. *Krishna* (4). The mere fact that the price of the walls which were valued at Rs. 15 by the Commissioner was taken into account in adjusting the value of the allotments and was included in the value put upon the appellant's portion does not in any way affect the applicability of the law as above stated.

The result is that the appeal fails and is dismissed with costs, which we assess at 3 gold mohurs.

Z. K. *Appeal dismissed.*

(8) 28 M. 495; 15 M. L. J. 255.
(9) 8 Bom. H. C. R. (O. C. J.) 181.
(10) 14 B. 452. 7 Ind. Dec. (N. S) 762.

PATNA HIGH COURT.

CIVIL REVIEW No. 10 of 1923.

August 6, 1923,

Present:—Mr. Justice Ross.

FIRM AMRIT PAIYAR BILAT MANDAL—PETITIONER,

Versus

FIRM SUNDAR RAM RAMPHAL RAM—OPPOSITE PARTY.

Contract Act (IX of 1872) s. 61—Appropriation of payments, absence of, effect of.

Under section 61 of the Contract Act where neither party makes any appropriation, payments made by a debtor must be applied in the discharge of debts in order of time.

Mr. *Md. Hasan Jan*, for the Petitioner.
Mr. *Manohar Lal*, for the Opposite Party.

JUDGMENT.

Ross, J.—This is an application for review of a judgment passed by this Court on the 9th of January 1923 in Civil Revision No. 199 of 1922 by which the decree of the Small Cause Court Judge of Darbhanga in favour of the present petitioner for a sum of Rs. 415-14-9 was set aside. The judgment of this Court proceeded on the basis that six items on the debit side and two items on the credit side of the account were barred by time when the suit was brought, this contention of the learned Counsel for the defendant not being then contested on behalf of the plaintiff. has now been shown by the petitioner that this is an error apparent on the face of the record. One of the six items on the debit side which were then excluded from consideration was an item of Rs. 645-2-3. This payment was made on Aghan Sudi 4th, 1325, which corresponds to the 7th December 1918. The suit was brought on the 7th December 1921 and, consequently, this item was not barred by time.

The learned Counsel for the opposite party, however, contends that, even if this item is into consideration, still nothing is due defendant to the plaintiff. His argu- is that the total of the entries of the

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debit side for 1326 is Rs. 1,761-10-0 and for 1327 Rs. 46-10-6 and that if the first five items only are excluded, which are all of dates anterior to the 7th December, 1918, the total will be only Rs. 828-2-0 whereas on the credit side of the account, after excluding the first two items Rs. 265-1-9 and Rs. 199, there is a total payment of Rs. 928-4-0. The fallacy of this argument, however, is that under section 61 of the Contract Act where neither party makes any appropriation payments are to be applied in the discharge of debts in order of time. The first payment of Rs. 265-1-9 cannot be applied to the debt of Rs. 977-3-0 because the payment was made on the 3rd of November while the debt was not incurred until the 7th November, but all the subsequent payment must be appropriated to the discharge of the debt of Rs. 977-3-0 before the item of Rs. 645-2-3 is reached. When the payments are appropriated in this way, the plaintiff is found to be entitled to the decree which the Subordinate Judge gave except as to interest.

The result is that this application must be allowed, the decree of this Court set aside, and the decree of the Small Cause Court Judge restored, except that the rate of interest is to be calculated at Re 1 and not Re. 1-8-0. The decree will be prepared accordingly.

There will be no costs.

Z. K. *Application allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 269 OF 1921.

February 19, 1924.

Present.—Mr. Justice Lindsay and Mr. Justice Sulaiman.

B. GAURI SHANKER SINGH AND OTHERS —PLAINTIFFS

versus

PT. SHEO NANDAN MISRA AND OTHERS —DEFENDANTS

Hindu Law—Joint family—Alienation by Antecedent debt, what is—Barred debt, whether antecedent—Debt incurred on security of family property, whether antecedent

Antecedent debt means merely a debt which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached. [p. 912, col. 2.]

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O and A. L. R. 82; 1924 A. I. R. (P. C.) 50; 33 M. L. T. 457; 21 A. L. J. 931 (P. C.); followed.

Per Lindsay, J:—If a Hindu father in his life-time chooses to discharge an antecedent debt by an alienation of family property although the recovery of that debt would have been impossible under the law of limitation at the time the father discharges it, his sons must be held to be bound by the father's transaction. [p. 913, col. 2; p. 914, col. 1.]

Per Sulaiman J:—When a debt becomes time barred it ceases to be a legal debt, and though the Hindu Law does not recognise the principle of limitation, there is no ground for holding that the sons of a Hindu debtor cannot take advantage of the Statute of Limitation which makes such a debt unenforceable. [p. 915, col. 2.]

The basis of the liability of Hindu sons in respect of debts incurred by the father is threefold. That liability may either be based on the existence of a legal necessity or on the ground of the personal obligation of the sons to pay their father's debts or on the ground of the transfer being in lieu of on antecedent debt; and each of these is a distinct and separate basis. The liability on the basis of antecedency of the debt is not affected by the question whether the father who contracted the debt is dead or alive. [p. 918, col. 1.]

A debt does not cease to be an antecedent debt merely because it is secured on the family property; and a mortgage debt can be an antecedent debt just as much as a simple money-debt can be. [p. 918, cols. 1 and 2.]

Although, therefore, a debt which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing, cannot be deemed to be a good antecedent so as to validate a conveyance by the father in lieu of it, yet where a mortgage-debt as such has not become time-barred but only the personal remedy against the father is barred, it can still be a good antecedent debt so as to justify an alienation in lieu of it. [p. 919, col. 1.]

Case law discussed.

First appeal from the decree of the Subordinate Judge, Ghazipur, dated the 30th March,

'. *L. Agarwala*, for the Appellants.

'. *Haribans Sahai* and *S. N. Gupta*, espondents.

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JUDGMENT.

Lindsay, J.—The material facts to be considered in this case are as follows:—

On the 8th October 1904 Bachu Singh, the defendant No. 2, executed a simple mortgage-deed in favour of the first defendant Sheo Nandan Misir.

Admittedly, the property which was hypothecated under this document was joint family property.

On the 22nd September 1916, with the object of satisfying the debt which was due under this earlier mortgage, Bachu Singh executed a mortgage with possession in favour of the same mortgagee. It was recited in this deed that the sum of Rs. 12,265 was owing on the earlier mortgage. A further sum of Rs. 460 was recited to have been taken in cash at the time of the execution of the mortgage for necessary expenses and for the completion of the document. The total mortgage-debt secured upon this second mortgage was thus a sum of Rs. 12,725.

The suit out of which this appeal arises has been brought by the son and two grandsons of Bachu Singh for the purpose of avoiding this latter mortgage. There were allegations in the plaint to the effect that Bachu Singh, the defendant No. 2, is a man of licentious and extravagant habits. It was further alleged that the mortgage in suit had not been executed for legal necessity or for any other purpose which would be binding upon the plaintiffs. It was, therefore, prayed that the mortgage transaction of the 22nd September 1916 should be set aside. At the same time, the plaintiffs expressed their willingness to pay to the defendant No. 1 any sum which the Court might find to be owing to him on the ground that it represented money which was taken for purposes binding upon the family.

In the result, the learned Subordinate Judge dismissed the suit for the setting aside of the mortgage. He has given the plaintiffs a decree for redemption on payment of the full amount, that is to say, Rs. 12,725.

The Subordinate Judge definitely found, and we agree with his finding, that th[e]re is no reliable proof whatever that Bach[u] is a licentious or extravagant man. T[he] ence which was led by the plainti[ffs] point is altogether vague and unsat[isfactory].

The plaintiffs come here in appeal and we have heard Dr. Agarwala at length on their behalf. In fact, we have had the case up twice for argument.

It seems to us that this appeal is, concluded by the principles which have been laid down by their Lordships of the Privy Council in their recent judgment in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (1).

The question to be considered is whether this mortgage which the plaintiffs now seek to have set aside was entered into for the purpose of discharging an antecedent debt.

It must be admitted that, as the law stood under the ruling in *Sahu Ram Chandra's case* (5), the debt incurred under the ealier mortgage of 1904 would not have been treated as an antecedent debt for the simple reason that that debt was incurred by the father on the security of the joint family property.

The learned Subordinate Judge was, therefore, right in holding that this earlier mortgage-debt could not constitute an antecedent debt within the meaning of the ruling just referred to. He dismissed the suit, however, on other grounds mainly concerned with the burden of proof. He was of opinion that the plaintiffs had failed to discharge, what he thought was, the onus which lay upon them, and it was for this reason that he ordered that a decree for redemption should be prepared.

Returning to the question of antecedent debt it seems to us plain from this recent decision of their Lordships that of the definition of "antecedent debt" which was given in *Sahu Ram Chandra's case* (5) has been materially altered. As we read this latest pronouncement of the Full Bench of the Judicial Committee, we understand antecedent debt to mean merely a debt which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached. In the concluding portion of the judgment their Lordships laid down five propositions which govern all cases of this kind and the definition which has just been quoted is recited in proposition No. 4.

(1) Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 28; [illegible]d 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 [illegible]s; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) [illegible]. C.) 50; 33 M. L. T. 457 (P. C.).

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It cannot, therefore, be doubted that the debt which was raised by the mortgage of 1904 must now under this recent ruling be treated as an antecedent debt

It has, however, been argued strenuously before us that we ought not to treat this earlier debt as an antecedent debt because, at the time the mortgage of 1916 was executed, no suit for the recovery of the debt owing under the earlier mortgage would have lain against the father. A suit to recover the money from the father as a personal debt would have been barred by the rule of limitation. We are asked, therefore, to hold that because in the year 1916 when the transaction which is now being impeached was entered into the earlier debt had become time-barred we ought to hold that the debt was not in reality an antecedent debt.

This is a question of some difficulty and there is no direct authority upon the point. There can, of course, be no doubt that a personal obligation incurred by the father in the year 1904 under a registered deed could not have been enforced after a period of six years had elapsed.

It is, however, well understood that. though the remedy which the creditor has may be extinguished the debt may nevertheless subsist and, even after the period of limitation for a suit for recovery of the debt has passed, the creditor has a right to receive the sum due to him from his debtor if the latter is disposed to pay him.

It is further clear that a payment made to discharge a time-barred debt could not in law be recovered by the debtor and, further, it is to be observed that the payment of a time-barred debt by a Hindu father could not in any sense be treated as an improper act or, to use the stock phrase, a transaction tainted with immorality. In this recent case which was before their Lordships of the Privy Council it is clear from the facts that the personal obligations incurred by the father were still enforceable, inasmuch as the earlier debts had been contracted within a period of between two and three years prior to the date of the mortgage in suit.

Here, as we have pointed out, t[h]e debt was incurred in 1904 while th[e] in suit is of the year 1916.

Bearing in mind, however, that the liability of the son for payment of the father's debts rests upon a pious duty, it may well be doubted whether the sons in this instance could be heard to say that they are not bound by the payment which their father made in order to discharge an earlier debt although the recovery of that debt was barred by the law of limitation.

It is well settled that an alienation made by a Hindu widow for the purpose of discharging a debt due by her husband is binding on the reversioner even though the recovery of the debt which was discharged had become time-barred at the time of the transfer made by the widow. This principle has been laid down in a number of cases, *e.g.*, *Kondappa* v. *Subba* (2), *Chimnaji* v. *Dinkar* (3), *Udai Chunder* v. *Ashutosh Das* (4).

In these cases it was held that the discharge of a husband's debt whether barred or not was a pious duty of the widow and that an alienation made by her for the payment of such a debt would be binding upon the reversioners. It was said in the judgment in the Bombay case that the moral obligation resting upon the widow could not be obliterated by the circumstance that the law of limitation barred or did not bar a suit against the widow for the recovery of the debts. It is no breach of duty on the widow's part if she pays a debt which is time-barred.

If these principles hold good in the case of a widow it appears to me that they ought to hold equally good in the case of a son who is also under the pious obligation of discharging the debts of his father.

It is true, as we have pointed out, that the father here is still alive, but under the recent Privy Council ruling that circumstance in no way affects the liability of the sons. It has now been definitely settled that the pious obligation which binds the sons can be enforced even in the life-time of the father.

It seems to me, therefore, that if the father in his life-time chooses to discharge an antecedent debt, although the recovery of that [debt] would have been impossible under the

13 M. 189 ; 4 Ind. Dec. (N. S.) 844.
1 B. 820 ; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S).
C. 190; 10 Ind. Dec. (N. S.) 759.

time-barred debts of her husband was supported, may be distinguished on the ground that thereby she had conferred a spiritual benefit on her deceased husband.

I am, therefore, of opinion that if the previous debt of the father had become absolutely time-barred a conveyance in lieu of it cannot be held to be binding on the sons. To hold so would be to extend the applicability of the exception to an extent for which there is up to now no precedent.

This, however, does not dispose of the whole question. In the present case the previous mortgage-debt had not become absolutely barred by time. The creditor's remedy, if enforcible, was to realise his debt as against the security. All that had happened was that owing to the lapse of six years a personal decree against the father in the event of the security proving insufficient, could not have been passed.

The question to be considered, therefore, is whether the mortgage-debt *per se* as distinct from a personal debt of the father can be deemed to be an antecedent debt within the meaning of the exception.

The rule laid down in *Suraj Bansi Koer* v. *Sheo Persad Singh* (12), was that where joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted. Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (13), remarked that,' the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority.' In none of these cases any expression like the expression "an antecedent unsecured debt" or the expression "an atecedent personal debt" was used. Stanley, C. J. in the Full Bench case of *Chandra Deo Singh* v. *Mata Prasad* (7), defined the expression 'antecedent debt' as meaning a debt which is not for the first time incurred at the time of a sale or mortgage, that is presently incurred, but a debt which existed prior to and independently of such sale or mortgage, though of course a *bona fide* debt not colourably incurred for the purpose of forming a basis for subsequent mortgage or sale or other similar object.

The case of *Sahu Ram Chandra* v. *Bhup Singh* (5), was one where on the facts no antecedency arose. The debt had been incurred under the mortgage itself which was in suit and all other remedies, excepting that of enforcing the security, had gone. In view of a certain conflict of decisions in the various Courts in India which was brought to their Lordships notice it was thought desirable to state the law comprehensively. According to the interpretation put on that case by the Allahabad High Court two main propositions could be deduced from it. (1) The debt, in order to be an antecedent debt, must 'not only have been antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate; that is to say, that it must be a personal debt of the father and not a mortgage debt by him. And (2) while the father remains alive, the attempt to affect the son's and grandson's sharesin the property in respect merely of their pious obligation to pay off their father's debt and not in respect of the debt having been principally incurred for the interest of the estate itself which they and their father jointly own, must fail, that is to say there could be no pious obligation to pay off the father's debt during the life-time of the father. It might [illegible] said that from the first proposition it [illegible] followed that the debt being a personal debt of the father must have been one [illegible] within six years of the transfer.

(12) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; C. J. 1; 3 Suth. P. C. J. 589; 2 Shome's L. Ind. Dec. (N. S.) 705.
(13) 13 C. 21 (P. C.), 13 I. A. 1; 10 Ind 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510

barred by the Statute of Limitation or not. But the argument on behalf of the plaintiffs is that though there may be a religious obligation on the sons to be bound by their father's debt, which is neither illegal nor immoral, nevertheless they are entitled to claim the benefit of statutory enactments. If a debt has ceased to be a legal and enforcible debt against the father the liability of the sons to pay it must also be deemed to have ceased. There cannot be much doubt that if a suit against the father were time-barred the creditor would not be allowed to pursue his remedy against the sons on the basis of the doctrine of their pious obligation to pay it. This was clearly laid down in the case of *Narasingh Misra* v. *Lalji Misra* (6) and this principle has been consistently followed. Stanley, C. J., in his leading judgment in the Full Bench case of *Chandra Deo Singh* v. *Mata Prasad* (7) remarked: "A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father's debts, provided that the suit be not barred by limitation, and a decree passed in such a suit may be enforced in execution by the sale of ancestral property of the family."

On the other land, it must also be conceded that, when a debt becomes time-barred the debt itself is not extinguished but the right to recover it becomes barred. There is nothing immoral or illegal in the debtor paying off such a time-barred debt. In fact, under section 25, sub clause (c) of the Indian Contract Act a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which a creditor might have enforced payment but for the law for the limitation of suits is not considered void as being without consideration. If, therefore, a father previous to the deed of transfer had given a promise in writing undertaking to pay his time-barred debt his personal liability would be revived and such liability could be enforced against his sons.

The point pressed before us, however, is that in the present case the father had not in any such way revived his personal liability before the conveyance was executed; that is to say, there was no subsisting personal debt of the father which could have been legally enforced just before this deed of transfer and independently of it. It is pertinently asked whether a sale-deed by a father in lieu of some old debt, more than 12 years old, on which remedies have become time-barred, would be considered to be a conveyance in lieu of an antecedent debt so as to bind the sons. I am not prepared to say that such a conveyance would be a good conveyance.

Knox and Piggott, JJ., in the case of *Inder Singh* v. *Sarju Singh* (8) laid down that a mortgage-deed executed by a father of a joint Hindu family in consideration of an antecedent debt which had become time-barred was not binding upon the sons. I am inclined to agree with the view expressed therein. When a debt has become time barred it has ceased to be a legal debt, and, even though the Hindu Law does not recognise the principle of limitation, I see no ground for holding that the sons cannot take advantage of the Statute of Limitation which makes such a debt unenforcible. If such a debt had been tried to be enforced against the father or the sons, the suit could not possibly have been decreed on the basis of any pious obligation. Can such an unenforcible obligation be deemed to be an antecedent debt for validating a subsequent transfer?

The soundness of the decision in *Inder Singh* v. *Sarju Singh* was somewhat doubted in the case of *Hari Har Baksh Singh* v. *Bharat Prasad* (9) but the latter case was one in which, previous to the transfer, there had been a promise in writing by the father undertaking to pay his previous debt. On the same ground the case of *Narayanasami Chetti* v. *Samidas Mudali* (10) is distinguishable inasmuch as there, too, the father had executed a promissory-note in lieu of a previous time-barred debt. The same can be said about the case of *Ram Kishan* v. *Chhedi Lal* (11). The cases where an alienation by a Hindu widow in lieu of

(6) 23 A. 206 ; A. W. N. (1901) 31.
(7) 1 Ind. Cas. 479 ; 31 A. 176 at p. 194 ; 6 A. L. J. 263.

11 Ind. Cas. 737 , 8 A. L. J. 1099.
10 Ind. Cas. 530 , 16 O. C. 185.
M. 293 , 7 Ind. Jur. 367 ; 2 Ind. L. J. (N. S.)
Ind. Cas. 235 ; 20 A. L. J. 577 ; 41 A. 628 ;
. R. (A.) 402.

time-barred debts of her husband was supported, may be distinguished on the ground that thereby she had conferred a spiritual benefit on her deceased husband.

I am, therefore, of opinion that if the previous debt of the father had become absolutely time-barred a conveyance in lieu of it cannot be held to be binding on the sons. To hold so would be to extend the applicability of the exception to an extent for which there is up to now no precedent.

This, however, does not dispose of the whole question. In the present case the previous mortgage-debt had not become absolutely barred by time. The creditor's remedy, if enforcible, was to realise his debt as against the security. All that had happened was that owing to the lapse of six years a personal decree against the father in the event of the security proving insufficient, could not have been passed.

The question to be considered, therefore, is whether the mortgage-debt *per se* as distinct from a personal debt of the father can be deemed to be an antecedent debt within the meaning of the exception.

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The case of *Sahu Ram Chandra* v. *Bhup Singh* (5), was one where on the facts no antecedency arose. The debt had been incurred under the mortgage itself which was in suit and all other remedies, excepting that of enforcing the security, had gone. In view of a certain conflict of decisions in the various Courts in India which was brought to their Lordships notice it was thought desirable to state the law comprehensively. According to the interpretation put on that case by the Allahabad High Court two main propositions could be deduced from it. (1) The debt, in order to be an antecedent debt, must not only have been antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate; that is to say, that it must be a personal debt of the father and not a mortgage debt by him. And (2) while the father remains alive, the attempt to affect the son's and grandson's sharesin the property in respect merely of their pious obligation to pay off their father's debt and not in respect of the debt having been principally incurred for the interest of the estate itself which they and their father jointly own, must fail, that is to say there could be no pious obligation to pay off the father's debt during the life-time of the father. It might [illegible] said that from the first proposition it [illegible] followed that the debt being a personal debt of the father must have been one [illegible] within six years of the transfer.

(12) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; [illegible] C. J. 1; 3 Suth. P. C. J. 589; 2 Shome's L. [illegible] Ind. Dec. (N. S.) 705.

(13) 13 C. 21 (P. C.), 13 I. A. 1; 10 Ind. [illegible] 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510.

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A Full Bench of the Madras High Court in *Arumugam Chetty* v. *Muthu Koundan* (14), came to the conclusion that the first proposition did not follow from *Sahu Ram Chandra's case* (5). A Full Bench of the Patna High Court in the case of *Mathura Misra* v. *Raj Kumar* (15), came to the same conclusion.

The case of *Jogi Das* v. *Ganga Ram* (16), was also a case in which there was no antecedency in time between the debt and the conveyance.

Great reliance has been placed by the learned Advocate for the respondents on the case of *Chet Ram* v. *Ram Singh* (17). In that case the father had executed a mortgage in the year 1904 for a period of ten years. Within three years from its date he in 1907 sold his equity of redemption in the property to the mortgagees themselves. Their Lordships set aside the sale deed and refused to treat the previous mortgage-debt as an antecedent debt so as to justify the second alienation. It is strongly contended on behalf of the plaintiffs-appellants that this case was expressly referred to in Counsel's argument before their Lordships in a subsequent case to be presently referred to and was not disapproved of. It is urged that this case is intelligible only on the assumption that, in order to be a good antecedent debt, there must be a personal liability of the father to pay it, and it is suggested that the mortgage-debt of 1904 was not treated as an antecedent debt because it was secured by a usufructuary mortgage under which the mortgagee had no right to sue for money against the father. It is said that if every previous mortgage-debt were to be treated to be an antecedent debt then the sale-deed of the year 1907 could not have been set aside at all. I have carefully considered the force of this argument and have come to the conclusion that *Chet Ram's case* (17) was decided not on this supposed ground but on the principle laid down in *Sahu Ram Chandra's case* (5). At page 373 Lord Shaw repelled the argument that 'although by the rules of the *Mitakshara* law a mortgage is at its date an invalid deed in so far as purporting to incumber the joint family property, yet when it purports to become a consideration for a sale it then becomes a just and a legal consideration on the principle of antecedent debt, and that the family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an antecedent debt, namely, the mortgage-debt itself. The rule in *Sahu Ram Chandra's case* (5) insisting that the obligation must not only have been antecedently incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate, was reaffirmed. The case of *Jogi Das* v. *Ganga Ram* (16) was also quoted where Lord Haldane had interpreted the judgment in the case of *Sahu Ram Chandra* v. *Bhup Singh* (5) as one laying down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that, in consequence, the transaction in that case could not stand,' and it was added that 'the very circumstance of a pious obligation does not validate the mortgage'. The other rule laid down in *Sahu Ram Chandra's case* (5), namely, that there could be no pious obligation during the father's life-time was also relied upon and the appellant's argument was not acceded to as the doctrine was being invoked against grandsons in the life-time of the sons. I am unable to find any passage in the judgment in *Chet Ram* v. *Ram Singh* (17) which would support the contention that the previous mortgage-debt was not treated as an antecedent debt because the usufructuary mortgagee had no right to recover a money decree.

The question what is an antecedent debt has been recently considered by a Full Board of the Privy Council in *Brij Narain Rai* v. *Mangala Rai* (1). Their Lordships, after referring to the previous authorities, have laid down propositions which they would wish to as the result of those authorities.

(14) 52 Ind. Cas. 525 ; 42 M. 711 ; 9 L. W. 565 ; (1919) M. W. N. 409 ; 37 M. L. J. 166 ; 26 M. L. T. 96 (F. B.).

(15) 62 Ind. Cas. 182 ; 2 P. L. T. 407 ; (1921) Pat. 245 ; 6 P. L. J. 526 (F. B.).

(16) 42 Ind Cas. 791 ; 21 C W. N 957 ; (1917) M. W. N 739 (P. C.).

(17) 67 Ind. Cas. 560 ; 44 A. 368 ; 3 P. L. T. 363 ; 31 M. L. T. 50 ; 43 M. L. J. 98 ; 16 L. W. 89 ; (1922) M. W. N. 455 ; 4 U. P. L. R. (P. C.) 64 ; (19[illegible] R. (P. C.) 247 ; 3 P. L. R. (P. C.) 1922, 24 P 123 ; 27 C. W. N. 150 ; 21 A. L. J. 111 ; 3 79 ; 49 I. A. 228 (P. C.).

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We are bound, therefore, to accept the most recent pronouncement as the final authority on the matter. I concede that, on the actual facts of that case, the question which we have to consider in the present case did not directly arise, for the previous mortgage-deeds were all deeds within six years of the mortgage-deed in suit and the personal remedy of the mortgagor had not become barred by time. Nevertheless, the five propositions laid down by their Lordships must be unreservedly accepted. In these five propositions I understand the basis of the liability of Hindu sons to be three-fold. That liability may either be based on the existence of a legal necessity or on the ground of the personal obligation of the sons to pay their father's debt, or on the ground of the transfer being in lieu of an antecedent debt. I understand each of these to be a distinct and separate basis. It is true that the original foundation of the doctrine of an antecedent debt might have been the pious obligation of the Hindu sons to pay their father's debt but by a long series of decisions it has been recognised as a distinct basis. Their Lordships define an antecedent debt as one which is antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. Their Lordships also add that the liability cannot be affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

The learned Judges of this High Court had held that 'a mortgage *per se* could not be an antecedent debt for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate, then the anterior mortgage could not be held to be debt antecedent to the subsequent mortgage and that subsequent mortgage could not stand though its proceeds were entirely used to pay off the prior mortgage'. Their Lordships of the Privy Council thought that if proper attention were paid to the word 'incurred' mentioned in the judgment in *Ram Chandra's case*, (5) this High [illegible] interpretation on it was not correct. Lordships clearly held that a debt [illegible] cease to be an antecedent debt merely it is secured on the family property. Referring to the observations in *Sahu Ram Chandra's case* (5) that there could be no pious obligations on the sons during the life time of the father their Lordships felt bound to say that they did not think that those observations could be supported. A mortgage-debt, therefore, can be an antecedent debt just as much as a simple money-debt can be. Although, in the particular case before their Lordships the personal liability of the father had not become barred by time when the deed in suit was executed, yet their Lordships do not at all lay stress on that fact or make it the basis of their decision. That this is so is supported by the following consideration. Their Lordships at page 937 express their entire agreement with the view of the learned Chief Justice in the Full Bench Madras case reported in *Arunugam Chetty* v. *Muthu Koundan* (14).

Now, there can be no doubt that the Madras Full Bench case had not proceeded on the basis of the personal liability of the father being still subsisting. The Division Bench had referred two questions for the decision of the Full Bench. "(1) Whether an independent debt, not immoral or illegal, contracted by the father on the security of the joint estate antecedent to the mortgage sued on can be treated as an antecedent debt so as to support the charge on the sons' share also to the extent of the same secured on the prior mortgage, and (2) in such a case can the former debt be treated as an antecedent debt for the purpose referred to, if the personal liability of the father under the earlier mortgage is not barred on the date of the suit on the document?" It is noteworthy that the learned Chief Justice, whose views have been approved of by their Lordships of the Privy Council, answered the first question in the affirmative and, therefore, thought it unnecessary to answer the second question at all. It is manifest that the learned Chief Justice treated a mortgage-debt as a good antecedent debt, independently of the question whether the personal liability of the father under the earlier mortgage had or had not become barred at the date of the [illegible]ge-deed in suit. These views having [illegible]roved of by their Lordships of the [illegible]ouncil we are bound to give effect to [illegible]

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The conclusion to which I have come, therefore, is that although a debt, which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing, cannot be deemed to be a good antecedent debt so as to validate a conveyance by the father in lieu of it, yet when the mortgage debt as such has not become time-barred but only the personal remedy against the father is barred it can still be a good antecedent debt so as to justify an alienation in lieu of it. I also, therefore, agree that the plaintiffs cannot avoid the mortgage.

BY THE COURT :—The appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1799 OF 1921.

December 5, 1923.

Present :—Mr. Justice Dass and Mr. Justice Ross.

CHHATERDHARI MAHTO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NASIB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, what amounts to—Statement in pleading acknowledging mortgage—Promise to pay, absence of, effect of.

An acknowledgment that a debt is due, without more, will be held to imply a promise to pay. On the other hand, a statement that there was a debt but it has been discharged will not amount to an acknowledgment.

Mani Ram v. *Seth Rup Chand*, 33 C. 1017 ; 4 C. L. J. 94 ; 8 Bom. L. R. 501 ; 10 C. W. N. 871 ; 1 M. L. T. 199 ; 3 A. L. J. 52 ; ; 16 M. L. J. 300 ; 2 N. L. R. 130; 33 I. A. 165 (P. C.) ; *Rangasami* v. *Thangavelu Chetty*, 50 Ind. Cas. 380 ; 42 (1919) M. W. N. 448 ; 26 M. L. T. 147 ; 10 I. relied on

A statement in a pleading that there was a mortgage but that a sale had been effected to pay off the mortgage and that since the date of the sale the vendee had been in possession of the property, does not imply a promise to pay and does not amount to an acknowledgment within the meaning of s. 19 of the Limitation Act.

Ram Das v. *Brijmundan Das*, 12 C. L. R. 284 ; 9 C. 616 ; 4 Ind. Dec. (N. S.) 1059, relied on.

Appeal from a decision of the District Judge, Patna, dated the 20th July 1921, affirming a decision of the Subordinate Judge, 2nd Court, Patna, dated the 9th June, 1920.

Messrs. *S. Dayal and Brijkishor Prasad*, for the Appellants

Mr. *Sushil Madhab Mullick*, for the Respondents.

Ross, J.—This is an appeal by the plaintiffs against the decree of the District Judge of Patna affirming a decision of the Subordinate Judge dismissing their suit. The facts may be briefly stated : One Parsan Singh, husband of defendant No. 1, and grandfather of defendant. No. 2, owned a *mukarrari* interest in 3 *dams* share in *mauza* Chariari Buzurg and the proprietary interest subsequently passed into defendants' family. By a deed of *Ijara*, dated the 11th July 1917, they granted a *Sataua* lease of the aforesaid share to the plaintiffs Jhandu Mahton and Chhatardhari Mahton in consideration of Rs. 600. On the 24th of March 1902 the defendants executed a mortgage in favour of Jhandu Mahton and Chhatardhari Mahton in respect of the same property in consideration of Rs. 1,300 repayable in five years. The present suit is brought on this mortgage. The debt became re-payable in March 1907 and a suit might, therefore, be maintained up to March 1919. The suit in fact was instituted on the 20th May 1919 and the only question was whether, as the Courts below have concurrently held, it is barred by time or not. The plaintiffs, in order to save limitation, alleged in paragraph 7 of the plaint that certain payments were made from time to time on account of principal and interest. Both the Courts below have held that these payments were not proved and this finding is conclusive. The plaintiffs were allowed to put in evidence a statement in suit No. 455 of 1909

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filed by the present defendants, Exhibit 4, which is said to contain an acknowledgement of liability sufficient under section 19 of the Limitation Act to give a fresh start to limitation from the date thereof. The procedure adopted by the Subordinate Judge in allowing this evidence to be given, notwithstanding the express provisions of O. VII, r. 6, which requires the ground upon which exemption from limitation is claimed to be pleaded, is to be disapproved. But the evidence cannot now be ruled inadmissible because the defendants did not object to it, as they should have done, at a time when the plaintiffs would have been enabled to apply for amendment of their plaint. Assuming, then, that this evidence was properly admitted, the sole question is whether it contains such an acknowledgment as is contemplated in section 19. The statement is as follows: "In 3 *Dams Pokhta* which as is said by plaintiff is equivalent to 12 as 12 *dams*, 12 *Kauri Kham*, Parsan Singh Ram Saran Singh and Ram Prasad Singh had as stated above full *milkut* rights and after the death of Parsan Singh, Ram Prasad Singh and Ram Saran Singh, their sons, as survivors acquired the same rights therein, and because they had run into debts and the share spoken of was in *Satana Zarpeshgi* lease (usufructuary mortgage) of Jhandoo Mahton and Chhaterdhari Mahton, so, in order to pay off the debt of Jhandu Mahto and Chhatardhari Mahton all the members of the joint family sold half of it, *i. e.*, 6 annas 6 *dams* and 5 *kauris*, under sale-deed dated 13th July 1903, corresponding to Sawan 1310 F. to defendants Nos. 1 to 4 and after the purchase the names of defendants Nos. 1 to 4 were entered in the Land Registration Register and from that time up till now they are in possession. Statements of the plaintiff contrary to this are entirely false.

The Courts below have held that this written statement does not contain any clear and specific acknowledgment of the bond in suit. It is true that the explicit reference is to the *Satana Zarpeshgi* lease. But paragraph 6 of the written statement in the present suit shows that it included the bond now in suit. This statement was made before the ex[illegible] of the period prescribed for the suit, signed by the party to be charged. then an acknowledgment of the de[illegible] it a sufficient acknowledgment of [illegible] An acknowledgment that a debt was due, without more, will be held to imply a promise to pay: *Mani Ram* v. *Seth Rup Chand* (1). On the other hand, the statement that there was a debt but it has been discharged, is not sufficient: *Rangaswami Chetti* v. *Thangavelu Chetti* (2). The present case seems to stand somewhere between these two. There is an acknowledgment that there was a mortgage.

There is no express statement that it was discharged; but there is a statement that, in order to pay it off, a sale was effected on the 13th July 1903 and since that date the vendees have been in possession of the property. The inference to be drawn from this will at least negative the implication of a promise to pay. The fact that it has been proved to the satisfaction of the Courts below that the alleged sale was not effective is immaterial, as we are concerned only with the form of the acknowledgment. It seems to me, reading the statement as a whole, that it is impossible to say that it has satisfied any of the tests laid down in *Manuram Seth* v *Seth Rupchand* (1). It is not an acknowledgment from which an absolute promise to pay can be inferred, nor is it an unconditional promise to pay the specific debt, nor is it a conditional promise to pay the debt with evidence that the condition has been performed. The case seems to me to be somewhat similar to the case of *Ram Das* v. *Birjnundun Das* (3). There also the acknowledgment relied upon was contained in a written statement in a previous litigation. After reciting the statement, the learned Judges went on to say: "Now that is an acknowledgment of the original making of the mortgage-deed and of possession being taken under it, but the statement goes on to allege the execution subsequently of two other deeds practically superseding the mortgage and altering the relation of parties. Under the terms of Article 148 we do not think that this is a sufficient acknowledgment to save the case from limitation," It is true that in the present case it is not

(1) 33 C. 1047 ; 1 C. L. J. 94 ; 8 Bom. L. R. 501 ; 10 C. W. N. 874 ; 1 M. L. T. 199 ; 3 A. L. J. 525 ; 16 [illegible] 300 ; 2 N. L. R 130 ; 33 I. A. 16 5 (P. C) [illegible] Ind. Cas. 380 ; 42 M. 637 ; (1919) M. W. N. [illegible] M. L. T. 147 ; 10 L. W. 333.
[illegible] C. 616; 12 C. L. R. 284; 4 Ind. Dec. (N. S.)

said that the mortgage was superseded by the subsequent dealings with the property, but it is said that in order to pay off the mortgage, the property was sold and passed into the possession of the vendees. When it is considered that the mortgage explicitly referred to in the written statement was the usufructuary mortgage, the statement that the possession passed to the vendees under the deed of sale suggests the inference that the liability under the mortgage no longer existed. I am, therefore, of the opinion that the statement cannot be relied upon as an acknowledgment within section 19 of the Indian Limitation Act. The appeal must be dismissed with costs.

Das, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 52 OF 1922.

November 6, 1923.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

K. RAMASWAMY NAICKER—APPELLANT

versus

ALAMELU AMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Co-defendants—Fraud—Party, whether can plead his own fraud—Estoppel.

No estoppel can be created between co-defendants so as to invoke the doctrine of *res judicata* unless there was a *litis contestatis* as between the defendants *inter se*.

Cottingham v. *Earl of Shrewsbury*, (1843) 3 Hare 627; 67 F. R. 530; *Kanga Ramaswamy Iyer* v. *Ponnusami*, 70 Ind. Cas. 769; (1922) M. W. N. 526; 16 L. W. 981; 31 M. L. T. 370; (1922) A. I. R. (M.) 452, followed.

C sold certain properties to P and the latter sold the same to R who in turn transferred the same to A. On C being adjudicated an insolvent, the Official Assignee challenged the alienations as being *bona fide* and as being without consider Trial Court and the Appellate Court set as ations on the ground of want of good f appellate judgment contained expressio that the alienations did not bear consi a suit by A against R for damages for breach of covenant for quiet enjoyment:

Held, (1) that the decision in the insolvency proceedings as to the fraudulent nature of the transaction was not *res judicata* in the present suit;

(2) that the defendant who was a party to the fraud was also estopped from relying upon the fraudulent character of the transfer so as to defeat the plaintiff in this suit.

Appeal against the judgment of the Honourable the Chief Justice in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 766 of 1920.

Mr. *V. Varadaraja Mudaliar*, for the Appellant.

Messrs. *V. V. Srinivasa Aiyengar* and *A. Narasimha Charya*, for the Respondents.

JUDGMENT.—This is a curious case which arises out of the rather complicated affairs of a man called Chockalinga Naicker, who was adjudicated insolvent in February 1915. I have had occasion to go into the story at considerable length on another occasion and I need only, for the purposes of the present case, recapitulate the circumstances very briefly. On the 2nd of September 1910, Chockalingam, purported to transfer the lands to Pachaimuthu Naicker for Rs. 2,000. On the 27th of June 1912, Pachaimuthu in his turn transferred them to Ramaswami Naicker, who is closely related in a double way to the insolvent Chockalingam for Rs. 3,000. On the 27th of June 1914, Ramaswami Naicker purported to transfer the lands to Alamelu Ammal for Rs. 4,550. In the course of the insolvency of Chockalingam, the Official Assignee challenged these alienations. He challenged them as being not *bona fide* and as being without consideration, and the end of that was that I tried a proceeding in which the Official Assignee, as representing the estate of Chockalingam, sued Ramaswami Naicker and Alamelu Ammal jointly in order to get it declared that these transactions must be set aside for want of good faith and like considerations. In those proceedings Ramaswami Naicker and Alamelu had exactly the same interest, *viz.*, to resist contentions of the Official Assignee on points. They failed. It was held by t the garnishee had not shown that re purchasers in good faith, and unly used expressions which indicated,

let us say, some suspicion as to whether the purchases were for valuable consideration. But, reading my own judgment, it seems to me to be clear that I took very good care not to decide that point. It went on appeal and my decision was confirmed by the late Chief Justice and Napier, J., and, no doubt, they did use language which went a good deal further than mine with regard to the question of consideration or want of consideration. The present Chief Justice who decided this case on the Original Side, has indicated the view that, even if the Appellate Court must be taken to have expressed the opinion that there was no consideration in that case, having regard to the fact that they agreed with the finding on which I dismissed the suit, namely, that there was a lack of good faith, that was the real ground of decision and that the other ground was *obiter dictum* being a mere expression of opinion not necessary for the decision of the case. The suit which was tried by the Chief Justice arose in this way. That was a suit brought by Alamelu Ammal against the vendor Ramaswami Naicker and she said, "Here is this conveyance in my favour. I have been ousted by the action taken by the Official Assignee. You must indemnify me for the loss on my bargain and pay me damages based on the value of the land at the time that you failed to carry out your undertaking as embodied in the covenant for quiet enjoyment which is part of the sale-deed." To that the only answer that is vouchsafed is this—at least that is the only point pressed before us—that, because the Court in those proceedings had to try whether there was a valid transfer away from the estate of Chockalingam and whether the lady Alamelu Ammal and Ramaswami Naicker, who were the garnishees who were resisting the attack in that case, were free from the charge of having in their hands property belonging to the insolvent's estate, it must be considered that the Court decided in that case that the transaction was a fraudulent one for all purposes and that their determination in those proceedings was binding in these proceedings against the twogarnishees. It is clear that, in certain circumstances, a judgment ma as *res judicata* as between two co-defe when they litigate against one anothe sequently. That doctrine, while reco strictly circumscribed both by the and by the Indian Law. The *locus classicus* is the judgment of Vice-Chancellor Wigram in *Cottingham* v. *Earl of Shewsbury* (1) where he says this: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." That principle was acted on and carried out in *Ramaswamy Iyar* v. *Ponnuswami* (2), a Letters Patent Appeal, where a Bench of three Judges, the present Chief Justice, Oldfield, J., and myself, held that the principle was well-established that there could be no estoppel created between co-defendants so as to invoke the doctrine of *res judicata* unless there was a *litis contestatis* as between those defendants *inter se*. There is no tract of such a thing here and we must, therefore, hold that the judgment of the Appellate Court in the former Insolvency Petition No. 62 of 1915, does not so act in this case, and as the learned Chief Justice points out, it may very well be that, even supposing that this lady was consciously intermeddling in these somewhat murky affairs of Chockalingam, she had a conveyance direct from Ramaswamy Naicker as a guarantee that, if anything went wrong with the estate of Chockalingam, he would stand to her in the position of an indemnifier. One must not forget that Ramaswamy Naicker was the son-in-law and brother-in-law of this Chockalingam. That seems to me to be quite sufficient to explain this transaction without any supposition at all that they must necessarily be engaged in a common fraud. Even if one has a suspicion of that kind, on the principle of *Prole* v. *Wiggins* (2), which has been acted upon in this Court in *Kamayya* v. *Mamayya* (4), it would not be possible to act on it here; because the plaintiff, having proved a conveyance containing a covenant for quiet enjoyment, the defendant could not be heard

(1) (1843) 3 Hare 627; 67 E. R. 530.
(2) Ind. Cas. 769; (1922) M. W. N. 526; 16 L. M. L. T. 370 (1922) H. I. R. (M) 452.
(3) 3 Bing (N S.) 230; 3 Scott 601; 2 Hodges C. P. 2; 132 E. R. 398. 43 R. R. 621.
(4) Cas. 352; 32 M. L. J. 484.

to say: "That was all a sham; that conveyance was not between me and her at all; it was a fraudulent transfer effected with intent to defeat the creditors of Chockalingam by putting my name as *benamidar*." On the principle that one *Allegans suam turpitudinem non est audiendus* the defendant will not be allowed to set up that case.

In my opinion, the learned Chief Justice came to the right conclusion in this case and this appeal must be dismissed with costs.

Ramesam, J.:—I agree.

V. N. V. *Appeal dismissed.*

S. D.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 18 OF 1923.

December 4, 1923.

Present:—Sir Dawson Miller, Kt. K.C., Chief Justice, and Justice Sir B. K. Mullick, Kt.

TILAKDHARI SINGH—PLAINTIFF—APPELLANT

versus

CHATURGUN BIND AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) s. 48, applicability of—Mortgage by occupancy tenant—Kabuliyat *in favour of Mortgagee—Mortgagor whether under*-raiyat.

An occupancy tenant executed a *Zarpeshgi* deed in respect of a portion of his occupancy holding for a period of nine years in consideration of an advance in cash in favour of the plaintiff. The latter was to enter into possession and take the profits arising out of the cultivation of the land in lieu of interest on the loan. In the event of the principal sum not being paid off at the end of the term, the *zarpeshgidar* was to remain in possession upon the condition stipulated in the deed until repayment of the principal in *Jeth* of any succeeding year. The property was also hypothecated to secure re-payment of the principal sum advanced if the *zarpeshgidar* should be dispossessed. Two days later the mortgagor executed a *kabuliyat* in favour of the mortgagee whereby he took the mortgaged land on lease from the mortgagee at a certain rent.

Held, (1) that the *zarpeshgi* was a mortgage and not a lease;

(2) that the *zarpeshgidar* did not become a *raiyat* under the mortgagor;

(3) that, consequently, the mortgagor did not become an under-*raiyat* under the mortgagee;

(4) that, therefore, section 48 of the Bengal Tenancy Act was not applicable to the case and the mortgagor was bound to pay the rent stipulated for in the *kabuliyat*.

Case law discussed.

Mr. *A. B. Mukharji*, for Mr. *B. N. Mitter*, for the Appellant.

Mr. *Jadubans Sahai*, for the Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of the plaintiff under the Letters Patent from a decision of Mr. Justice Ross reversing the decision of the District Judge and restoring that of the Munsif.

The facts out of which the suit arises are as follows:—On the 16th January 1917, Ram Piyar Bind, the father and predecessor in, rest of the defendant, executed a *zarpeshgi* deed for a term of 9 years from 1324 F. over 2 *bighas* 7 *cottahs* 12 *dhurs* of his occupancy holding in favour of the plaintiff in consideration of an advance of Rs 975. The plaintiff in lieu of interest on the loan was to enter into possession and take the profits arising out of the cultivation of the land after paying the proprietor's rent amounting to Rs. 16 odd. In the event of the principal sum not being paid off at the end of the term, the *zarpeshgidar* was to remain in possession upon the condition stipulated in the deed until repayment of the principal in *Jeth* of any succeeding year. The property was also hypothecated to secure re-payment of the principal sum advanced if the *zarpeshgidar* should be dispossessed. Two days later, Ram Piyar Bind executed a *kabuliyat* in favour of his mortgagee. This document recites the previous *zarpeshgi* transaction and states that the *zarpeshgidar* has been in possession of the property and as the mortgagor wished to keep the property under his own cultivation paying the *zarpeshgidar* Rs. 75-7-0 [illegible]ally as rent the latter had acceded [illegible]is request and granted him a [illegible] lease for 9 years from 1324 to 1333 F. [illegible]ent named. The rent so arrived at assumed to include the Rs. 16 odd

payable to the landlord and interest amounting roughly to 6 per cent. on the principal sum advanced. In the year 1919 the rent was in arrears and Piyar Bind having died the plaintiff instituted the present suit against his sons the defendants.

The defendants challenged the genuineness of the *kabuliyat* and pleaded payment of a smaller rent amounting to Rs. 24-7-0 which they contended was all that was payable according to the Survey *khatian*. They further pleaded that their father was an old man with a disordered brain and was incapable of understanding the terms of the *kabuliyat* The genuinineness of the *zarpeshgi* executed two days earlier was not challenged in the written statement.

The Munsif rejected the plea of payment. He held that the only rent recoverable was that recorded in the Survey *khatian*, namely, Rs. 24-7-0 and stated that he thought the plaintiff had succeeded in getting the *kabuliyat* executed but he had great doubt as to the genuineness of the transaction. It appears that at the recent Revisional Survey the Assistant Settlement Officer had entered the rent in the Record of Rights as Rs. 27-7-0 being of opinion that the plaintiff was the *raiyat* and Piyar Bind his under-*raiyat* and that, under section 48 of the Bengal Tenancy Act, the plaintiff could not recover from his under-*raiyat* more than 50 per cent. in excess of the rent payable by him to his superior landlord.

The plaintiff appealed to the District Judge who considered that the Assistant Settlement Officer and the Munsif had proceeded upon an incorrect application of section 48 of the Bengal Tenancy Act and that Piyar Bind by executing the *zarpeshgi* did not lose his original status of a *raiyat*. He accordingly varied the decree of the Trial Court and entered judgment for the plaintiff for the amount claimed with costs in both Courts.

The defendants preferred a second appeal to the High Court which came before Mr. Justice Ross. The learned Judge was of opinion that the *zarpeshgi* deed was both a lease and a mortgage and that the plaintiff in this transaction held directly under the landlord and not by way of sub-lease under *raiyat* and that Piyar Bind ceased *raiyat* as long as the lease was out against him. He further considered that the *kabuliyat* did not create a lease of the *rayati* interest of the land in the original *rayat* but that he was an under-*rayat* of the plaintiff, and that section 48 of the Bengal Tenancy Act was applicable in the circumstances of the case. He accordingly set aside the decree of the District Judge with costs and restored that of the Munsif.

From that decision the present appeal has been preferred under the Letters Patent by the plaintif.

In my opinion the *zarpeshgi* was an instrument of mortgage and not a lease. The sum advanced was not paid by the *zarpeshgidar* as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor. The profits, after deducting the proportionate amount of rent payable to the landlord, were to be taken as interest on the principal sum and even at the end of the term the *zarpeshgidar* was to remain in possession upon the same conditions until the principal sum should be re-paid ; and the property was hypothecated for re-payment of the loan in the event of the *zarpeshgidar* being dispossessed. I think it is well established that a mortgagee, which I consider the *zarpeshgidar* was in this case, is not the tenant of his mortgagor. In fact, in argument before us it was conceded that the mortgagee is not a *raiyat*. It was contended, however, that Piyar Bind and consequently the defendants were under-*raiyats* within the meaning of the definition of that term in section 4 (3) of the Bengal Tenancy Act which defines under-*raiyats* as "Tenants holding whether immediately or mediately under *raiyats*." It was argued that Piyar Bind held if not immediately at least mediately under himself as a *raiyat* and was, therefore, an under-*raiyat*. I am unable to accede to the view that a person who is a *raiyat* can also be his own under-*raiyat*. I agree with the view of the District Judge that the mortgagor by the *zarpeshgi* transaction never ceased to be the *rayat* holding under the landlord and he cannot, in such circumstances, be said to be an under-*raiyat* holding indirectly under himself.

A further point was raised that Piyar Bind was found to be incapable of understanding effect of the *kabuliyat*. There is no definite finding of the Munsif upon this point and the

matter does not appear to have been urged in appeal before the District Judge as a defence to the suit. Moreover, the defendants having remained in possession of the land under the kabuliyat cannot now be heard to say that it was not a genuine transaction. In my opinion the appeal should be allowed, the decree of Ross, J. should be set aside and that of the District Judge restored. The appellants are entitled to their costs of this appeal and of the appeal before Mr. Justice Ross.

Mullick, J.—On the 16th January 1917, Ram Peari Bind, the predecessor of the defendants, executed a *zarpeshgi* deed in respect of 2 *bighas* 7 *kathas* 12 *dhurs* of *kasht* land in favour of the plaintiff for a consideration of Rs, 975. On the 18th January of the same year Ram Peari executed a *kabuliyat* for the land in favour of the plaintiff reserving a rent of Rs. 75-5-0 per annum for a term of 9 years from 1324 to 1333 F. S. In 1919 the defendants defaulted in the payment of the reserved rent in respect of the year 1325 and of part of the year 1326 and the plaintiff brought the present suit for recovery thereof.

The Munsif decreed the suit at a rate of Rs. 24-7-0 per annum relying on a Record of Rights prepared under the Bengal Tenancy Act.

On appeal the District Judge of Chapra set aside the decree of the Munsif and held that the defendants were not under-*raiyats* and that, therefore, section 48 of the Bengal Tenancy Act was not applicable to the case and he decreed the suit at the full rate claimed.

There was a second appeal then to this Court and Mr. Justice Ross has reversed the decree of the District Judge and restored that of the Munsif.

The present appeal is preferred under the Letters Patent against the judgment of Mr. Justice Ross.

Now the first question is what was the effect of the *zarpeshgi* deed of the 16th January 1917. If it was a lease and not a mortgage, then the plaintiff became an under-*raiyat* of the first degree under Ram Peari Bind who in turn, by the *kabuliyat* of the 18th January, became an under-*raiyat* of the second degree under the plaintiff. In that case section 48 of the Bengal Tenancy Act would operate to preclude the plaintiff from recovering from his under-*raiyat* more than 50 per cent. in excess of the rent payable by him to his superior landlord, that is to say, more than a total rent of Rs. 24-7-0 as recorded by the Settlement Officer.

If, on the other hand, the *zarpeshgi* transaction was not a lease but a mortgage then the *kabuliyat* of the 18th January 1917 operated to create a *raiyati* tenancy and section 48 would have no application.

The view taken by the learned Judge of this Court is, that the transaction was both a lease and a mortgage. It seems to me that, even in that case, the transferee would be neither a *raiyat* nor an under-*raiyat*.

I am, however, of opinion that the document does not create any *raiyati* tenancy at all. The transfer in this case was for the purpose of securing the payment of money advanced and was not consideration for a price paid. The sum of Rs. 975 did not represent either wholly or in part an advance payment for the rent of the land. The deed recites that the transferee is to pay to the superior landlord the rental due from the *raiyat* which was a sum of Rs. 16-6-0 and that he was to pay himself the interest upon the mortgage-money out of the proceeds of the land, and it is very similar to a *zarpeshgi* deed which was the subject of *Ram Khelawan Roy* v. *Sambhoo Roy* (1). In that case the whole of the rent for a period of five years was to be taken by the *zarpeshgidars* on account of the profits of their *zarpeshgi* excepting one rupee which was to be paid yearly by them to the proprietors, (the grantors) and if the *zarpeshgi* money was not paid at the end of the five years the *zarpeshgidars* were to remain in possession until payment. The decision was that the deed did not create a *raiyati* tenancy.

On the other hand, it was held in *Ramdhari Singh* v. *Mackenzie* (2), that where the *raiyat* was already previously in possession as a *raiyat* he does not divest himself of his right to acquire a right of occupancy in the land by taking a *zarpeshgi* lease of the land.

Again, in *Damodar Narain Chowdhry* v.

(1) W. N. 758.
(2) W. N. 351.

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Dalgliesh (3), it was held that a *zarpeshgi* lease which merely provided for a part of the rent to be paid in advance, there being no stipulation for the payment of interest on the money so advanced, did not create the relationship of mortgagor and mortgagee.

In the present case the contract was not merely for the cultivation of the land but also constituted a real and valid security to the transferee for the principal sum advanced by him and for the interest thereon and his possession was not merely that of a cultivator but of a creditor holding the land as security. In these circumstances, the transferee was a mortgagee and not a *raiyat* within the meaning of section 5, clause (3) of the Bengal Tenancy Act. It follows, therefore, that by executing the *kabuliyat* of the 18th January 1917, Ram Peari Bind did not become a tenant holding immediately or mediately under a *raiyat*, and section 48 of the Bengal Tenancy Act is not applicable.

For the purposes of this case it is immaterial whether the *zarpeshgi* and the *kabuliyat* constituted one transaction or two separate transactions and *Chimman Lal* v. *Bahadur Singh* (4), has no application to the present case.

Nor does the decision in *Uttam Chandra Das* v. *Rajkrishna Dalal* (5), on which the learned Judge of this Court relies assist the defendants. In this last mentioned case a proprietor executed a *zarpeshgi* mortgage in favour of the defendants who on the same day re-settled the land with the proprietor as tenants. The mortgagor having defaulted in payment of rent the mortgagee sued for it, obtained a decree and in execution purchased the equity of redemption and took possession of the property. The plaintiffs alleged that they were purchasers of the equity of redemption from the mortgagors and filed a suit for redemption. The principal point decided in that case by a Full Bench was that the sale was not void but voidable and that, although the mortgagee had purchased the equity of redemption in contravention of the terms of section 99 of the Transfer of Property Act, the sale was not a nullity and must be duly avoided and that the plaintiffs were not entitled to redeem so long as it subsisted. One of the points in the case was whether the sale was held in execution of a rent-decree or whether it was merely a sale in execution of a decree for arrears of interest upon the mortgage-money. Mr. Justice Chattejea, in the course of his judgment, observed that by executing the *kabuliyat* in favour of the martgagee the mortgagor had become the tenant of the mortgagee within the meaning of the Bengal Tenancy Act. If I may say so, the facts found in that case entirely supported this view and the mortgagor became a *raiyat* by reason of the terms of section 5 of the Bengal Tenancy Act, when read together with the definition of proprietor in the Act which includes a trustee. But a mortgagee from an occupancy *raiyat* is not in any sense a *raiyat* or under-*raiyat* and a sub-tenant under him cannot be an under-*raiyat*.

A point was taken in the Trial Court that there had been no intelligent execution of the *kabuliyat* by Ram Peari Bind. This defence does not appear to have been repeated before the District Judge and the point is no longer open.

The result is that the judgment of Mr. Justice Ross must be set aside and that of the District Judge restored. The appellant will be entitled to his costs in this Court.

Z. K. *Appeal allowed.*

(3) 9 Ind. Cas. 913 ; 15 C. W. N. 315 , 9 M. L. T. 364; 8 A. L. J. 441; 13 C. L. J. 512; 13 Bom. L. R. 396; 38 C. 432 ; (1911) 2 M. W. N. 182 ; 38 I. A. 65. (P.C.).
(1) 23 A. 338; A. W. N. (1901) 95.
(5) 55 Ind. Cas. 157; 47 C. 377; 24 C. W. N. 98; 31 C. L. J. 98.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2500 of 1921.

January 16, 1924.

Present :—Mr. Justice Broadway, and Mr. Justice Zafar Ali.

SHIB DEO SINGH, MINOR THROUGH SARDAR SANGAT SINGH —PLAINTIFF—APPELLANT

versus

UTTAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Attachment, whether affects reversioner—declaration, suit for, maintainability of.

SENGODA GOUNDAN *v.* MUTHU GOUNDAN

The mere attachment of ancestral property in execution of a decree does not in any way injuriously affect the interests of a reversioner, and he cannot, therefore, sue for a declaration that the attachment shall not affect his reversionary rights.

First Appeal from the decree of the Subordinate Judge, 1st Class, Amritsar, dated the 31st May 1921, dismissing the plaintiffs' suit.

Lala *Amar Nath Chopra*, for the Appellant.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—Certain property belonging to one *Sardar* Jhanda Singh was attached in the execution of a money decree against the said *Sardar*. Thereupon his minor son, *Sardar* Shib Dev Singh, instituted a suit asking for a declaration to the effect that the property in question was not liable to attachment and sale in execution of the said decree inasmuch as under Customary Law he was a reversioner and that alienations could not be effected of ancestral property, such as this, except for the benefit of the family and legal necessity. This suit was based on the customary rights of reversioners and it was alleged that an objection under O. XXI, r. 58, Civil Procedure Code, to the attachment and sale had been made but dismissed. The Trial Court framed four issues but decided the case on the fourth, which is to the following effect :—

"Is the suit not entertainable according to law or custom ?"

He held that the suit was premature.

The minor plaintiff has come up to this Court in appeal through Mr. A. N. Chopra, and we have heard Mr. Bhagat for the respondents.

It appears to us that the appeal must fail. The reversioner's interest is only a contingent one and the mere attachment does not in any way affect injuriously his reversionary rights. It has been urged that, inasmuch as the appellant's objections were rejected under r. 63 of O. XXI, the decision must be regarded as final unless set aside by a suit. Even assuming that this view be correct, and that it be finally held that the reversioner cannot object to the *attachment* of the property, there would be nothing, as far as we can see, to prevent he appellant from taking such action as is necessary to safeguard any reversionary rights he may have in the property *when the property is sold.*

We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 767 OF 1922.

January 29, 1924.

Present :—Mr. Justice Spencer, Acting Chief Justice, and Mr. Justice Kumaraswamy Sastriar.

SENGODA GOUNDAN—DEFENDANT—APPELLANT

versus

MUTHU GOUNDAN MINOR BY NEXT FRIEND, KOMARAVELU GOUNDAN AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Separation of some members, effect of—Division inter se*—Two co-parceners joining in partition suit, effect of—Guardian of minor co-parceners, whether can effect severance* inter se.

Where a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit.

Palaniammal v. *Muthuvenkatachala Maniagar*, 43 Ind. Cas. 833 ; 33 M. L. J. 759, followed.

The mere fact that two co-parceners combine to ask for a partition does not indicate an intention on their part to become divided *inter se.*

Balakrishna Mudaliar v *Raju Mudaliar*, 27 I. C. 736, 16 M. L. T. 610 ; (1915) M. W. N. 17, dissented from.

A guardian of two undivided minors has no power to divide their status so as to make them lose their rights of survivorship *inter se.*

Where two minor brothers by their next friend sued their father for partition of their 2/3rds share in the family property and the decree gave them an undivided 2/3rds share ;

Held, that the plaintiffs remained undivided *inter se* and on the death of one his interest survived to the other.

SENGODA GOUNDAN *v.* MUTHU GOUNDAN

Second appeal against the decreee of the District Court of Salem, in A. S. No. 45 of 1921, preferred agaist the decree of the Court of the District Munsif of Namakkal, in O. S. No. 1269 of 1918.

Mr. *T. M. Krishnaswamy Ayyar*, for the Appellant: —In this case two Hindu sons sued their father for partition and obtained a decree. The question for decision is whether the plaintiff's brothers were not divided *inter se*. It has now been definitely held by the recent decision of the Judicial Committee of the Privy Council in *Jatti* v. *Banwari Lal* (1), that where one member of a joint family separates there is no jointness amongst the rest. An agreement to remain united or to be reunited has to be proved as a question of fact, thus setting at rest the interpretation of the passages in the two early decisions of the Privy Council in *Balabux* v. *Rukhmabai* (2), and *Balkrishen Das* v. *Ram Narain Sahu* (3), See also *Balakrishna Mudaliar* v. *Raju Mudaliar* (4), where their Lordships Sadasiva Aiyar and Napier, JJ., hold that the separation of one member *prima facie* effects a separation amongst other members.

In this view, the decision of this Court in *Palaniammal* v. *Muthuvenkatchala Maniagar* (5), has to be restricted to the facts of that Case.

Further, the reported decisions to the contrary view are all cases of one member separating, the question arising of separation or jointness amongst the rest, but the question has not arisen of division amongst the separating members themselves. The presumption of division enunciated by the Privy Council is particularly applicable. In the present case the separating members are minors and if the presumption is one of division there can be no reunion or agreement to live joint: see *Balabux* v. *Rukhmabai* (2).

Again, under the Hindu Law it is inconceivable, except in the case of a father, that two persons can bring a suit for partition against another, themselves being joint. The right to partition is a personal right and has been held to be intransferable. So it has been held that a suit by an alience of a co-parcener's share for partition is not strictly a suit for partition in the technical sense in which the word is used in the *Mitakshara*.

A suit for partition in the technical sense can be brought only by an undivided member of the family. The right to it is personal and not transferable. *Ayyagari Venkataramyya* v. *Ayyagari Ramayya* (6). The individual and personal right to partition cannot be presumed to have been collectively and jointly used. It was merely accidental that one suit was brought by the two brothers instead of two. The brothers were clearly divided in status.

Mr. *V. N. Venkatavaradachari*, for the Respondents :—When one member of a joint family separates, there is no presumption that the rest are joint or divided. The question is really one of fact. The Privy Council case in *Jatti Ram* v. *Banwari Lal* (1), is and purports to be a decision on the facts of the case. So are the three early decisions of the Privy Council in *Balabux* v. *Rukhmabai* (2), *Balakrishen Das* v. *Ram Narain Sahu* (3), *Ram Pershad Singh* v. *Lakhpati Koer* (7). The decision in *Rangasami Naidu* v. *Sundararajalu Naidu*, (8) is exactly in point. The question of partition is one of intention and cannot be decided on mere presumptions of law. Also the case in *Palaniammal* v. *Muthuvenkatachala Maniagar* (5). These decisions have been followed in a long series of decisions here in Madras and elsewhere and the Privy Council decision in *Jati* v. *Banwari Lal* (1), has far from changed the law. It has merely emphasised the position that the question is one of fact.

Further, the plaintiffs here were minors and a division *inter se* amongst them cannot

(1) 74 Ind. Cas. 462 ; 45 M. L. J 855 ; 21 A. L. J 582 ; (1923) A. I. R. (P. C.) 136 ; 18 L. W. 273 (1923) M. W. N. 687 : 25 Bom. L R. 1256 ; 4 L. 350.
(2) 30 C. 725 (P. C) 30 I. A. 130 ; 7 C. W N. 642 ; 5 Bom. L. R. 469 ; 8 Sar. P. C. J. 470.
(3) 30 C 738 (P. C.) 5 Bom. L. R. 461 ; 30 I. A. 139 ; 7 C. W. N. 578 ; 8 Sar. P C. J. 489.
(4) 27 Ind. Cas. 736 ; 16 M. L. T. 610 ; (1915) M. W. N. 17.
(5) 43 Ind. Cas. 838 ; 33 M. L. J. 759.
(6) 25 M. 690. at. p. 717.
(7) 30 C. 231 (P. C.) 30 I. A 1; 7 C. W. N. 162 ; 5 Bom. L. R. 102 ; 8 Sar. P. C. J 980.
(8) 35 Ind. Cas. 52 ; 34. M. L. J. 172.

be presumed without the matter having been brought to the notice of the Court at the time of the division. It is beyond the powers of the guardian to effect a separation between the two minors. The Court has to consider and exercise its discretion in allowing a partition. The Privy Council decision in *Ram Pras d Singh* v. *Lakhpati Koer* (7), at 9 and 10, is clear authority for the position that two co-parceners may sue for partition against the rest of the family and yet remain undivided. It is submitted the finding of fact of the Courts below that the brothers were joint is not open to any legal objections.

JUDGMENT.

The Acting Chief Justice: —This suit is for partition and the question argued before us relates to the plaintiff's claim to succeed to the share of his deceased minor brother by right of survivorship. There was a previous suit by the plaintiff and his brother, both being minors represented by next friend, for partition, which ended in a compromise decree, Ex. A, dated 24th Novemer 1915. It has been argued before us that, when two persons ask for a partition, it should be implied that they intend to get divided from each other as well as from the joint family to which they belong. Nothing can be gathered from the fact that in the former suit the minor plaintiffs combined to ask for a partition as to their intention to become divided *inter se*. The right to obtain a partition, though personal, happened to be common to both the plaintiffs and common questions of law and fact arose out of there suing. The mere fact that there was one trial and one decree in the former suit was a consequence of procedure applicable to persons suing under the same cause of action rather than conduct showing an intention to become separated *inter se*.

In *Musammat Jatli* v. *Banwari Lal* (1), the Privy Council quoted a former decision by that body, *Balabux* v. *Rukmabai* (2), in which Lord Davey remarked that there was no presumption when a co-parcener separates from others that the latter remained united. The agreement to remain united must be proved like any other fact. The Privy Council did not say that there was no presumption in such a case that the other co-parceners became divided, as it was not necessary to do so for that decision. But it seems to me that such is the case. In *Rangaswami Naidu* v. *Sundararajalu Naidu* (8), it was held that the separation of one member of a co-parcenary was not necessarily a separation of the remaining members, and in *Palaniammal* v. *Muthuvenkatachala Maniagar* (5), Sir John Wallis, C. J., and my learned brother held that, if a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of decree or by the scope of the suit. I think that Sadasiva Aiyar, J., went too far in *Balakrishna Mudaliar* v. *Raju Mudaliar* (4), in observing that there was a presumption that, when one of several co-parceners has become divided, the others also have become divided in status. The Privy Council decisions to which he referred do not support such a proposition.

If the effect of the former decree is to be determined by terms of it, we find from Ex. A that in the former suit both the plaintiff and his brother had the same next friend to represent them and the decree speaks of their two-thirds share, not of their properties as two shares, each representing one-third of the whole. There was no order that their two-thirds share should be divided into separate shares and no authority has been shown for a guardian of two undivided minors dividing their status so as to make them lose their rights of survivorship to each other. The District Judge observes that the plaintiff and his brother did not sue for division *inter se* and that the decree does not divide their shares, and he formed a conclusion from their conduct that they remained undivided, agreeing with the first Court on that point. I see no reason to interfere with that finding on any point of law. I would, therefore, confirm the decree of the lower Appellate Court, and, as the other grounds of second appeal are untenable and have not been seriously pressed, this second appeal must be dismissed with costs.

The memorandum of objections which relates to mesne profits anterior to the date of the institution of the suit, is dismissed with costs.

Kumaraswami Sastri, J.—I agree with my Lord. I think there is no authority for holding that, where two members of a joint

family sue for partition, it *necessarily* divides *inter se*. The observations of the Privy Council in *Balabux* v. *Rukmabai* (2), and the decisions of this Court in *Rangaswami Naidu* v. *Sundararajalu Naidu* (8) and *Palaniammal* v. *Muthuvenkatachala Maniagar* (5), are clearly against that contention.

V. N. V. *Appeal dismissed.*

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 61 OF 1920.

February 1, 1924.

Present:—Mr. Raymond, A. J. C., and Mr. Kennedy, A. J. C.

PIRIMAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Mt. SANGHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 47—Execution of decree—Decree-holder purchaser, whether party to suit—Possession, delivery of—Separate suit, whether lies.

A decree-holder by becoming a purchaser at a Court-sale does not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code and proceedings for delivery of possession of property purchased by the decree-holder are proceedings in execution of the decree and fall within the scope of section 47 and a separate suit for the purpose is barred under that section.

Sadashiv Mahadu v. *Narayan Vithal*, 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661; *Madhusandas* v. *Gobinda Pria*, 27 C. 34; 4 C. W. N. 417; 14 Ind. Dec. (N. S.) 23; *Sheo Narain* v. *Nur Mahomed*, 30 A. 72; 5 A. L. J. 20, A. W. N. (1908) 12; *Abdul Gani* v. *Raja Ram*, 35 Ind. Cas. 468; 20 C. W. N. 829; 1 P. L. J. 232; 3 P. L. W. 62 (F. B.); *Prosunno Kumar Sanyal* v. *Kalidas Sanyal*, 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.), followed. *Goba Nathu* v. *Sakhara Topi*, 59 Ind. Cas. 366; 44 B. 977; 22 Bom. L. R. 1104, distinguished.

Bhagwanti v. *Banwari Lal*, 1 Ind. Cas. 416; 5 M. L. J. 185; 31 A. 82; 6 A. L. J. 71 (F. B.), not followed.

Bapuchand v. *Mugitrap*, 22 B. 340; 11 Ind. Dec. (N. S.) 809, relied upon.

Appeal against the judgment and decree of the First Class Sub-Judge, Hyderabad (Sind), dated 9th August 1920.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Gopaldas Jhamatmal*, for the Respondents.

JUDGMENT.—The point involved in this appeal is whether a decree-holder by becoming the purchaser of the property of the judgment-debtor in execution of his decree ceases to be a party to the suit in which the decree was passed.

Some agricultural lands, consisting of sixteen Survey Nos., were purchased in execution of a mortgage-decree at a Court-sale by the decree-holder. With regard to ten of them after the purchase he obtained possession through the Revenue authorities, in respect of the remaining six however, though he obtained the sale certificate, yet it has been found, notwithstanding his allegation to the contrary, that he never obtained possession of them. The suit out of which this appeal arises was for possession of all the sixteen Survey Nos. on the allegation that plaintiff had been dispossessed of them. The 1st Class Sub-Judge of Hyderabad decreed possession of the ten Survey Nos. but held the suit barred in respect of the remaining six as he was of opinion that the remedy of the plaintiff was not by a suit but in execution proceedings. Plaintiffs' appeal against this findings.

We are in entire agreement with the view of the lower Court that the appellant had never obtained possession of these six Survey Nos. and his evidence that he had is clearly unreliable.

The point now before us is whether the suit in respect of these six Survey Nos. is barred by section 47, Civil Procedure Code.

In arriving at the conclusion that it did, the lower Court was mainly guided by the judgment in the case reported in *Sadhashiv Mahadu* v. *Narayan Vithal* (1), the facts of which are identical with the present case. It was held that a decree-holder by becoming a purchaser at a Court-sale did not cease to be a party to the suit within the meaning of section 47, Civil Procedure Code, and that pro-

(1) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661

ceedings for delivery of possession of property purchased by the decree-holder were proceedings in execution of the decree and fell within the scope of section 47, Civil Procedure Code.

Mr. Kimatrai, for the appellants pointed out to us that that the judgment in the case cited had been doubted in *Goba Nathu* v. *Sakhara Tepi* (2). No doubt, in this case Macleod, C. J., did express himself as follows: "For myself I feel inclined to doubt the decision in *Sadashiv Mahadu* v. *Narayan Vithal* (1)". The two cases are, however, entirely distinguishable. For there was another party claiming the property purchased who was not a party to the original suit and plaintiff would have to proceed in execution proceedings against one defendant and file a suit against the other.

In *Madhusudan Das* v. *Gobinda Pria* (3) it was held that a decree-holder was none the less a party to the suit because he happens to be an auction-purchaser. In this case there was, on the one side, the plaintiff who was both the decree-holder and the auction-purchaser, and, on the other side, the representatives of the judgment-debtor, and it was observed that proceedings for delivery of possession were proceedings in execution of the decree.

In *Sheo Narain* v. *Nur Mahomed* (4), it was held that where the decree-holder himself purchased property at auction-sale held in execution of his own decree but fails to obtain possession, his remedy is by application under section 244, Civil Procedure Code, and he cannot bring a separate suit for possession. This judgment was, however, overruled by a Full Bench of the same Court in *Bhagwati* v. *Banwari Lal* (5), where it was held that section 244 was not a bar to such a suit.

In *Abdul Gani* v. *Raja Ram* (6), the judgment was of a Full Bench of the Patna High Court, the Court was of the opinion that they should not, without strong reasons, differ from the series of decisions of the Calcutta High Court that a suit such as the one above described was barred by section 214, Civil Procedure Code.

There is no doubt as to the variance of opinion in different High Courts as to whether section 47 of the present Code, corresponding with section 244 of the Code of 1882, operates so as to bar a suit for recovery of possession in the circumstances mentioned.

The point seems not yet decided by our High Court.

In *Prosunno Kumar Sangal* v. *Kalidas Sanyal* (7), the Privy Council observed as follows: "It is of the utmost importance that all objections to execution-sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that Courts in India have not placed any narrow construction on the language of section 244. Appellant was the decree-holder and he purchased the property in execution of his decree. The decree could not be deemed satisfied till he obtained possession of the property purchased by him. The circumstance that he became an auction-purchaser did not render him the less a decree-holder and the question of recovering possession was one that relates to the satisfaction of his decree and, therefore, fell within the purview of section 47, Civil Procedure Code. There is no complete satisfaction of the decree till possession is obtained and although the decree-holder by virtue of his purchase may be clothed in a new garb, yet he still remains a decree-holder till his decree is satisfied and, therefore, still a party to the suit. As observed in *Sadashiv* v. *Narayan Vithal* (1), above referred to, proceedings in execution so far as the decree-holder is concerned are not completed until the decree-holder obtains the benefit of the sale held in execution of the decree. In the present case the decree-holder had not obtained possession and the question between him and the other parties to this suit related to execution, discharge or satisfaction of his decree, and these questions could only be determined by the Court executing his decree and a separate suit was barred. In *Bapuchand* v. *Mugittra* (8) it was observed in the

(2) 59 Ind. Cas. 866 ; 44 B. 977 ; 22 Bom. L. R. 1101.
(3) 27 C. 34; 4 C. W. M. 417 ; 14 Ind. Dec. (N. S.). 28.
(4) 30 A. 72; 5 A. L. J. 20; A. W. N. (1908) 12.
(5) 1 Ind. Cas. 416 F. B. ; 5 M. L. T. 185; 31 A. 82; 6 A. L. J. 71.
(6) 35 Ind Cas. 468; 20 C. W. N. 829; 1 P. L. J. 232; 3 P. L. W. 62 (F.B.).
(7) 19 C. 688 , 19 I. A. 166; 6 Sar P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).
(8) 22 B. 340; 11 Ind. Dec. (N. S) 809.

judgment by Farran, C. J., following the views of the Allahabad and Madras High Courts, that even when money is paid into a Court in execution of a decree, still the decree is not fully completed till the payment has been actually made to the judgment-creditor or some one on his own account, and on the same principle the execution of the decree cannot be deemed complete until the decree-holder had obtained possession of property purchased by him at the auction sale.

In our opinion, therefore, the decree-holder does not lose his character as a party to the suit merely because he is the auction-purchaser, and the question as to the delivery of possession to him of the property purchased was a question relating to the execution, discharge and satisfaction of his decree and the suit was, therefore, barred. The appeal fails and is dismissed with costs.

P. B. A. *Appeal dismissed.*

LAHORE. HIGH COURT.

SECOND CIVIL APPEAL NO. 2526 OF 1920.

November 19, 1923.

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

Musammat TABI—PLAINTIFF—APPELLANT

versus

SAUDAGAR SINGH—DEFENDANT—RESPONDENT.

Custom—Personal law, when to be applied—Court, duty of—Riwaj-i-am, *entry in, value of—Mother, whether includes grand-mother—Succession—Uncle v. grand-mother—Sikh Jats of Lahore District.*

Among parties generally following Customary Law it is permissible to fall back *as a last resort* on their personal law for the decision of a point on which no definite rule of custom applicable can be found. The function of a Court in matters of disputed custom, is to discover the actual practice and to give effect to it.

Dayaram v. *Sohal Singh*, 110 P. R. 1906; 31 P. L. R. 1907 ; 9 P. W. R. 1907, explained.

The *Ruriaj-i-am*, even when unsupported by instances, is an important piece of evidence in support of the custom which it records to which serious regard must be paid.

The word 'mother' in a *riwaj-i-am* must be presumed to carry its plain literal meaning, in default of any evidence that it was intended to mean or include somebody else. A grandmother cannot, therefore, be included within the word mother used in a *riwaj-i-am.*

Among Sikh Jats of the Lahore District a paternal uncle is to be preferred to the grandmother.

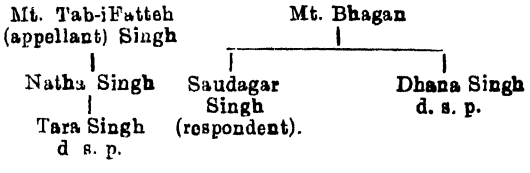
Second appeal from the decree of the Additional District Judge, Lahore, dated the 5th August 1920, affirming that of the Senior Subordinate Judge, Lahore, dated the 31st March 1920, and dismissing plaintiff's suit.

Mr. *Aziz Ahmad*, for the Appellant.

Mr. *Nanak Chand*, for Bakhshi *Tek Chand* and Lala *Shaukat Rai*, for the Respondent.

JUDGMENT.—This judgment will dispose of Second Appeals Nos. 2526 and 2631 of 1920, the question for decision in each being the same. That question is, as stated in the Certificate given by the lower Appellate Court under section 41 (3) of the Punjab Courts' Act, that of the respective right of a Sikh grandmother and a paternal uncle *inter se* and of the interpretation and scope of the word 'mother' as given under answer No. 66 of Bolster's Customary Law of the Lahore District.

The following pedigree table elucidates the facts :—



Dhana Singh died first of the sons of Fatteh Singh and his estate was inherited in equal shares by Saudagar Singh and Natha Singh. Natha Singh died and was succeeded by Tara Singh. When Tara Singh died his land was mutated half in favour of Saudagar Singh and half in favour of his grandmother *Musammat* Tabi by an amicable arrangement. Subsequently, each of these persons brought a suit for a declaration that he and she were sole heirs of Tara Singh. Saudagar Singh succeeded in

both suits in one of which he was plaintiff and in the other defendant. *Musammat* Tabi appealed unsuccessfully to the District Judge and she has now come on second appeal to this Court in each case with a certificate in the terms noted above.

In the Trial Court 12 witnesses were produced by *Musammat* Tabi in whose opinion the grandmother is a preferential heir to an uncle, while 17 witnesses for Saudagar Singh deposed that a grandmother is no heir at all in the presence of an uncle. No concrete instance was quoted by either set of witnesses and this evidence is valueless,

The only other evidence is the *riwaj-i-am* the terms of which are embodied in paragraph 66 of Bolster's Customary Law of the Lahore District. It is there declared that when a man dies without lineal descendants, widow or daughters, his property devolves on the follwing in order :—

1. Father;
2. Mother;
3. Brothers or their male descendants through males;
4. Paternal uncles of their descendants;
5. Other collaterals;
6. The village community.

This is stated to be the answer of all tribes, but no instances of succession are quoted in the record.

Two contentions are advanced on behalf of *Musammat* Tabi before us and they are mutually contradictory. The first, is that in the *riwaj-i-am* the word 'mother' must be held to include grandmother so that the grandmother stands as regards succession on an equal footing with the mother. The second is that, since no definite rule of custom applicable to the question before the Court can be found, recourse must be had to Hindu Law for a rule and under Hindu Law the grandmother is preferred to the uncle.

This second argument is based on 110 P. R., 1906 but it has no force. What the Full Bench ruled in that case was that, among parties generally following Customary Law it is permissible to fall back *as a last resort* on their personal law for the decision of a point on which no definite rule of custom applicable can be found. In the present instance there is no gap which cannot be filled otherwise than by a resort to Hindu Law. The *riwaj-i-am*, even when unsupported by instances, has been ruled by the Privy Council to be an important piece of evidence to which serious regard is to be paid and here, we have the *riwaj-i-am* which describes the uncle as an heir and does not mention the grandmother at all. There is thus a piece of evidence that, under custom, the uncle is an heir and the grandmother is not. If the contest were between two such persons as the sister's husband and the mother's brother and if there were no evidence on the record except the present *riwaj-i am*, then it might be said that there was a gap which could not be filled except by a reference to personal law, and this is manifestly what the learned Judges meant who delivered *Daya Ram* v. *Sohel Singh* (1).

On the first point the argument addressed to us amounts to a claim that the word 'mother' should include grandmother because it ought to do so and because a grandmother is an heir under Hindu Law and thus there would be nothing strange in her being an heir under Punjab Agricultural custom. Under Hindu Law, however, a grandmother does not stand on the same footing as a mother and although she comes before a father's brother she comes after a brother and his descendants to whom the mother is preferred under the rule of custom enunciated in the *riwaj-i-am*. It is easy to theorize and to speculate as to what the rules of custom should be but the function of a Court, in matters of disputed custom, is to discover the actual practice and to give effect to it. Here not a single instance is discoverable of inheritance by a grandmother in preference to an uncle, and the *riwaj-i-am* declares the uncle to be an heir and omits all mention of the grandmother. The word 'mother' in the *riwaj-i-am* must be presumed to carry its plain literal meaning in default of any evidence that it was intended to mean something else. Bricks cannot be made without straw, and there is no material except the words themselves of paragraph 66 of Bolster's Customary Law which enable us to interpret it or explain its scope.

Both appeals, therefore, fail and are dismissed with costs.

Z. K. *Appeals dismissed.*

(1) 110 P. R. 1906 ; 31 P. L. R. 1907; 59 P. W. R. 1907.

KEDAR NATH *v.* SHANKER LAL

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 702 OF 1922.

January 6, 1924.

Present:—Mr. Justice Stuart and Mr. Justice Mukerji.

Lala KEDAR NATH—PLAINTIFF—APPELLANT

versus

SHANKER LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) ss. 105, 107—Lease, what is—Registered Kabuliyat, *whether creates tenancy.*

A lease is a transfer of property and can be made only by the transferor and not by the transferee. The transfer can only be made by the volition of the transferor, but in the case of a lease for a term exceeding one year the transfer does not become effective until a registered instrument comes into being; the instrument must, however, be effected by the transferor.

Therefore, a registered *kabuliyat* executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow a title upon the person occupying the premises and can in no way be considered a lease as defined in section 105 of the Transfer of Property Act.

Case-law discussed.

Second Appeal from the decree of the District Judge of Saharanpur, dated the 25th March 1922.

Mr. *Nehal Chand*, for the Appellant.

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

JUDGMENT.

Stuart, J.—The learned District Judge decided the contentions which we are now considering upon one point. He wrote in his judgment: "The main point for decision is one of law and may be stated in this form—'Is a registered *kabuliyat* executed by the tenant and accepted by the landlord sufficient to create a tenancy?'"

He decided that point only.

The facts were as follows: The plaintiff, who is here the appellant, is the owner of a shop with a shed attached which he leased to a certain Kundan Lal. Kundan Lal executed a *kabuliyat* in plaintiff-appellant's favour, dated the 19th March 1913, agreeing to occupy these premises on a monthly rental until 1918. It is not clear whether the plaintiff had executed a lease for this period of five years in favour of Kundan Lal. It is of no consequence whether he did or did not execute a lease, for it is admitted that he took no exception to Kundan Lal as a tenant during those five years. His relations with Kundan Lal appear to have been amicable during that period. When that lease came to an end, it is an admitted fact that Kundan Lal executed a registered *kabuliyat* dated the 10th April 1918 by which he agreed to occupy the same premises as tenant for a further period of eleven years on an annual rental of Rs. 200. Kundan Lal continued to occupy the premises and the plaintiff made no objection, as far as we can gather, to his occupation. Kundan Lal died in 1918. After his death the plaintiff instituted the suit out of which the present appeal arises against the sons of the deceased Kundan Lal, who had continued to occupy the premises, for possession of the premises, for an amount for use and occupation for the period between their father's death and the date of the suit calculated at the rate at which their father had been paying rent, and for damages at the same rate up to the period that the plaintiff might obtain possession. The learned District Judge did not go into the other points raised between the parties. He did not even decide upon the evidence whether the plaintiff had or had not accepted the *kabuliyat*. He took the view that without considering other evidence the plaintiff must be considered to have accepted the *kabuliyat* on the wording of the plaint and on the wording of a notice issued by the plaintiff's pleader to Kundan Lal's sons dated the 14th April 1919. We do not consider that on the wording of the plaint and the wording of the notice a conclusion can be drawn that the plaintiff accepted the *kabuliyat* of 10th April 1918. The plaint affords no authority for a finding other than that the plaintiff had permitted Kundan Lal to hold over as a tenant from year to year after the first period of five years had come to an end. It does not follow from this that he would extend the same towards Kundan Lal's sons after the death of Kundan Lal. The wording of the notice in no way supports the suggestion that the plaintiff accepted or

admitted the *kabuliyat* and so far there has been no finding on the evidence as to whether, and, if so, how far the plaintiff misled the defendants by his action in permitting Kundan Lal to hold on after the period of five years had come to an end, or, in other words, as to the validity of the plea of estoppel which has been raised by the defendants. The point as to what the plaintiff actually did do or omitted to do and the effect of his acts and omissions upon the merits of the case has not been decided by a finding of fact and, as will be seen from the subsequent portion of this decision, we propose to leave this question, in addition to the other question which so far have not been decided, to the decision of the learned District Judge's successor.

But it is unnecessary for us to remand the case for further findings and await their decision before we decide the only question now before us because we answer in the negative the question which the learned Judge answered in the affirmative. We do not find that the plaintiff accepted the *kabuliyat* and we express no opinionas to whether he did or did not, but assuming that he accepted the *kabuliyat* we cannot accept the learned Judge's view as to the law.

The question which we have to decide is one which has been before this and other High Courts on previous occasions and, in so far as this High Court is concerned it, has not so far been decided in explicit terms by a Bench. The first occasion when it arose in a reported decision was when it came before a Bench of this Court in *Nand Lal* v. *Hanuman Das* (1). There the defendants who were the occupiers of a house alleged that they could not be ejected therefrom because they held under a lease. What they alleged to be a lease was a registered *kabuliyat*. It was found in that case that the plaintiffs, the owners of the house, had been fully aware of the execution of the *kabuliyat* and had given consent to its execution. Blair, J., referred to a decision in a Letters Patent Appeal (this is quoted as a note to the report) in which the view which he had previously taken that a registered *kabuliyat* even whena ccepted by the landholder does not constitute a lease was approved by Edge, C. J., and Burkitt, J. He maintained his previous opinion and found that the *kabuliyat* before him in the appeal which he was then deciding could not operate as a lease. He found for the ejectment of the defendants. Banerji, J., also found in favour of the ejectment but he did not express an opinion upon the point now before us. He is entered in the head-note as having questioned the validity of the opinion of Blair, J., but the hand-note is not accurate on that point as will be seen from the words of Banerji, J. All that he said was this :—

> "Having regard to the fact that it is a common practice in these provinces to treat a *kabuliyat* as the instrument creating a tenancy, and that a ruling such as that contended for by the appellants may unsettle titles, I do not desire to express any opinion upon the first question raised in this appeal."

I fail to understand how, by using these words, the learned Judge could be held to have expressed a doubt as to the correctness of the view of Blair, J. This decision was passed in 1904. A few months later, the same point arose before Blair, J., sitting singly, in *Kashi Gir* v. *Jogendro Nath Ghose* (2). In that case he repeated the view that a lease could not be created by a *kabuliyat*, and that until a lease or a *patta* was duly executed and registered in cases in which the law required a registered instrument no lease was created or could be proved. In 1905 the point again came before a Bench of this Court when Blair, J., and Banerji, J., refused, in a case where certain persons claimed to collect market dues under an unregistered lease and a registered *kabuliyat*, to recognise that claim. The decision clearly was that the lease being unregistered was ineffective and that the *kabuliyat* although registered did not create a lease. But the point was not decided explicitly. This decision is reported in *Sikandar* v. *Bahadur* (3). The point was raised again in 1909 before a Full Bench consisting of Stanley, C. J., and Banerji and Aikman, JJ. Their decision is reported in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (4).

(1) 26 A. 368 ; 1 A. L. J. 96 ; A. W. N. (1904) 46.

(2) 27 A. 186 ; A. W. N. (1904) 189; 1 A. L. J. 576.
(3) 2 A. L. J. 208 ; A. W. N. (1905) 48 ; 27 A. 462.
(4) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347 (F. B.).

The point was not decided. The question was not raised in the form before us. The appeal related to a suit for arrears of rent on the basis of a registered *kabuliyat*. The defendants who were tenants of the Maharaja of Benares were let in to occupation of a tenancy on a registered *kabuliyat*. The Maharaja sued them for arrears of rent and they set up that they could not be made to pay rent because, as the Maharaja had not executed a lease, they were not liable to pay anything. This plea did not find favour with the Assistant Collector who heard the suit. He decreed the claim. The plea which was advanced before the High Court was that a *kabuliyat* was equivalent to a counter-part and that there could not be a counter-part without a lease. Thus, there being no lease, the *kabuliyat* was waste paper and the defendants were not liable to pay rent at all. The defendants-appellants endeavoured to press into their favour the decisions which I have already quoted and asked the Court to take the view that as a lease could not be created by a *kabuliat* a tenant who had agreed to pay rent by a registered instrument was under no liability to pay rent at all. The Full Bench decided this plea in the following words : –

> "The only ground of appeal which has been pressed in argument before us is the first, namely, that a *kabuliyat* without a *patta* does not create a valid lease of immoveable property. As to this we express no opinion, inasmuch as we find that, under the circumstances, the plaintiff is clearly entitled to recover compensation for use and occupation."

They added that they expressed no opinion as to the correctness of the rulings which had already been cited. I fail to understand from the wording of this decision that the learned Judges who composed the Bench dissented from the view taken by Blair, J. The matter was raised again before me as a single Judge in 1916. My decision is reported in *Bijai Narain Singh* v. *Sri Maharaja Parbhu Narain Singh* (5). The point taken in the present appeal was not material to my decision in that appeal and I expressed no view upon the point which is now before us. The learned Counsel for the respondents in this appeal has been unable to show us any decision of our own Court in which a view has been taken differing from or questioning the law as laid down by Blair, J., and by the Bench which decided *Sikandar* v. *Bahadur* (3), and it would appear to me that upon the principle of "*stare decisis*" this Bench would not be competent to accept the view taken by the learned District Judge of Saharanpur and if they differed from the view taken in the past should refer the point for the decision of a Full Bench. It has been urged upon us by the learned Counsel for the respondents that in, view of certain decisions in the High Courts of Madras and Calcutta, we should refuse to follow the view taken by our own Court. He relies in particular upon a decision of the Full Bench of the High Court at Madras passed in 1910, *Syed Ajam Sahib* v. *Anantha Narayana Aiyar*, (6) and a decision of a Bench of the Calcutta High Court, *Raimani Dassi* v. *Mathura Mohan Dey* (7). In deference to the views of the learned Judges who decided those appeals I propose to say something more. I refer to the provisions of Act IV of 1882 to show what a lease is in India and how a valid lease can be created by the Indian Law. Section 105 of that Act states :—

> "A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> "The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent."

Section 107 commences :—

> "A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."

(5) 37 Ind. Cas. 395; 15 A. L. J. 317.

(6) 8 Ind. Cas. 668; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 487; 21 M. L. J. 202.

(7) 14 Ind. Cas. 540 ; 39 C. 1016 ; 15 C. L. J. 665 ; 16 C. W. N. 606.

Thus, in order to create a valid title to occupation of premises, the property of another person, for a term exceeding one year by lease a registered instrument is necessary. A lease is a transfer. A transfer must obviously be made by the transferor. It cannot be made by the transferee. So the owner of the premises must make the transfer. The transfer can be only made by his volition, but that transfer does not become effective in case of a lease for a term exceeding one year until a registered instrument comes in to being The argument on the other side is apparently that the owner must make the transfer, but the registered instrument creating the transfer, which is essential to the validity of a title in such cases, can be made by the transferee. How is this possible? Surely, if such is the case, the transfer itself is made by the transferee and is accepted by the transferor. I observe that both in Calcutta and Madras stress has been laid upon the terms of section 2, clause (7) of the Registration Act, old Act III of 1877. Clause (7) of section 2 states that a lease includes a counter-part, *kabuliyat*, an undertaking to cultivate or occupy, and an agreement to lease. From this it is argued that the word "lease" includes *kabuliyat* and that a *kabuliyat* is a lease. I understand the meaning of the words, however, to be that for purposes of registration a counter-part, *kabuliyat*, an undertaking to cultivate or occupy, and an agreement to lease are put in the same category as a lease, in other words that an undertaking to cultivate or occupy from year to year ordinarily requires registation under the provisions of section 17. I do not understand these words to suggest that what is known as a lease under the law is the same thing as an undertaking to cultivate, and that the substantive law relating to leases can be applied to undertakings to cultivate by substituting the words "undertaking to cultivate" for "lease" wherever the word "lease" occurs in legislative enactments other than the Registration Act. It is true that section 4, Act IV of 1882, lays down that section 107 of that Act is to be read as supplemental to the Indian Registration Act. I understand those words to mean that the provisions in section 107 relating to registration were intended to supersede and to absorb the provisions relating to registration of leases which were contained in the Registration Act that had been passed five years earlier. For these reasons, taking the view of the law which I consider to be the view that has always been accepted in this Court, and finding no reason to refer the point to a Full Bench, I should answer the District Judge's question in the negative and decide that a registered *kabuliyat* executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow title upon the person occupying the premises and can in no way be considered a lease as defined in section 105 of Act IV of 1882. The result of this decision would be that this appeal would succeed and the District Judge's decision upon a preliminary point of law having been reversed, the case would be sent back to his successor for restoration to its original number and decision on the merits upon the other points.

Mukerji, J. :—I entirely agree with what has fallen from my learned brother. I wish to add just a few words. In arriving at the conclusion at which I have arrived, namely, the same conclusion at which my learned brother has arrived, I have not overlooked the fact that in this country the custom largely prevails of creating leases, rather attempting to create them, by means of a mere *kabuliyat* or a document executed by the intending lessee alone. What we have to do, however, is merely to interpret the law as it stands. In interpreting the law as we have done, it is satisfactory to note, we are not interfering with a large number of *kabuliyat* and leases which relate to agricultural holdings. By the express provisions of section 117 of the Transfer of Property Act the provisions in Chapter V of that Act do not apply to agricultural leases.

Lastly, I would observe that we have decided merely a point of law. If, apart from the *kabuliyat*, the defendants can show any good reasons, for being allowed to continue to occupy the premises in suit, they would still be entitled to show those reasons before the lower Appellate Court. I, therefore, concur in the order proposed.

Order by the Court :—The appeal is allowed. As the Court from whose decree the appeal has been preferred has disposed of the suit on a preliminary point and its decree has been reversed on appeal, a copy of these judgments

shall be sent to the Court with directions to re-admit the appeal under its original number and determine it on the merits. Costs here and hitherto will abide the result. The costs in this Court will be on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 2886 AND 2887 OF 1923

January 17, 1924.

Present :—Mr. Justice Spencer, Acting Chief Justice, and Mr. Justice Devadoss.

JOHN JOSEPH BRITO—PETITIONER—
versus
MRS. S. S. BRITO—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 105, 109, 115, 151—Final order, what is—Order restoring suit—Revision—Order refusing to interfere whether final—Leave to appeal to His Majesty in Council.

An order passed under section 115 of the Civil Procedure Code refusing to interfere in Revision with an order of a Subordinate Judge passed under section 151 of the Code restoring to file a suit which had been disposed of upon an alleged compromise between the parties is not a "final order" within the meaning of section 109 of the Code and leave cannot, therefore, be granted to appeal to His Majesty in Council against such an order.

An order is a final one under section 109 of the Civil Procedure Code if it finally disposes of the rights of the parties.

Ramachand Manjimal v. *Goverdhandas Vishandas Ratanchand*, 47 Cal. 918 ; *Shankar Bharati* v. *Narasimha Bharati*, 47 Bom. 106 and *Croasdell & Cammell Laird & Co., Ltd.*, In re : (1906) 2 K. B. 569, relied on.

Section 105 of the Civil Procedure Code is inapplicable to appeals to His Majesty in Council.

Nayarin Venkataranga Row v. *Venkatarama Narasimha Rao*, 38 M. 509 ; 21 Ind. Cas. 842 ; 14 M. L.T. 560 ; (1914) M. W. N. 64 ; 26 M. L. J. 96, relied on.

C. M. P. No. 2886 OF 23.

Petition under O. XLV, rr. 2, 3 and 8 and sections 109 and 110 of Act V of 1908 and clause (39), Letters Patent, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment and order of the High Court dated 18th July 1923, in C. R. P. No. 423 of 1922 presented to the High Court to revise the order of the Court of the Subordinate Judge of South Kanara in I. A. No. 565 of 1921 in O. S. No. 55 of 1920.

C. M. P. No. 2887 of 1923.

Petition praying that in the circumstances stated in the affidavit filed in C. M. P. No 2886 of 1923, the High Court will be pleased to issue an order directing stay of all further proceedings in O. S. No. 55 of 1920 on the file of the Court of the Subordinate Judge of South Kanara, pending disposal of the said C. M. P. No. 2886 of 1923, on the file of the High Court praying for leave to appeal to His Majesty in Council.

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

Mr. *B. Sitarama Rao*, for the Respondent.

ORDER.—This is an application for leave to appeal to the Privy Council against an order passed by us in C. R. P. No. 423 of 1922, in which we refused to interfere in revision with the order of a Subordinate Court restoring to file a suit which had been first disposed of upon an alleged compromise between the parties.

Before we can certify that the case is a fit one for appeal to His Majesty in Council, we must be satisfied that the order passed by us was a final order within the meaning of section 109, Civil Procedure Code. What is a "final order" has been defined in *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratanchand* (1). The Privy Council say that,—

> "an order is a final one if it finally disposes of the rights of the parties."

A similar interpretation of the word "final" has been adopted in *Shankar Bharati* v. *Nara-*

(1) 56 Ind. Cas. 302; 47 C. 918 at p. 923; 24 C. W. N. 721; 18 A. L. J. 591; 22 Bom. L. R. 606; 39 M. L. J. 27; 12 L. W. 15; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M. L. J. 87; 47 I. A. 124; 14 S. L. R. 191, (P. C.).

simha Bharati (2) where Shah, C. J., says that,

> "a final order is one which decides a cardinal point in the suit and finally disposes of the rights of the parties."

Crump, J., who sat with him, took the word "final" to mean

> " an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision."

An English case, *Croasdell & Cammell, Laird & Co., Ltd., In re:* (3) has been quoted before us in which it was held that

> "an order passed by a Divisional Court setting aside an award made by an arbitrator was not a final order but an interlocutory one which involved no determination of the rights of the parties as regards the matters which were in dispute in the arbitration."

Applying those definitions to the case before us, let us see what is the result. The Court below restored the suit to file because it found as a result of an enquiry that the defendant caused the plaintiff to sign a compromise petition by fraud and undue influence. The matter came up to us because it was argued that the Subordinate Court had no power to make such an order under section 151, Civil Procedure Code. We refused to interfere on the ground that the lower Court could have made such an order in the exercise of its powers of Review and because the merits of the case would be finally enquired into at the trial which was to take place thereafter. Assuming that the lower Court's order refusing to act upon the compromise did in some way dispose of the rights of the parties, our order did not take away from or add anything to what the lower Court decided. We only decided the question of jurisdiction. The rights of the parties in the suit were left open for decision and have since been decided. We are, therefore, of opinion that our order was not a final order within the meaning of section 109, Civil Procedure Code.

It is argued that, if the petitioner is not given leave to appeal against our order, he will be precluded from raising the contention that the matter has been settled by compromise and making that a ground of appeal against the final decree, and, in that connection, reference has been made to section 105, which may also be read with section 97, Civil Procedure Code, as to the right of a party to raise an issue in appealing against a final decree which he has not appealed against in appeal from the preliminary decree.

The answer to that argument is found in *Venkataranga Row* v. *Narasimha Rao* (4) where it was pointed out by Miller and Sadasiva, Aiyar, JJ., that section 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in section 109. In *Saratmani Debi* v. *Bala Krishna Banerjee* (5), Mookerjee, J., defined a "final order" as

> "one which finally decides any matter which is directly at issue in the case in respect of the rights of the parties."

With due respect, we consider that this, as it stands, is a definition which cannot be quite reconciled with the definition in, *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratan Chand* (1), *Shankar Bharati* v. *Narasimha Bharati* (2) but as the learned Judge goes on to say that

> "the answer to the question whether the order is final or not must depend on whether it decided finally the cardinal point in the suit or an issue which goes to the foundation of the suit"

there is noneed to quarrel with his first definition *Meghraj* v. *Bidyabati Koer* (6) and *Lachmi Narain Marwari* v. *Balamakund Marwari* (7) are both cases in which an order was passed setting aside a decree dismissing a suit for default. It is unnecessary to canvass the correctness of the view that such an order might be a final order, because the orders there passed do not in any way correspond to the order which we passed on the Revision Petition in this suit. Assuming that the Subordinate Judge's order finally disposed of the rights of the parties to have their dispute settled by compromise and was thus a "final

(2) 69 Ind. Cas. 80; 47 B. 106; 24 Bom. L. R. 925; (1922) A. I. R. (Bom.) 383.

(3) (1906) 2 K. B. 569 ; 75 L. J. K. B. 769 ; 95 L. T. 441 ; 54 W. R. 620 ; 22 T. L. R. 759.

(4) 21 Ind. Cas. 842 ; 38 M. 509 ; 14 M. L. T. 560; (1914) M. W. N. 64 ; 26 M. L. T. 96.

(5) 4 Ind. Cas. 459; 10 C. L. J. 336.

(6) 28 Ind. Cas. 587; 21 C. L. J. 279.

(7) 60 Ind. Cas. 479; 6 P. L. J. 116; 2 P. L. T. 155.

order", our order did no more than refuse to interfere with that order upon a question being raised as to the Subordinate Judge's jurisdiction to pass it.

Holding that the order passed by us was not a final order, we dismiss the present application with costs.

C. M. P. No. 2887 of 1923. which is a petition for stay of proceedings, is dismissed without costs.

V. N. V. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 31 OF 1922.

January 24, 1922.

Present :—Mr. Raymond, A. J. C., and Mr. Kennedy, A. J. C.

DAYARAM RAMDAS—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Income Tax Act (VII *of* 1918), *s.* 52—*Assessment of Income Tax—Suit to contest validity of order, maintainability of—Jurisdiction of Civil Courts, limits of.*

Whereby on Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Courts is ousted and in case of injury the party cannot proceed to action. [p. 942, col. 1.]

Saibesh Chandra Sarkar v. *Bejoy Chand Mahatap*, 65 Ind. Cas. 711 ; 26 C. W. N. 506 ; (1922) A. I. R. (C.) 41, relied on.

A Civil Court has no jurisdiction to interfere with or question the propriety of an order which has been passed by a duly constituted tribunal and which the Legislature has declared to be final. [p. 942, col. 1.]

Vertenial v. *Cantonment Committee, Karachi*, 37 Ind. Cas. 267 ; 10 S. L. R. 113, followed.

The Income Tax Act creates a special jurisdiction and provides a special remedy. [p. 942, col. 1.]

Where an Income Tax Officer professes to tax income and income only, his order is one under the Income Tax Act, and if it is erroneous it is capable of rectification on appeal to the Commissioner. A Civil Court has no jurisdiction to question the propriety of such an order, as its jurisdiction is expressly barred under section 52 of the Income Tax Act of 1918.

*In re Poonamchand Manekla*l, 25 Ind, Cas. 333; 38 B. 642; 16 Bom. L. R. 446; 15 Cr. L J. 581, referred to.

Forbes v. *The Secretary of State for India*, 26 Ind. Cas. 893 ; 42 C. 151 ; 19 C. W. N. 138, relied on.

It is only where an Income-Tax Officer assesses something which is not income or levies an assessment on classes of income exempted by the Act, that he over-steps the limits of his jurisdiction and his assessment ceases to be under the Act within the meaning of section 52 of the Income Tax Act of 1918. [p. 942, col. 2.]

Appeal against the judgment and decree of the District Judge, Sukkur, dated the 2nd May 1922.

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

Mr. *T. G. Elphinston*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff-appellant against the Secretary of State for India, defendant-respondent, for a declaration that his assessment to income tax in the sum of Rs. 3,125 for the year 1918-19 was illegal and for the recovery of this sum with interest and costs. The suit has been dismissed on a preliminary point, the District Judge of Sukkur holding it barred by section 52 of the Income Tax Act VII of 1918. Section 52 is as follows : "No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceedings shall lie against any Government Officer for any thing done in good faith or intended to be done under this Act". The main point that arises on appeal is whether the assessment of the appellant to payment of income-tax was under the Act, for if it were not, a suit would undoubtedly lie.

The assessment is obviously based on classes of income that are not exempted by the Act.

The Income-tax authorities adjusted the income of the appellant for the year in question at Rs. 50,000 and a demand notice was issued to the appellant to pay income tax in the amount of Rs. 3,125. The appellant contends in the first instance that there has been an illegal assessment of

interest on capital which has been taken to be recovered by the appellant from 18 different partnership concerns wherein he is interested. It is alleged that all these partnership concerns have paid income-tax at their respective places of business and the same income cannot be taxed twice ; secondly, the amount shown as interest has not been received by the appellant in many cases and the total investment shown in these partnerships is inaccurate ; thirdly, the interest shown as received from some of the partnerships has been included in some of the other items in the assessment order. It was next urged that the Income-tax authorities acted arbitrarily and illegally in determining the income to be Rs. 50,000 whereas it was actually Rs. 20,626, and, lastly, that the sum of Rs. 8,130 has not been taken into consideration as rebate in respect of bad debts. I have set forth in detail the objections to the assessment by the appellant, for even assuming there has been an error in the assessment, is the error one of such a character as to render the assessment one not under the Act ? We have had an elaborate argument from Mr. Lulla on behalf of the appellant and his contentions may be substantially narrowed down to two points, first, that it is not income that has been taxed, second, that a part of his income has been taxed twice, consequently, the assessment is not under the Act and the Civil Courts are not ousted of their jurisdiction to determine the question whether the assessment is legal.

The Income Tax Act, VII of 1918, though wholly repealed by Act II of 1922, has reproduced the provisions of section 52 of the former Act in their entirety in the latter. In the present case it is the former Act that is applicable.

Section 18 of the Act of 1918 prescribes the procedure prior to the determination of the assessment of income-tax payable by the assessee. An Income-tax Collector is a Revenue Court : *In re Poonamchand Maneklal* (1), and if the assessee is aggrieved by his order either under sections 18 and 19 of the Act he has the right under certain limitations to petition the Commissioner for relief against any order of the Collector in respect of such assessment or adjustment (section 21). It is established that prior to the assessment the Collector gave the assessee an opportunity of appearing before him with any documentary evidence in his possession and after hearing him and examining such of the accounts-books as were produced, assessed the income-tax.

Assuming that the Collector has made an erroneous assessment, can it be said that the assessment was not under the Act so as to give the Civil Courts jurisdiction, for it cannot for a moment be denied that if the assessment was under the Act, the suit is unentertainable.

It is argued that income has been taxed which has not arisen or been received in British India, that appellant had some of his capital invested in Khairpur and Mysore States from which he has received no profits. By his order Ex. 30 the Collector stated as follows : " Moreover, he is a capitalist partner in 18 lucrative concerns (some of which are not taxed separately) the separate accounts (*khatas*) of which show he has received as much as Rs. 4,85,375 from them in 1918. The original accounts of these concerns have not been produced to show how much of this is business profit. Since all these necessary documents and account-books have not been produced there is no certainty that the personal profits and business profits are really as much as stated and no more ; appellant has admittedly about 6 lakhs of rupees invested in different partnership concerns and income on 6 per cent. interest on this has been taxed. The Collector was not satisfied that the appellant had not received at least this amount of profit on his capital, and if there was an error, it was an error due to the appellant not having adduced satisfactory evidence to prove the contrary, but it is scarcely arguable that the assessment was not under the Income Tax Act. Similarly, it was for the appellant to satisfy the Collector that the income which had been taxed had been already taxed before and, therefore, could not be taxed twice. The Collector holds that necessary and essential books and documents have been withheld from him and a summary assessment based on the previous years' figures was justifiable. What the Collector, therefore, taxes is income which, in his honest opinion, has not been

(1) 25 Ind. Cas. 333 ; 38 B. 642 , 16 Bom. L. R. 446 ; 15 Cr. L. J. 581.

previously taxed and if the appellant was dissatisfied with the order of the Collector he had his right of appeal to the Commissioner. The appellant's unsupported statement that it is not income is not sufficient to regard the assessment as one not under the Income Tax Act.

It is not, as observed, an exempted class of income that has been taxed, the only question that could arise would be in the event of the partnerships having paid income-tax at their respect place of business the appellent could be again charged in respect of the same income under section 18 of the Act of 1918, but it was for appellant to prove that the income-tax had already been paid on these items of income.

It was argued that the assessment was arbitrary, no doubt it had to be an assessment on scanty materials but for this the appellant is responsible. The Collector finds that the (*a*) invoices from the commission agents, (*b*) *noondh* book for speculative transactions, (*c*) the *Kharra* book for business, done in ready goods, were not produced before him by the appellant, and he, perforce, had to arrive at a figure on such materials as were before him taking into account the previous year's assessment.

In *Saibesh Chandra Sarkar* v. *Bejoy Chand Mahatoh* (2), it was observed that "it is an established principle that where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Courts is ousted and in case of injury the party cannot proceed to action." There can be little doubt that the Income Tax Act creates a special jurisdiction and provides a special remedy. In *F. J. de Verteuil* v. *Cantonment Committee, Karachi*, (3), "it was held that a Civil Court has no jurisdiction to interfere with or question the propriety of an order which has been passed bya duly constituted tribunal and which the legislature has declared to be final." This judgment no doubt dealt with the provisions of the Cantonment House Accomodation Act but the principle as to the jurisdiction of the Civil Court is *in pari materia*.

If the Collector of Income Tax, who has been constituted a special tribunal by the Income Tax Act, had assessed anything but income or had levied an assessment on the classes of income exempted by the Act, he would have over-stepped the limits of his jurisdiction his assessment would not have been under the Act. But in this case he professes to tax income and income only; there may be an error in his calculation, but his order is still one under the Act, and, if erroneous, it is capable of rectification on appeal, The Collector was exercising a jurisdiction vested in him under the Act and his assessment, under the circumstances shown above, was one under the Act.

In *Forbes* v. *The Secretary of State for India* (4) a suit was brought by the executor of an estate for a declaration that as executor he was not liable to pay income-tax in respect of any income of the estate and that the Collector in realizing the sums paid to him, acted without jurisdiction, and for a decree for the amount so paid with interest, it was held that the suit did not lie. There was no doubt in this case that the tax had been levied on income but the objection taken was that the executor was not liable to pay it. The High Court held that, as the Collector had determined that the plaintiff was the person chargeable and in doing so had acted within his jurisdiction, the suit was incompetent. If there was an error in assessment by the Collector then it was a mistake of fact and not of Law his action was in confirmity with the Act and hence the assessment was under the Act.

The result is, therefore, that the suit is barred and this appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 65 Ind. Cas. 711 ; 26 C. W. N. 506 ; (1922) A. I. R. (C.) 4.

(3) 37 Ind. Cas. 267 ; 10 S. L. R. 113.

(4) 26 Ind. Cas. 893 ; 42 C. 151 ; 19 C. W. N. 138.

MAHADEO LAL *v.* SRI GOBIND LAL SAHU

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1439, 1544 AND 1546 OF 1921.

January 18, 1924.

Present:—Mr. Justice Kulwant Sahay.

MAHADEO LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SRI GOBIND LAL SAHU AND OTHERS—PLAINTIFFS—
SHANKAR PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) ss. 72, 76—Mortgagee in possession—Settlement of bakasht lands—Tenants, position of.

Under sections 72 and 76 of the Transfer of Property Act, it is one of the rights of a mortgagee in possession to settle land with tenants.

A mortgagee in possession, with all *zemindari* rights vested in him, has a right to settle *bakasht* lands with tenants during the continuance of the mortgage, and the persons with whom the settlement is made would, in anyevent, acquire non-occupancy rights in the land.

Sheobarat Singh v. *Padarath Mahton*, 52 I. C. 473, followed. *Mahadeo Prasad Sahu* v. *Gajadar Prasad Sahu*, 73 Ind. Cas. 359 ; 1 P. L. R. 145, distinguished.

Appeals from a decision of the Offg. District Judge, Shahabad, dated the 5th September 1921, reversing the decision of the Munsif, 2nd Court, Sasaram, dated the 24th July 1920.

Mr. *N. C. Sinha*, for the Appellants.

Messrs. *S. M. Tahir*, *Rai Tribhuban Nath Sahay* and *D. C. Varma*, for the Respondents.

Kulwant Sahay, J.:—These three appeals have been preferred by the principal defendants against the decision of the District Judge of Shahabad, dated the 5th September 1921 whereby he reversed the decrees of the Munsif of Sasaram, and decreed the plaintiffs' suits for possession of certain lands. The facts are shortly these : The plaintiff is admittedly the *zemindar* of the village. He holds 3 annas share *pucca* which is equivalent to 9-annas, 7-pies, 4 *krants* under a Collectorate partition in *Mauza* Neoras. On the 5th April 1904 the plaintiff executed a *bharna*-deed in respect of his interest in the village in favour of the predecessor-in-interest of *pro forma* defendants. The deed was executed to secure repayment of an advance of Rs. 2,641 made by the ancestor of the *pro forma* defendants to the plaintiff and the stipulation in the deed was that the mortgagee would remain in possession of the plaintiff's share in the village for the period from 1312 to 1319. A sum of Rs. 750 was fixed as the annual *jama* or rental payable by the mortgagee to the mortgagor out of which the mortgagee was to deduct a sum of Rs. 450 annually and to appropriate the same towards re-payment of the sum advanced by him and the balance of Rs. 300 was to be paid yearly to the mortgagor. The plaintiff's case is that the lands in dispute in these three suits were the *zirait* lands of the proprietor ; that at the time of the execution of the *bharna*-deed the plaintiffs were in possession of these lands and when the *pro forma* defendants came into possession of the village, they took possession of these lands as *zirait* lands ; that during the Survey and Settlement proceedings, which came to an end sometime in November 1912, the *pro forma* defendants got the names of the principal defendants in each of these suits recorded as tenants of the lands in dispute. *Tanazu* was filed before the Survey authorities but the objection was disallowed and the principal defendants were recorded as occupancy tenants of the lands in dispute. The plaintiff's case was that there was no *bona fide* settlement in favour of the principal defendants and, as a matter of fact, the *pro forma* defendants themselves continued in possession of these lands and the names of the principal defendants were caused to be recorded with the object of retaining possession of these lands even after the expiry of the term of the *bharna*. They, therefore, prayed for a declaration that the lands were *zirait* lands of the plaintiff; that the *proforma* defendants had no right to settle the lands with the principal defendants ; that, as a matter of fact, no such settlement had been made and that the principal defendants were trespassers and they prayed for recovery of possession of these lands. The *pro forma* defendants did not enter appearance and the suit was contested by the tenant-defendants and their allegation was that the lands in dispute were their ancestral occupancy holdings. In paragraph 11 of the written statement these defendants alleged

that the plaintiffs' allegations that the *bharnadars* had no right to settle the lands and that the defendants are not *kashtkars* of the disputed lands, were altogether wrong and false, that the disputed lands constituted the *kasht* of the defendant, and that the Survey entries were correct.

Before the Munsif, where the case came on for trial, the principal issues were Issues Nos. 4 and 5. Issue No. 4 was—Was the disputed land *Zirait* of the plaintiff and was it in possession of defendants Nos. 3 to 7 and are the contesting defendants trespassers thereon?

Issue No. 5 was—Whether the defendants Nos. 3 to 7 had right to settle the *bakasht* land. The learned Munsif came to the conclusion that the lands were not the *zirait* lands of the plaintiffs. He held further that the lands were the occupancy holdings of the principal defendants. As regards Issue No. 5 he held that under the terms of the *bharna*-deed the *pro forma* defendants were entitled to settle the lands with the principal defendants and, relying on the case of *Atal Chandra Rishi* v. *Lakhi Narayan Ghose* (1), he held that even if the principal defendants were not the occupancy tenants of the land from before the alleged settlement by the *pro forma* defendants they had, in any event, acquired non-occupancy right under a settlement made by the *pro forma* defendants. He accordingly dismissed the plaintiffs' suit. Against this decision the plaintiffs went on appeal before the learned District Judge and the learned Judge has reversed the decision of the Munsif and decreed the plaintiffs' suit for possession.

The learned Judge considered the two principal issues, *viz.*, Nos. 4 and 5 stated above. As regards Issue No. 4 the learned Judge says that it is not necessary to come to any decision as to whether the lands are *zirait* lands of the plaintiffs or not. He refers to the fact that the plaintiffs are admittedly the *zemindars* and, relying upon the principle laid down in the case of *Narsing Narayan Singh* v. *Dharam Thakur* (2), he holds that it was not incumbent upon the appellants that they should prove the *zirait* character of these lands before they can succeed. He then refers to the entry in the Record of Rights which is in favour of the defendants and he says that the entry in the Record of Rights has been rebutted by the evidence produced on behalf of the plaintiffs.

As regards Issue No. 5, the learned Judge holds that the deed of 5th April 1904 was a pure usufructuary mortgage and that the *pro forma* defendants did not acquire the rights of a tenure-holder and, therefore, could not settle tenants on the land beyond the term of the *bharna*-deed.

As regards the question whether the principal defendants were occupancy tenants of the land in dispute from before the execution of the *bharna*-deed, there is a finding of fact by the learned District Judge which cannot be upset in second appeal. One of the reasons given by him for holding that the presumption raised by the Record of Rights in favour of the defendants has been rebutted, namely, that there is nothing to show on what the Record of Rights is based, is no doubt wrong. The entry being in favour of the defendants it was not necessary for them to show on what it was based, but it was for the plaintiffs to prove that it was incorrect. Later on, however, the learned Judge refers to evidence produced by the plaintiffs and he is of opinion that this evidence rebuts the presumption raised by the Record of Rights. This is a finding of fact which is binding upon me in second appeal.

The only question left for decision is as to what was the effect of the settlement alleged to have been made by the *pro forma* defendants with the principal defendants. The learned Judge, on a construction of the *bharna*-deed, has come to the conclusion that the *pro forma* defendants had no right to settle the lands with the principal defendants. I am unable to agree with the learned Judge on this point. On referring to the deed itself it appears that all *zemindari* rights were given to the mortgagee. The deed provides that the mortgagee would remain in possession of the mortgaged property for the period from 1312 to 1319 and what was transferred to the mortgagee was all lands, *i.e.*, *dih*, arable, waste, *talkeeari* and all *zemindari* rights appertaining to the same. The only reservation made in the deed was as regards cutting of certain trees

(1) 2 Ind. Cas. 417; 10 C. L. J. 55.
(2) 9 C. W. N. 144.

and transplanting the same. The deed therefore is a deed by which all the *zemindari* rights of the mortgagors had been transferred to the mortgagee. One of the ordinary rights of a *Zemindar* is to settle lands with tenants and if, in the ordinary course of management of the mortgaged property, the *pro forma* defendants settled the lands with the tenant defendants, such settlement would be good in law and the settlement holders would, in any event, acquire a non-occupancy right in the land. This was the view taken by this Court in the case of *Sheo Barat Singh* v. *Padarath Mahton* (3). There also a usufructuary mortgage had been executed in favour of certain persons and the usufructuary mortgagees during the continuance of the mortgage settled lands with certain tenants. After expiry of the term of the mortgage the mortgagor brought a suit for possession against the settlement-holders and this Court held that the mortgagee was entitled to settle lands with tenants during the continuance of his mortgage. It was held that, under sections 72 and 76 of the Transfer of Property Act, it is one of the rights of the mortgagee to settle land with tenants. It has been pointed out by the learned Vakil for the respondent that in that case the land in dispute was found to be tenancy land, that is, land in possession of tenants before the mortgage was executed; whereas there is no such finding in the present case. To my mind this does not make any difference so far as the present case is concerned. The case of the plaintiffs that the lands were the *zirait* lands of the *malik* was found to be not true by the Munsif. The learned Judge on appeal does not consider this question and it is conceded that they cannot be proved to be *zirait* in the strict sense of the term. In that event, the lands at most would be *bakasht* lands and to my mind a mortgagee in possession, with all *Zemindari* rights vested in him, has a right to settle such *bakasht* lands with tenants during the continuance of the mortgage and the persons with whom the settlement is made would in any event acquire a non-occupancy right.

It has next been contended by the learned Vakil for the respondent that the settlement of the land by the *pro forma* defendants amounted to an encumbrance and a mortgagee in possession has no right to create an encumbrance beyond the term of his mortgage and the mortgagor is entitled to take possession of the mortgaged property free from such encumbrance and reliance has been placed upon the decision of the learned Chief Justice and Jwala Prasad, J., in *M. A. No.* 90 *of* 1920—*Mahadeo Prasad Sahu* v. *Gajadhar Prasad Sahu* (4), That decision has no bearing on the facts of the present case. The decision in that case turned upon the construction of a compromise decree which clearly provided that the appellant in that case was entitled to take possession of certain properties free from encumbrance created by the respondent and their Lordships held that the settlement in that case amounted to an encumbrance. In the present case there is no reservation in the *kharna* deed such as was made in the compromise decree in that case, Mr. Tahir for the respondents further contends that the case made by the tenant defendants was that the lands in dispute formed their ancestral occupancy holding and that there was no allegation in the written statement that these defendants were in possession by virtue of a settlement from the *pro forma* defendants, and that the case made by them having filed, these defendants were not entitled to fall back upon a case of settlement from *pro forma* defendants not made by them in the written statement. It is true that no case of settlement was clearly made in the written statement, but, as I have already stated, they did make an allegation in paragraph 11 of the written statement that the *pro forma* defendants had a right to settle lands and an issue was distinctly raised on this point, and was considered by both the Courts below and it is too late now to say that no such case was made. It may be mentioned here that there is no finding in the judgments of either the Trial Court or of the Court of Appeal below that the settlement by the *pro forma* defendants was not a *bona fide* settlement. In fact, the point does not appear to have been pressed by the plaintiffs although an allegation to this effect was made in the plaint. In this view of the case the present action in ejectment treating the principal defendants as

(3) 52 Ind. Cas. 473

(4) 73 Ind. Cas. 359 ; P. L. R. 145.

trespassers cannot be maintained. I would, therefore, set aside the decree of the learned Judge and restore the decree of the Munsif. The appellants will be be entitled to the costs of this Court.

Z. K. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 281-B OF 1922.

November 30, 1923.

Present:—Mr. Kinkhede, A. J. C.

GANPAT SAMBAJI AND ANOTHER—APPELLANTS

versus

MAHADEO AND OTHERS RESPONDENTS.

Hindu Law—Guardianship—Mother, whether legal guardian of person and property of son.

Under Hindu Law, after the father the mother is the natural and legal guardian of her minor son's person and property, in a family where the minor is the sole owner of the property and there are no other undivided co-parceners entitled to a share therein. [p. 947, col. 2.]

Case-law discussed.

Appeal against the decision of the District Judge, East Berar, Amraoti, date the 28th February 1922.

Mr. *V. V. Chitale*, for the Appellants.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The following points are pressed for my consideration in this second appeal: (1) that the mortgagor defendant No. 1's mother Radha Bai was not his legal guardian and as she was a mere *de facto* guardian the mortgage was void and could not be ratified (grounds 1 and 3); (2) that the ratification, if any, after the transfer in favour of defendant No. 2, could not affect him or his successors in title the defendants Nos. 3 and 4 (ground No. 2); (3) that the transfer by way of mortgage was not justified by legal necessity, or by *bona fide* enquiry (grounds Nos. 4, 5 and 6).

Before proceeding to discuss these points, I should think a brief statement of a few relevant facts is necessary. One Babuji Patel of *mouza* Kharala died possessed of considerable property several years ago. Defendant No. 1 Bajirao is his son. He was then a minor. Radha Bai was his widow. Radha Bai, purporting to act as the guardian and manager of her minor son's estate, executed two mortgages (1) mortgage dated 3rd January 1896 Exhibit p-3, in favour of the predecessor in title of the present plaintiffs for a consideration of Rs. 600 in respect of fields Nos. 147, 159, 6 and 7 P and some other property of *mouza* Kharala; (2) mortgage dated 22nd April 1910, Exhibit D-5, in favour of defendant No. 2's husband's firm for Rs. 350 in respect of the said fields. Defendant No. 2's husband instituted suit No. 46 of 1913, Exhibit D-3, on the basis of his mortgage and obtained a preliminary decree for foreclosure in terms of the compromise on 12th Novemb r 1913, Exhibit D-3, and made it final on 15th September 1917, Exhibit D-2. Apparently mention of No. 137 in the decree is a mistake for No. 147. After this foreclosure, defendant No. 2 by a registered sale deed dated 9th March 1918, Dxhibit D-6, transferred the property foreclosed to defendants Nos. 3 and 4. After attaining majority, defendant No. 1 executed two bonds dated 2nd February 1914, Exhibit P-2, and 20th November 1917, Exhibit P-1, in favour of Krishnaji the predecessor in title of the present plaintiffs Nos. 1 to 4, wherein he has admitted liability under the mortgage deed in suit, Exhibit P-3. It is on this admission that the plea of ratification is based by the plaintiffs.

Defendant No. 1 pleaded that his mother Radha Bai was not his guardian at the date of the mortgage, Exhibit P-3; that, as a matter of fact, he lived in *mouza* Sherola with his cousin whereas his mother lived at Chandur. He also disputed the validity of the admission made by him in Exhibits P-1 and P-2 on the ground that unfair advantage was taken of his urgent need for the loan taken under the documents. Defendant No. 4 also contested the binding character of the mortgage on the ground that Radha Bai was not the guardian of the minor; that there was no legal necessity for the mortgage and, further, that the ratification, if any, by defendant No. 1 was not binding on him. Plaintiffs controverted the

GANPAT SAMBAJI v. MAHADEO

defendants Nos. 1 and 4's assertions and pleaded that Radha Bai was the proper guardian and could properly represent defendant No. 1, even if the latter lived with his cousin. The plaintiffs also justified the mortgage on the ground that it was a mortgage given by a *de facto* guardian and that the mortgagees acted after due and proper enquiry from the nearest relatives and were satisfied as to the existence of necessity for the loan. They also denied that the defendant No. 1 was forced to ratify the mortgage in suit.

The first Court found that the mortgagees advanced the loan to defendant No. 1 acting through his *de facto* guardian Radha Bai, after making due and proper enquiries, that it was open to defendant No. 1 to ratify the mortgage even after the passing of the preliminary decree dated 12th November 1923, Exhibit D-4, and that its effect was to validate the mortgage even if it be considered as made without legal necessity. In the result, the plaintiff got a preliminary decree for foreclosure against all the defendants.

Defendants Nos. 3 and 4 alone appealed to the District Judge, Amraoti, who upheld the findings of the lower Court. The defendants Nos. 3 and 4 have now come up in second appeal urging the points stated at the beginning of this judgment.

In view of the concurrent findings of fact on the questions of *bona fide* enquiry, existence of legal necessity, and ratification, which I consider are binding against me as the second Appellate Court, it is sufficient for me to say that the question of ratification is rendered immaterial as the mortgage is found to be one made by a *de facto* guardian for legal necessity. The finding as to *bona fide* enquiry and existence of legal necessity being based upon evidence proper for consideration by the lower Appellate Court is not liable to challenge. This disposes of points (2) and (3).

The only point which requires careful consideration is, whether Radha Bai was only a *de facto* guardian or a *de jure* guardian of her minor son Bajirao at the date of the mortgage and whether, in view of the ruling of this Court in *Husen* v. *Rajaram* (1), the alienation made by Radha Bai is void if her position is that of a mere *de facto* guardian, and whether, in view of the ruling in *Kolhu* v. *Belsingh* (2), she is not the natural or legal guardian of Bajirao. The decision of these questions has been rendered somewhat difficult by reason of the said two decisions of this Court. Reliance is placed by the appellants particularly on the passage at page 192 of *Kolhu* v. *Belsingh* (2) and it is contended that, in a case governed by Hindu Law, the mother becomes the guardian of the person of her infant child after the death of the father, but his property would still remain under the management of the *Karta* of the joint family of which he was a member.

With due respect to the view of my learned colleague who decided the case of *Kolhu* v. *Belsingh* (2), I am contrained to say that there is no support in Hindu Law for the proposition that a Hindu mother is not the legal guardian of the property of her minor son, after the father. On the contrary, there is overwhelming authority in support of the proposition that under Hindu Law after the father the mother is the natural and legal guardian of her minor son's person and property, in a family where, as in this case, a minor son is the sole owner of the property and there are no other undivided co-parceners entitled to a share therein.

The case of *Husen* v. *Rajaram* (1), was a case of an alienation by a step-mother and not by the mother of the minor, although the two widows of the minor's father lived together the elder widow, that is, the step-mother of the minor was managing the property and the family affairs. On the strength of the Privy Council ruling in *Mataдin* v. *Sheikh Ahmad Ali*, (3) which was a case of Mahomedan brothers alienating property in which their minor brother was interested along with them, and, therefore, inapplicable to a case under Hindu Law, as pointed out in a subsequent decision of this Court by Stanyon, A. J. C., in *Somwarpuri* v. *Gopalsingh* (4) it was held that the alienation was by the minor's guardian *de*

(1) 26 Ind. Cas. 818 ; 10 N. L. R. 133.

(2) 66 Ind. Cas. 303 ; 17 N. L. R. 183 ; (1922) A. I. R. (N.) 201.

(3) 13 Ind. Cas 976 ; 34 A. 213; 23 M. L. J. 6; 16 C. W. N. 388 ; 11 M. L. T. 145; (1912) M. W. N. 188; 9 A. L. J. 215 ; 15 C. L. J. 270 ; 14 Bom. L. R. 192 ; 15 O. C. 49 ; 39 I. A. 49 (P.C.).

(4) 49 Ind. Cas. 246.

facto and not *de jure*, and that it was not merely voidable but absolutely void, and that the minor need not sue to have it set aside before he could obtain possession of the property. In my opinion the ruling in *Husen* v. *Rajaram*, (1) is, therefore, no authority for the view that the mother is not the natural guardian of the minor or that the alienation made by her is void. On the contrary, that case gives strong indication that Hallifax, A. J. C., regarded the case of an alienation by a mother of a minor on a different footing from that of an alienation by a step-mother, as we find from the distinction made by him at page 136 of the report between that case and the two earlier cases of this Court, *Seetaram Sadasheo* v. *Nilu Patel* (5), and *Mt. Tanto* v. *Gajadhar* (6), which were cases of alienations made " by the mother of the minor who was his guardian *de jure* and also *de facto*. " Having thus distinguished the earlier cases on this important point he held that the alienation in question in the case before him was void on the ground that it was effected by a *de facto* or unauthorised guardian.

In the case of *Kolhu* v. *Belsingh* (2), the question was whether the alienation by one Warlu, the elder brother of the minor plaintiffs, during their minority was void on the ground that it was not an alienation by the mother who, according to the plaintiffs, was the natural guardian of their person and property. It was a case of Raja Gonds. It could not necessarily be accepted as settled law as regards Gonds that they were governed by Hindu Law. It has since been held by a Bench of this Court in *Vithoba* v. *Lal Singh* (7), that a Gond is not a Hindu and is not governed by the Hindu Law, so that the *onus* of proving that any particular Gond family or any large body of Gonds in which the party is included has accepted Hindu Law and is governed by it rests on the party alleging it . . . . . The question whether the mother was the natural guardian of the minor or whether his elder brother was his guardian for the purposes of alienating the property of the minor could not, therefore, be necessarily decided with reference to Hindu Law, in the case of Gonds unless it was proved that the particular Gond family was governed by Hindu Law.

(5) 1 C. P. L. R. 75.
(6) 1 N. L. R. 129.
(7) 76 Ind. Cas. 980 ; 19 N. L. R. 104 ; (1923) A. I. R. (N.) 317.

The following observations at page 191 of the report of the case are pertinent :—

> "It has been held by this Court in the case mentioned, which is Mt. *Ujiyara* v. *Tilochan Gond* (8), that a Gond is not a Hindu and the *onus* of proving that a Gond family has adopted the Hindu law and is governed by it rests on the party alleging it. The matter is by no means free from doubt and the question is raised in the petition of appeal here. It appears, however, that in the pleadings in the first Court it was admitted by both parties that, except in a few matters with which we are not now concerned, the plaintiffs are not governed by the Hindu Law, and the position now taken by the appellants was abandoned. The view, therefore, that in the absence of proof of any special custom the question of guardianship must in this case be decided according to justice, equity and good conscience is perfectly sound. Where the learned District Judge has erred is in the assumption that, 'according to justice and equity and according to all systems of jurisprudence', the mother is the natural guardian after the father, being led into the error by not having a very clear distinction in his mind between a guardian for the property and a guardian of the person. We are here concerned with a guardian for the property only, and in neither of the two main systems of personal law with which we have to deal most frequently in India does the mother of a minor become his guardian in respect of his property next after his father. In Hindu Law the mother becomes the guardian of the person of her infant child after the death of the father, but his property would still remain under the management of the *Karta* of the joint family of which he was a member if he were a Hindu."

The above quotation will show that the question whether under Hindu Law the natural mother of a minor was his lawful or legal guardian, and whether an alienation by her of property which belonged solely to a minor and not to a joint family consisting of the

(8) 44 Ind. Cas. 435.

minor and other undivided co-parceners, was void, or voidable, was neither involved in the case nor was any decision of that question necessary for the disposal thereof.

Treating that case as a case of a Gond family proved to be governed by Hindu Law (which, however, was not the case there), the view that a mother of a minor son does not, next after the father, become his guardian in respect of his property, *i. e.*, of property in which he alone is interested, is one which, with due respect for my colleague, I must say is not supported by Hindu Law.

Mr. Mayne in his valuable treatise on Hindu Law and Usage, 9th Edition, at page 283, states the summary of the Law on the point as follows :—

> "The Hindu Law vests the guardianship of the minor in the sovereign as *parens patrice*. Necessarily, this duty is delegated to the child's realtions. Of these the father, and next to him the mother, is his natural guardian, any other relative must derive his authority from the Courts.....Of course, in an undivided family governed by *Mitakshara Law*, the management of the whole property, including the minor's share, would be vested not in the mother, but in the eldest son. It would be otherwise where the family was dovided."

Trevelyan's Law relating to Minors, 5th Edition, page 49, contains the following statement of the law on the point : —

> "The Hindu Law does not seem to prescribe any positive rules with respect to the right of guardianship ; but by practice and custom the right of certain relations of a Hindu minor have now almost acquired the force of law. . . For instance, the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable."

At page 50 the followiyg statement appears :—

> "On the death of the father, or in his absence or in case of his having lost the right of guardianship, and in the absence of a valid appointment by him, the natural or adoptive mother, as the case may be, is entitled to the guardianship of her minor children . . . . If the minor is a member of a joint Hindu family, the *Karta* of the family would be entitled to the management of the joint property; but if the family be a divided one, the mother is, failing the father, entitled to custody of the minor's property; and even if the family were joint, she would apparently be so entitled, so far as the minor's separate property, if any, is concerned, where the whether is manager of her minor child's property, her position necessarily requires her to seek the advice of her husband's relations, and she would often strengthen her position by her so doing, but the law cannot compel her to seek, or to act under their advice, if she wishes to take the whole responsibility upon herself "

Similarly, Trevelyan on Hindu Law, 2nd Edition, at pages 214 and 215, we find the above statement of law re-produced practically *verbatim* and supported by citations from several authoritative decisions.

Dr. Gour in his Hindu Code, 2nd Edition, mentions " the mother," in section 59 at page 428, as " the natural guardian of the person and property of the minor " next to " the father."

In *Watson and Company* v. *Sham Lal Mitter* (9), their Lordships of the Privy Council accepted the position of the mother of a minor Hindu as that of a lawful and natural guardian of the minor and raised the presumption that in executing the *kabuliyats* in respect of the estate of her minor son under her management, she executed them as his natural guardian, that is, she acted in " her lawful capacity as guardian of her minor son " and not in her own capacity adversely to her son. There are numerous authorities quoted in several other works on Hindu Law by eminent authors where the position of the mother as the guardian and manager of her minor son's property has been affirmed in the clearest of terms. I may smiply quote the local case of *Vithu* v. *Devidas* (10) where the observations of Sadashiva Ayyar, J., in the case of *Thayammal* v. *Knpanna Koundan* (11), were quoted with

(9) 15 C. 8 at p. 16 (P. C.), 14 I. A. 178; 11 Ind. Jur. 395; 6 Sar. P. C. J. 66; 7 Ind. Dec. (N. S.) 591 (P. C.).

(10) 51 Ind. Cas 945; 15 N. L R. 55 at p. 57

(11) 26 Ind. Cas. 179; 38 M. 1125; 27 M. L J, 286.

approval by Mittra, A. J. C., in support of the position of a Hindu minor.

Under these circumstances, the contention urged by the appellants that the mortgage in suit was void on the ground that *Mt.* Radha Bai, the mother of the minor Bajirao, was only a *de facto* guardian and not *de jure* guardian cannot be upheld. The Courts below have also held that the mortgage was justified by legal necessity and was taken by the mortgagees after *bona fide* enquiry. The appellants can, therefore, succeed in no case. The appeal is, therefore, dismissed with costs. The costs in the Courts below will be paid as ordered.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEALS NOS. 85 OF 1921 AND 118 OF 1922.

December 14, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

IN A. S. NO. 15 OF 1921.

PERIA NATTAMAI MALKAJIGUNDA AND OTHERS—DEFENDANTS NOS. 1 TO 5 —APPELLANTS

versus

THIPPA RAMASWAMI CHETTIAR AND OTHERS—PLAINTIFFS AND—DEFENDANTS NOS. 6 AND 7—RESPONDENTS

IN A. S. NO. 118 OF 1922.

PERIA NATTAMAI MALKAJI GUMDA—(1ST DEFENDANT)—APPELLANT—

versus

THIPPA RAMASWAMI CHETTIAR AND OTHERS—(PLAINTIFFS AND DEFENDANTS NOS. 6 AND 7)—RESPONDENTS

Civil Procedure Code (*Act V of* 1908) *s.* 92, *suit under—Relief against alienee of trust property—Trustee* de son tort, *liability of.*

No relief can be granted against alienees of trust property in a suit under section 92 of the Civil Procedude Code.

Kalyana Venkataramana Aiyangar v. *Kasturi Ranga Iyengar*, 88 Ind. Cas. 73; 40 M. 212; 31 M. L. J. 777; 20 M. L. J. 490; 5 L. W. 625; (1917) M. W. N. 400; *Aasam Raghavalu Setty* v. *Pellati Sitamam*, 25 Ind. Cas 794; 27 M. L. J. 266; 16 M. L J. (1914) M. W. N.692 and *Rangayya Naidu* v. *Chinnaswamy Iyer*, 29 Ind. Cas. 898; 28 M. L. J. 326; 17 M.L.T. 191. followed.

But a suit under section 92 of the Civil Procedure Code will lie against a trustee *de son tort* who is a trustee *de facto* though not *de jure*.

Jugalkishore v. *Lakshmandas*, 23 Bom. 659; 1 Bom. L. R. 118; 82 Ind. Cas. (N, S.) 410; *Budree Das Mukin* v. *Chooni Lal Johurry*, 33 Cal. 789; 10 C. W. N. 581; *Ram Bilas* v. *Nstya Nand*, 69 Ind. Cas. 990; 44 A. 652; 21 A. L. J. 105; (1922) A. I. R. (A) 542 and *Siddhan Lal* v. *Gouri Shanker*, 40 I. C. 165, followed.

Appeal against the preliminary decree of the Court of the 2nd Additional Subordinate Judge of Tanjore, in O. S. No. 15 of 1919,)

and

Appeal against the final decree of the Court of the Additional Subordinate Judge of Tanjore, in O. S. No.33 of 1921 (same as O.S. No. 15-1919.)

Messrs. *T. R. Venkatarama Sastri*, *T. S. Ramaswami Aiyar*, and *K. S. Ramabadra Aiyar*, for the Appellants in A. S. No. 85 of 1921.

Messrs. *S. T. Srinivasagopalachariar*, *T. A. Ananta Aiyar*, and *V. Sundaram Aiyar*, for the Respondents in A. S. No. 85 of 1921.

Messrs. *T. R. Venkatarama Sastri*, *T. S. Ramaswami Aiyar*, and *S. Subramania Aiyar*, for the Appellant in A. S. No. 118 of 1922.

Messrs. *S. T. Srinivasagopalachariar*, *K. Rajah Aiyar*, *V. Sundaram Aiyar*, and *A. V. Viswanadha Sastri*, for the Respondents in A. S. No. 118 of 1922.

JUDGMENT.

Phillips, J:—The plaintiffs bring this suit under section 92 of the Code of Civil Procedure against Seven defendants and pray for the removal of the defendants from management, for the appointment of new trustees, for an an account from the defendants and for the settlement of a scheme. In the plaint it is stated that defendants Nos. 6 and 7 are the "present trustees" of the plaint temple and defendants Nos. 1 to 5 are the *Nattamaikars* who are entrusted with collecting money due to the temple; and, although defendants Nos. 1 to 5 are not specifically described in the plaint as trustees, it is clear from the language of the plaint that the

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allegation is that they have been in management of the trust and should be removed on account of their misappropriation of the temple funds.

When the case came on for trial, the plaintiffs and defendants Nos. 6 and 7 agreed upon a schedule which was approved of by the Court, but defendants Nos. 1 to 5 were *ex parte* at this hearing. A preliminary decree was, therefore, drawn up settling the scheme and ordering a Commissioner to examine the accounts in order to find out which of the defendants were liable to make good monies to the temple. In accordance with this decree, the Commissioner proceeded to examine the accounts and to take evidence and, as a result of his enquiry, he sent in a report to which objections were taken by the defendants. After hearing these objections, the learned Subordinate Judge has found that deefendants Nos. 6 and 7 have to make good a sum of Rs. 338; that the 1st defendant has to account for Rs. 2,774-8-2, and that the 7th defendant is also liable for another sum of Rs. 60.

Defendants Nos. 1 to 5 appeal against the preliminary decree in Appeal No 85 of 1921 and the 1st defendant alone appeals against the final decree in Appeal No. 118 of 1922. The first objection that is taken in appeal is, that this suit, under section 92 Civil Procedure Code, will not lie against the defendants Nos. 1 to 5 as they are not trustees but mere alienees of the trust property. It has been held that no relief can be granted against alienees of trust property in a suit under section 92, vide *Kasturi Venkataramana Aiyangar* v. *Kasturi Ranga Aiyengar* (1), *Asam Raghavalu Shetty* v. *Pellati Sitamma* (2) and *Rangayya Naidu* v. *Chinnasamy Iyer* (3) and if the 1st defendant, to whose case the argument is almost entirely addressed is a, mere alienee, it is clear that no relief can be granted against him in this suit. It is, however, contended for the plaintiffs that the 1st defendant is not a mere alienee but a trustee *de son tort* and it is well settled that a suit under section 92 will lie against such a person, for he is in effect a trustee *de facto*, though not *de jure*. I may refer to *Jugalkishore* v. *Lakshmandas* (4), *Budree Das Mukin* v. *Chooni Lal Johurry* (5), *Ram Bilas* v. *Nitya Nand* (6) and *Siddan Lal* v. *Gauri Shankar* (7).

It is argued that the Subordinate Judge, when directing an account to be taken, did not find that the 1st defendant was a tustee *de son tort* and that apparently is correct, for no finding is recorded and admittedly no evidence on the point was taken ; but the Commissioner was ordered to enquire as to which defendant was liable and although the Subordinate Judge seems to have taken it for granted that the 1st defendant would be liable, he did not definitely consider the point, probably because, defendants Nos. 1 to 5, being *ex parte*, the question was not argued before him. When evidence was taken by the Commissioner, two witnesses were examined on behalf of defendants Nos. 6 and 7 who were not at all cross-examined, and their evidence shows clearly that the 1st defendant was actually collecting money for the temple and was, in effect, managing all the affairs of the temple. There is no counter-evidence and, consequently, I think we must accept the statements of these witnesses and find that the 1st defendant was a trust *de son tort*.

A request is made that the case should be sent down for further enquiry; but, inasmuch as defendants Nos. 1 to 5 have been grossly negligent in conducting their defence, I do not think it is right that they should be given any further opportunity of prolonging this litigation on the chance that they may be able to establish their innocence. The lower Court has, in effect, found that the 1st defendant as a trustee is liable to refund large sums of money and, on the evidence before the Commissioner, this finding is obviously correct.

It is alleged that the plaintiffs and defendants Nos. 6 and 7 have colluded together in order to defraud the 1st defendant. No doubt, they did come to an agreement in the case and it is the witnesses examined on behalf of defendants Nos. 6 and 7 who prove the management by the 1st defendant and his receipt of the temple

(1) 88 Ind. Cas. 73 ; 40 M. 212 ; 31 M. L. J. 777 ; 20 M. L. T. 490 : 5 L. W. 625 ; (1917) M. W. N. 400
(2) 25 Ind. Cas. 794 ; 27 M. L. J. 266 ; 16 M. L. T. 178 ; (1914) M. W. N. 692.
(3) 28 Ind. Cas. 898 ; 28 M. L. J. 326 ; 17 M. L. T. 191.
(4) 23 B. 659 ; 1 Bom. L. R. 118 ; 12 Ind. Dec. (N. S.) 443.
(5) 33 C. 789; 10 C. W. N. 581.
(6) 69 Ind. Cas. 990 ; 44 A. 652 ; 21 A. L. J. 105 ; (1922) A. I. R. (A.) 542.
(7) 40 Ind. Cas. 165.

funds. It is possible that, in the absence of defendants Nos. 1 to 5, the plaintiffs and defendants Nos. 6 and 7 have made up their differences and have joined in imputing liability to the first defendant; but in the proceedings before the Commissioner the 1st defendant had ample opportunity to put forward his own case and not only was he *ex parte* when the preliminary decree was passed but he declined to adduce any evidence before the Commissioner and did not even cross-examine the witnesses that were examined. There is, therefore, no ground for delaying the proceedings by allowing any further enquiry to be held.

It is then urged that the Commissioner's account is altogether wrong and does not represent the true state of affairs. A similar objection was taken before the Subordinate Judge but, as he points out, the objections taken were hazy and the 1st defendant made silly allegations against the Commissioner. The 6th and 7th defendants raised objections which were in part allowed and now the 1st defendant again raises his objections which I think may well be described again as hazy. No real attempt has been made to show in what respect the accounts are wrong. Certain portions of the account have been placed before us, but from the data afforded by these papers it is impossible to say that the Commissioner is wrong. It is not suggested that he has deliberately misstated the accounts, and his account was accepted by the lower Court. I see no grounds now for holding that the Commissioner's report is not strictly accurate. In this view, the 1st defendant's appeal would have to be dismissed

The only point remaining for consideration is, whether defendants Nos. 6 and 7 should not be made jointly liable with the 1st defendant. This plea was not specifically taken in the memorandum of appeal by 1st defendant and it would perhaps be hard on defendants Nos. 6 and 7 to make them liable without giving them an opportunity of putting forward an answer. It is clear from the Commissioner's report that it was the 1st defendant alone who actually received the money which has been misappropriated and, therefore, he has rightly been made liable and his liability is certainly the preliminary liability. Nevertheless, defendants Nos. 6 and 7 are trustees and as such responsible for the proper administration of the trust property and are no doubt secondarily liable. I would, therefore, modify the decree by declaring that the 1st defendant is liable for the amount specified therein and that, failing recovery from him, defendants Nos. 6 and 7 will have to make good the deficiency.

No objections are taken in appeal to the scheme that has been framed and, consequently, subject to the above modification, both these appeals must be dismissed with costs of plaintiffs.

As regards the memorandum of objections, I am not prepared to interfere with the lower Court's discretion and, therefore, dismiss it.

Venkatasubba Rao, J.—It is conceded that the decree against the 1st defendant could be justified only on the footing that he was a trustee *de son tort*. The allegations in this respect in the plaint, such as they are, have been denied not only in the written statement of defendants Nos. 1 and 2 but also by the 6th and 7th defendants. Even should issue 9 "Whether defendants Nos. 1 to 5 are necessary parties to the suit" be deemed to cover this question, there has been no trial of that issue and no finding has been recorded. The truth is, that in the lower Court the case was not looked at from this point of view at all and the Commissioner was directed to take an account on the assumption that a suit under section 92 would lie against strangers. It was not within his province to adjudicate upon the liability of the 1st defendant a question that should have been tried by the Court before the Commissioner was appointed. Even when evidence was adduced before the Commissioner, it was directed to prove not that the 1st defendant was liable but to prove the measure of his liability and this circumstance is amply borne out by the fact that witnesses were examined only by defendants Nos. 6 and 7 who had previously denied that the 1st defendants was a trustee. My inclination is, therefore, to direct further inquiry, but as my learned brother takes a different view and as the nonchalant manner in which the 1st defendant conducted his case before the lower Court makes me very sceptical as to his ultimate success, whereas a further enquiry will certainly entail more expense, I do not desire to dissent from my learned brother's conclusion and I, therefore, agree in the order proposed by him.

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

NUR MAHOMED *v.* HASSOMAL

SIND JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPLICATIONS NOS. 76 AND 7 OF 1922.

November 2, 1922.

Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

NUR MAHOMED AND OTHERS—APPLICANTS

versus

HASSOMAL AND OTHERS—OPPONENTS.

Limitation Act (IX of 1908), ss. 5, 12—Application for leave to appeal to Privy Council—Time spent in obtaining copy of judgment, whether extended—"Sufficient cause," interpretation of—Time, when can be extended.

The time spent in obtaining a copy of the judgment can be extended in addition to the time for obtaining a copy of the decree only in cases where the decree is appealed from or sought to be reviewed. In an application for leave to appeal to the Privy Council, it is only the time requisite for obtaining a copy of the decree that can be excluded in computing the period of limitation. [p. 953, col. 2]

The words "sufficient cause" in section 5 of the Limitation Act must no doubt receive a liberal construction, but when once the time for appeal has passed, a valuable right is secured to a successful litigant of which he must not be deprived unless the Court is satisfied that justice requires that extension of time should be granted and it must further be shown that there has been no inaction or negligence on the part of the petitioner. [p. 954, col. 2]

Application for leave to appeal to the Privy Council from the judgments and decrees of the Court of the Judicial Commissioner of Sind in Second Appeal No. 39 of 1918 and Revision Application No. 135 of 1919.

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *Tolasing Khushalsing*, for the Respondent No. 1.

JUDGMENT.—This is an application for leave to appeal to the Privy Council. A preliminary objection has been taken to the application being time-barred.

Article 179, Indian Limitation Act of 1908, as amended by Act XXV of 1920, reduces the period of limitation from six months to ninety days to be computed from the date of the decree appealed from.

The decree is dated the 26th January 1922, the application for leave to appeal to the Privy Council was made on the 13th May 1922, that is to say, 107 days after the date of the decree. *Prima facie*, therefore, the application is time barred unless the applicant satisfies the Court that, in computing the period of limitation, he is entitled to the exclusion of any time.

Mr. Elphinston who represents the applicant urges that the period occupied in granting him a copy of the judgment against which he seeks leave to appeal should be excluded under section 12, Indian Limitation Act. His argument is that the application for leave to appeal to the Privy Council would not be validly presented unless it were accompanied by a copy of the judgment and decree appealed against and that both the Rules of this Court as well as its practice require that a copy of the judgment should be attached to the application for leave to appeal. He also argues that a copy of the judgment is indispensable to enable the Court to which the application is presented to determine whether it should be granted or refused.

Clause (2) to section (12) Indian Limitation Act is as follows: "In computing the period of limitation prescribed for an appeal, for leave to appeal and an application for review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

Clause (3) of the same section reads: "Where a decree is appealed from or sought to be reviewed the time requisite for obtaining a copy of the judgment on which it is founded shall *also* be excluded."

The words used in both these clauses are perfectly plain and unambiguous, and the user of the word "also" in clause (3) clearly manifests the intention of the Legislature that the time requisite for obtaining a copy of the judgment can be excluded in addition to the time for obtaining a copy of the decree, only in cases where a decree is appealed from or sought to be reviewed. Therefore, in an application for leave to appeal the Law permits exclusion only of the time occupied in obtaining a copy of the decree. Whatever be the

intention of the Legislature in establishing the distinction, there is no doubt that the distinction exists and it is not open to us to circumvent it or nullify the effect of the section. The applicability of section 12 of the Limitation Act to the present case is not questioned and hence, in terms of the section, it is only the time requisite for obtaining a copy of the decree that can be excluded in computing the period of limitation.

Nor do the rules of this Court insist upon a copy of the judment being annexed to the petition for leave to appeal to the Privy Council. Rule 7 of the rules of the Court, at p. 147, refers to Civil miscellaneous appeals and applications which require copies of the judgment to be attached, but an application for leave to appeal to the Privy Council is not to be classified as a civil miscellaneous application. Equally, rule 1 under the heading of Privy Council appeals, at p. 157, to which reference was made in argument, merely states that every petition under section 598, Civil Procedure Code shall be in the form prescribed by the Code for appeals, and this, obviously, refers to its being in the form of a memorandum signed by the appellant or his pleader and presented to the Court or such officer as it appoints in this behalf.

I may further observe from inquiries made from the Registrar of this Court that, though it is usual to attach a copy of the judgment appealed from in an application for leave to appeal to the Privy Council, yet it has never been insisted upon to secure a due presentation of the application and the application would be deemed proper if only a copy of the decree accompanied it. Hence, neither the rules of this Court nor the practice require that a copy of the judgment is an essential adjunct to a petition for leave to appeal to the Privy Council.

Mr. Elphinston strongly relied on *Mahabir Prasad Tewari* v. *Jomina Singh* (1), where it was held that, in computing the period of limitation prescribed by Art. 179 of the Limitation Act for an application for leave to appeal to His Majesty in Council, the time spent in obtaining a copy of the judgment sought to be appealed from should be excluded under section 12 (3). It was observed in the judgment in this case that, "under the practice in this Court it is necessary that a copy of the judgment from which it is sought to appeal should always be filed with the petition applying for leave. The Court insists upon that because in some cases it is absolutely necessary that the judgment itself should be considered, notably in cases where the question is whether a substantial question of law arises for consideration." Inasmuch as the practice of the Patna Court has been to insist on a copy of the judgment being attached to the petition it is but a logical deduction to exclude the time occupied in obtaining it but, as I have observed, it is not the practice of our Court to insist upon a copy of the judgment, and, consequently, the principle on which the Patna High Court proceeded, (whether the practice is in conformity with the Law or not, I venture no opinion), cannot find place in our Court.

It appears to me that we must interpret the law as it stands, particularly as it is free from all ambiguity and when the Legislature clearly declares that only a copy of the decree is essential in a petition for leave to appeal consequently the time occupied in obtaining a copy of the judgment cannot be excluded. Mr. Elphinston pressed us to apply the provisions of section 5 of the Limitation Act in his favour. His main argument for invoking the aid of this section was that some of the applicants were minors and the Court, therefore, ought to treat them in a generous spirit. Section 5, no doubt, vests the Court with a discretion which, however, must be judicially exercised. It is true that the words "sufficient cause" in the section must receive a liberal construction, but, at the same time, it must not be overlooked that when once the time for appeal has passed, a valuable right is secured to the successful litigant, of which he must not be deprived unless the Court is satisfied that justice requires that an extension of time should be granted. But, further, to attract the applicability of section 5 it must be shown that there has been no inaction or negligence on the part of the petitioner. The judgment, as I have observed, was delivered on the 26th January 1922 and the applicant had time till the 25th April 1922 to file his application. Assuming the correctness of his statement that

(1) 66 Ind. Cas. 88 ; 1 Pat. 429 ; 3 P. L. T. 289 ; (1922) Pat. 198 ; 4 U. P. L. R. (Pat.) 33 ; (1922) A. I. R. (Pat.) 255.

though he applied for a copy of the judgment on the 28th January 1922 it was ready for delivery only on the 20th February 1922. The petitioner had full two months to file his application. It was urged that, as the estate of Gulam Mahomed was under the management of the Court of Wards, it was necessary to send the copy of the judgment to the Manager and it was not returned till a short time before the application was filed. This is certainly not an adequate reason for condoning the delay. The mother of the minors was their guardian *ad litem* and she was assisted in this litigation by the brother of her deceased husband who lived in the same house. Both in the District Court of Hyderabad and in this Court they had the advice of competent legal advisers. It did not require a period of two months either for the Manager of the Court of Wards or for the widow of Gulam Mahomed, who herself was also personally interested in the litigation, to make up their minds whether they should apply for leave to appeal to the Privy Council. To apply the provisions of section 5 of the limitation under these circumstances would be an injudicious exercise of our discretion.

We, therefore, hold that the application for leave to appeal to His Majesty in Council is time barred and we reject it with cost.

S. D. *Application rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 708 OF 1922.

October 31, 1923.

Present :—Mr. Justice Sulaiman.

KESRI SINGH—PLAINTIFF—APPELLANT
versus
CHANNO—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment, suit for—Tenancy, proof of—Mortgage-deed, unregistered, whether can be relied upon to show nature of possession—Registration Act (XVI of 1908) ss. 17, 49.

Where, in a suit for ejectment, the plaintiff comes into Court on the allegation that the defendant is a tenant, it is open to the latter to rely on an unregistered deed of mortgage which was followed by delivery of possession, in order to show the nature of his possession and to satisfy the Court that he is not holding the land as a tenant.

Kurri Veerareddi v. *Kurri Bapireddi*, 29 Mad 336 ; *Thakore Fatesingji* v. *Bomanji A. Dalal*, 27 Bom. 515, relied on.

Second appeal against the decree of the Additional District Judge of Cawnpore, dated the 7th February 1922.

Mr. *M. S. Bajpai*, for the Appellant.

Mr. *S. P. Sinha*, for Mr. *Beni Bahadur*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for ejectment in the Revenue Court. The defendant pleaded that the relation of landlord and tenant did not exist between the parties. He in fact set up his rights as a mortgagee from the proprietor Ganesh, who is now dead, and one of whose sons is in Jail and the other absconding. He in support of his contention produced an unregistered deed dated the 22nd of April 1909.

The Court of first instance found that the relation of landlord and tenant did not exist between the parties. It also remarked that in this village the *lambardar* was not the sole person who made collections, but that all the co-sharers made collections in respect of their separate shares. The first Court, therefore, was further of opinion that the suit by the *lambardar* alone for ejectment was not maintainable.

On appeal the lower Appellate Court has upheld the findings of the first Court and dismissed the suit. The judgment is not as clear as it might have been but I take it that the lower Appellate Court was opinion that the relation of landlord and tenant did not subsist between the parties.

It is true that the mortgage-deed in question, not being a registered document, is invalid as a mortgage-deed and cannot affect the property purporting to have been transferred under it. At the same time, this was executed in 1909 and delivery of possession followed. When the plaintiff came to Court on the alligation that the defendant was a tenant, I think it was open to the defendant to produce this document in order to show the nature of his possession and to satisfy the Court that he was not holding the land as a tenant. This is the view which was accepted in the Full

NILKANTH *v.* KESHEORAO

Bench case of the Madras High Court reported in *Kurri Veeravreddi* v. *Kurri Bapireddi* (1) and by the Bombay High Court in the case of *Thakore Fatesingji* v. *Bomanji A. Dalal* (2). It is also clear that if a suit had been brought in the Civil Court for the ejectment of the defendant as a trespasser he would have been allowed to show that he had been put in possession on payment of a certain mortgage-money and might have asked the Court to give him some relief in equity. Similarly, there may, be a case where a co-owner has transferred his share under an unregistered sale-deed to his other co-owners and put them in possession. Even though the other co-owners cannot set up this unregistered deed as passing title, I think it is open to them to show by means of that deed that since that date they have been holding possession adversely to the original owner and not as mere co-owners. In this view of the matter, I am of opinion that it was open to the defendant to show that his possession was not that of a tenant, and that, whatever else his possession may be, the relation of landlord and tenant does not exist between the parties. This I take to be the finding of both the Courts below. On that finding the suit for ejectment in the Revenue Court was liable to be dismissed.

It is to be noted that the present plaintiff, though a *lambardar*, is in no sense the legal representative of Ganesh or his sons. A suit by him either for redemption of the supposed mortgage or for the ejectment of the defendant as a trespasser would not have been maintainable in the Civil Court. It is, therefore, not open to him to turn round and treat the defendant as a tenant, when on the facts found by the Courts below the defendant has not been holding this land as a tenant at all.

I am, therefore, unable to interfere with the decree passed by the lower Appellate Court and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395. (F.B.).
(2) 27 B. 515; 5 Bom. L. R. 274.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 265-B OF 1921.

November 29, 1923.

Present:—Mr. Krinkhede, A. J. C.

NILKANTH—APPELLANT

versus

KESHEORAO AND OTHERS—RESPONDENTS.

Stamp Act II of 1899) *ss.* 26, 35, *Sch. I, Arts.* 5 (*c*), 57 (*b*)—*Agreement of service and security-bond without limit, duty payable on—Deficiency—Procedure -Penalty, whether can be recovered.*

Where no limit is defined in a security-bond or the limit is exceeded, the instrument falls under clause (*b*) of Article 57 of Schedule I to the Stamp Act and a fixed duty is payable thereon. Section 26 of the Stamp Act, which must be read subject to section 35 of the Act, has no application to such an instrument.

Mulji Bechar v. *Jetha Jeshankar*, 10 Bom. 239; 5 Ind. Dec. (N. S.) 517; *Kondapi Seshayya* v. *Grouchi Venkata Subbayya Chetty*, 30 Ind. Cas. 448; 31 M. L. J. 234, relied on.

A combination of an agreement of service and a security-bond in which no limit is defined falls under Articles 5 (*c*) and 57 (*b*) of Schedule I to the Stamp Act, and if the stamp paid on such an instrument is not sufficient the deficiency can be made up under section 35 of the Act. Section 26 of the Act has no application to such an instrument.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated the 30th April 1912.

Messrs. *D. R. Dixit* and *R. B. D. N. Khare*, for the Appellant.

Mr. *M. R. Indurkar*, for the Respondents.

JUDGMENT.—The defendant No. 1. Motisao who is not a party to this appeal was in the service of the respondent as a *warkari*. The defendant No. 2, who is appellant before me, was a surety for him. Both of them have executed what is known as "*Nokarnama*" dated 20th November 1910, Exhibit P. 1. The aforesaid Motisao misappropriated large sums of money amounting to Rs. 1,399-2-0 belonging to the plaintiffs firm. The defendant No. 2 contested his liability on several grounds, one of them being that the secu-

rity-bond was not admissible in evidence for want of proper stamp-duty. The plaintiffs admit that the defendant No. 2 agreed to stand surety for an unlimited amount, and submit that if the stamp-duty of Rs. 3 was insufficient the deficiency may be recovered from them and the document validated. The following issue is material to the points raised in this second appeal:—

"Whether the agreement "*Nokarnama*" and security bond is not properly stamped?"

The finding on this issue is that the document which was engrossed on a stamp worth Rs. 3 was executed under the impression that the funds in the hands of Motisao would never exceed the amount covered by the stamp, and had it been intended to cover an unlimited liability it would have been scribed on a five rupees stamp. That since the plaintiffs claim an unlimited liability thereunder, the finding of the Court was that it was not duly stamped. The plaintiffs' suit as against defendant No. 2 was, therefore, dismissed and a decree for Rs. 1,269 was passed against defendant No. 1. Plaintiffs' appeal against this decision was successful and defendant No. 2 was also made liable along with defendant No. 1 for Rs. 1,269 and proportionate costs. The only point, therefore, pressed before me is whether under this "*Nokarnama*" and "security-bond" the plaintiffs can recover anything more than what is covered by the stamp-duty paid on the document. It is argued that, whereas the instrument does not mention the limit of the pecuniary liability, nothing more than what is covered by the stamp paid on it can be legally recoverable thereunder. The rulings reported in *Mc Dowell* v. *Ragava Chetty* (1), *Collector of Tanjore* v. *Ramasamier* (2), and *In the Matter of Gajraj Singh* (3), have been brought to my notice. It is urged that the cases in *Mc Dowell* v. *Ragava Chetty* (1), and *In the Matter of Gajraj Singh* (3), are distinguishable as the documents therein involved did contain a statement of the consideration and of all other facts affecting the chargeability of the instrument with duty as required by section 27 of the Stamp Act to enable the Court to determine or define the extent of the liability of the executant thereunder and determine the stamp-duty payable. On the strength of the ruling *Collector of Tanjore* v. *Ramasamier* (2), it is contended that the liability being unlimited the document Exhibit P-1 does not entitle plaintiffs to recover more than Rs. 600 if it be treated as a bond under Article 15 of the Stamp Act. On the other hand, it is contended by the plaintiffs-respondents that the present case does not fall within the scope of section 26, Indian Stamp Act, because the instrument is not chargeable with *ad valorem* stamp-duty.

It is next contended on behalf of the plaintiffs that this document is a combination of an agreement of service and also of a security-bond within the meaning of Articles 5, clause (*c*), and 57, clause (*b*), of the Indian Stamp Act. The total stamp-duty payable in respect of the instrument was, therefore, 8 annas *plus* Rs. 5 but, as a matter of fact, the document was written upon a stamp-paper worth Rs. 3 and that it may be admitted in evidence on payment of duty and penalty. It is pointed out that section 26 of the Indian Stamp Act is subject to section 35 of the Indian Stamp Act. This is clearly established by the rulings in *Mulji Bechar* v. *Jetha Jeshankar* (4), and *Kondapi Sashayya* v. *Grandhi Venkata Subbayya Chetty* (5). I am not prepared to hold that in this case the "*Nokarnama*" and "security-bond" taken together can be said to be wholly an instrument in respect of which *ad valorem* duty is payable. It is outside the scope of section 26 of the Stamp Act. There are several documents in respect of which fixed duty is prescribed and others where *ad valorem* duty is payable only up to a certain extent. Where, therefore, the limit is not defined or is exceeded, the instrument falls under the clause "in any other case" and fixed duty is payable thereon. Under these circumstances, I think the document in question is one which falls under Articles Nos. 5, clause (*c*), and 57, clause (*b*), of the Schedule and that the stamp-duty payable was 0-8-0 + Rs. 5 = Rs. 5-8. There is a deficiency of Rs. 2-8-0. This, together with the penalty Rs. 25 should be recovered from the respondents.

(1) 27 M. 71.
(2) 3 M. 242; 1 Ind. Dec. (N.S.) 793 (F.B.)
(3) 9 A. 585; A. W. N. (1887) 150; 5 Ind. Dec (N.S.) 827 (F. B.)
(4) 10 B. 239; 5 Ind. Dec. (N. S.) 547.
(5) 39 Ind. Cas, 448; 31 M. L. J. 234.

SATISH CHANDRA BHATTACHARJEE *v.* SRI JOGUNNESSA BIBI

As the document has already been admitted into evidence, acting under section 61 of Indian Stamp Act, I direct the recovery of the amount of deficient stamp-duty, and penalty from the respondents. Until payment of stamp-duty and penalty the decree passed in the case shall not be confirmed in this Court. The respondents are called upon to furnish the necessary stamp-duty and penalty and then a decree dismissing the appeal and confirming the decree of the lower Appellate Court shall issue and the appeal will stand dismissed with costs. If the plaintiffs-respondents fail to make good the deficiency and the penalty by the 30th of this month, the appeal will be allowed and the decree will be modified by deleting the name of defendant No. 2 from the same and in that event the respondents will pay the defendant No. 2's costs of this appeal and of the lower Courts.

Z. K.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 42 OF 1923 IN CONNECTION WITH CIVIL RULE NO. 832 OF 1922.

February 12, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice M. N. Mukerjee.

SATISH CHANDRA BHATTACHARJEE—PETITIONER

versus

SRI JOGUNNESSA BIBI AND OTHERS—OPPOSITE—PARTIES.

Civil Procedure Code (Act V of 1908), s. 115 (c), O. XXII, rr. 3, 9 (2)—Abatement—Substitution made after time without objection—Opportunity, if to be given to set aside abatement—Section 115 (c), "Acting illegally," meaning of.

Where, during the pending of an application under O. XXI, r. 90, Civil Procedure Code, the applicant having died, and his heirs were not substituted till after the expiry of time allowed by law without any objection from the opposite party and or on appeal the District Judge held that the substitution was incompetent by reason of abatement having taken place under O. XXII, r. 3, Civil Procedure Code, which abatement was not set aside in accordance with O. XXII, r. 9 (2), Civil Procedure Code :

Held, that the order of the District Judge was right in law but that, by reason of the application for substitution having been readily allowed and no objection having been taken at any stage of the proceeding, the order of the District Judge unjustly deprived the petitioner of an opportunity to make an application under O. XXII, r 9 (2) and had left him altogether without any remedy [p 959, col. 1].

The expression "acting illegally" in section 115 (*c*) does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. This part of the clause was advisedly left open in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of injustice resulting from it [p. 959, col. 2].

Rule against the order of the District Judge of Tipperah in Miscellaneous Appeal No. 86 of 1922 against the decision of the Munsif, 6th Court, Comilla in Miscellaneous Suit No. 353 of 1920.

Mr. *Mahomed Nurul Huq Chowdhury*, for the Petitioner.

Babu *Nagendra Chandra Chowdhury*, for the Opposite Party.

Mukerji, J.—The facts which have given rise to the present application are these.

One Umedali applied under O. XXI, r. 90, Civil Procedure Code, in the Court of the 6th Munsif at Comilla for setting aside a sale, and during the pendency of the said proceedings died on the 18th July 1920. On the 24th July 1920 the death was reported to the Court, and the learned Munsif made a note of it in the order-sheet. Thereafter, on five different dates, the proceedings were adjourned on the ground that the heirs had not been made parties and six months had not yet elapsed from the date of death. On the 5th February 1921, one of the dates to which the case was adjourned, an application for substitution was made on behalf of the heirs and legal representatives of Umedali and the same was allowed. It does not appear whether the opposite party were present on that date or not, but on none of the dates to which the case was subsequently adjourned, was any objection taken to the order for substitution that had been made, and the proceedings went on with the result that the learned Munsif

set aside the sale by an order passed on the 18th February 1922. The opposite party preferred an appeal to the District Judge of Tipperah and the learned District Judge set aside the Munsif's order and dismissed the application for setting aside the sale, on the ground that the application had, as a matter of fact, abated by reason of the death of Umedali and the application for substitution was incompetent and the substitution had been wrongly allowed. The petitioners have thereupon moved this Court and obtained the present rule to show cause why the order of the District Judge should not be set aside and that of the Munsif restored or why such other or further orders should not be passed as to this Court may seem fit.

We have heard the parties and considered the facts and circumstances of the case in so far as they bear upon the present Rule. The learned District Judge was undoubtedly Right in his view of the law that the proceedings had automatically abated on the 18th January 1921 under O. XXII, r. 3, Civil Procedure Code, and no application for substitution could be entertained after that date, the petitioners by presenting a proper application under O. XXII, r. 9(2), Civil Procedure Code, and only by showing sufficient cause could obtain an order setting aside the abatement. We think, however, that by reason of the application for substitution being readily allowed by the learned Munsif and no objection having been taken by the opposite party at any stage of the protracted proceedings that followed in his Court, the petitioner were deprived of an opportunity to make an application under O. XXII, r. 9(2), Civil Procedure Code, and they were misled by the course of the proceedings that were adopted. The order passed by the learned District Judge reversing the decision of the learned Munsif and dismissing the application for setting aside the sale has also not given the petitioners any such chance, and, as matters stand, they were altogether without any remedy.

It has been pressed on us on behalf of the opposite party that our powers of interference under section 115, Civil Procedure Code, are very limited In my opinion the case does not fall within clause (*a*) or (*b*) but under the first part of clause (*c*) of that section, "Acting illegally in that clause does not merely imply the committing of an error of procedure such as " acting with material irregularity " does. In my opinion this part of the clause was advisedly left in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. In the present case, in my opinion, injustice has been done to the petitioners.

The question then is, what should be our order. Having regard to the fact that the petitioners are all minors with the exception of one who is their guardian and who is said to be a *purda nashin* Muhammadan lady and who, as far as can be made out, is also illiterate an application on their behalf under O. XXII, r. 9(2), Civil Procedure Code, stands a good chance of succeeding. I would, therefore, treat the order for substitution as being one setting aside the abatement, and would set aside the order of the learned District Judge and remit the appeal to him to be dealt with on the merits. No, order is made as to the costs of this Rule.

Walmsley, J.—I agree.

S. D. *Appeal remitted.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1623 of 1923.

January 7, 1924.

Present :—Mr. Justice Moti Sagar.

Nawab GHULAM QUTAB-UD-DIN KHAN—DEFENDANT—APPELLANT

versus

Mian FAIZ BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872) s 213—Principal and agent— Principal, whether bound to keep account—Accounts, suit for, when maintainable.

BHUWAN LAL *v.* MANHORI

Under s. 213 of the Contract Act an agent is under statutory obligation to render accounts to his principal but the principal is under no counter-statutory obligation of the same nature towards the agent. Where no duty is cast upon the defendant under the law to keep an account, the plaintiff cannot demand an account from him merely on the ground that the defendant has, as a matter of fact, kept an account.

The right to claim a statement of account is an unusual form of relief only granted in certain specific cases and can only be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights.

Jowahir Singh v. *Haria Mal*, 60 P. R. 1899, followed.

Mr. *Sagar Chand*, for Mr. *Zafarullah Khan*, for the Appellant.

Mr. *Oertel*, for the Respondents.

Second Appeal from the decree of the District Judge, Ferozepore, dated the 16th May 1923, affirming that of the Subordinate Judge, Ferozepore, dated the 9th April 1923, passing a preliminary decree for rendition of accounts.

JUDGMENT.—This second appeal arises out of a suit for an adjustment of accounts brought by the plaintiffs, the sons of a certain contractor, who, it is alleged, did some building work for the defendant. A preliminary decree for rendition of accounts was passed by the Trial Court and the judgment was upheld on appeal by the learned District Judge on the 16th of May 1923. The defendant has now come up in second appeal to this Court.

The case, in my opinion, is clearly governed by *Jowahar Singh* v. *Haria Mal* (1), where it was laid down that "the right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights."

In the present case it is clear that there was no duty cast upon the defendant under the law to keep an account, and that the proper relief to claim for the plaintiffs was to have brought a suit for a specific sum and to have asked the defendant to produce his account-books as evidence in support of their (the plaintiffs') case. Under section 213 of the Contract Act an agent is under a statutory obligation to render accounts to his principal, but the principal is under no counter-statutory obligation of the same nature towards the agent.

It is urged by the respondent's Counsel that though, ordinarily, the principal is not bound to render accounts to his agent, yet in the present case there was a specific agreement to the effect that the defendant would keep accounts. There is, however, no evidence on the record in support of this special agreement and I must, therefore, hold that there is no force in this argument. The mere fact that the defendant did keep an account does not entitle the plaintiffs to the relief claimed. In my opinion, on the evidence produced, it has not been established that the defendant was under any obligation to keep an account for the plaintiffs' benefit and I must, therefore, accept the appeal and dismiss the plaintiffs' suit. Under the special circumstances of the case, I order that the parties should bear their own costs throughout.

Z. K. *Appeal accepted.*

(1) 60 P. R. 1899.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 278 of 1922

February 29, 1924.

Present:—Mr. Kinkhede, A. J. C.

BHUWAN LAL AND ANOTHER—APPELLANTS
versus
MANHORI—AND OTHERS—RESPONDENTS.

Limitation Act (Act IX of 1908) s. 3—Second Appeal - Question of Limitation, when can be raised.

When a question of limitation is not a question purely of law but one of mixed fact and law the Second Appellate Court cannot go into it of its own accord under section 3 of the Limitation Act and dismiss the suit as barred although limitation was not set up as a defence.

BHUWAN LAL *v.* MANHORIA

Appeal against the decree of District Judge, Chhindwara, dated the 22nd February 1922.

Mr. *A. V. Wazalwar*, for the Appellants.

Messrs. *M. Guptu* and *A. C. Roy*, for the Respondents.

JUDGMENT.—This appeal has been argued at great length on both sides. After carefully considering the arguments addressed and perusing the records, I am of opinion that the decision arrived at by the lower Appellate Court on the important question of Sumaranlal's alleged exclusion from the joint family for more than 12 years prior to the date of the present suit is correct. If, in spite of the repeated demands of Sumaranlal and his mother, commencing from the date of the Exhibit 4 D-3, dated 20th August 1890 and ending with Exhibit 4 D-8, dated 4th December 1906 which was after Sumaranlal became a major, and which are relied upon as proving Sumaranlal's exclusion to his knowledge from joint family by his father during his own lifetime, and after his death, by his brothers the present appellants, there was mutation of names in favour of Sumaranlal after the father's death, I cannot understand how the appellants can successfully contend that Sumaranlal was excluded from enjoyment of his status as a joint co-parcener. Exhibit 2 D-2 is another piece of evidence which clearly imports an admission on the part of Bhuwanlal in the year 1913 of the subsisting title of Sumaranlal to the joint family property. He, no doubt, asserted in that Exhibit a right to the share of Sumaranlal on the ground that by partition or an arrangement effected between them the share of Sumaranlal had become his. The title, if it had prevailed, would have negatived the right of Sumaranlal to the property and would have precluded the attaching creditor from selling Sumaranlal's interest in execution of his decree and there would have been no occasion for anybody to purchase it. But the objection which Bhuwanlal preferred on the basis of this title or arrangement was disallowed, and the property was ordered to be put to auction and actually sold and it was Bhuwanlal who became the auction-purchaser. But the sale was not confirmed in favour of Bhuwanlal. This piece of conduct on the part of Bhuwanlal of arranging to acquire by partition, or by auction Sumaranlal's interest, clearly shows that he regarded Sumaranlal to have a subsisting interest in the property in 1913. Sumaranlal paid up the decretal amount and Bhuwanlal got back the purchase-money.

The plaintiff became a purchaser of Sumaranlal's interest long after these incidents took place. The lower Courts have disbelieved the evidence tending to show that Sumaranlal's demands were refused. Under these circumstances, the finding of the lower Appellate Court that the appellants failed to prove that they had been in adverse possession of the property in suit for more than 12 years prior to the institution of the suit, is supportable by evidence proper for consideration and is not liable to attack in second appeal.

A minor question about the present suit being barred by limitation when instituted in the Court of the Senior Subordinate Judge had been noticed by me, but on going through the record carefully I find that the suit was originally filed on 25th July 1919 in Munsif's Court, but the plaint was returned for presentation to the proper Court on 22nd April 1920. It was re-presented either on the 23rd or 27th of April 1920 to the Court of Senior Subordinate Judge. Whether on the 23rd after presentation it remained with plaintiff until 27th April 1920 is not very clear and as it was doubtful whether the correction which I find in the plaint was made before 23rd or after it, I think that the question of limitation is not a question purely of law but one of mixed fact and law, and I cannot, therefore, go into this question of my own accord under section 3 of the Limitation Act, which entitles a Court to dismiss a suit as barred although limitation was not set up as a defence.

The appeal fails and is dismissed with costs. Costs in the Courts below will be paid as already ordered.

G. R. D. *Appeal dismissed.*

KAMAL KRISHNA KUNDU CHOWDHURY *v.* CHATOORBHUJ DASSA

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 73 OF 1921.

January 28 and February 21, 1924.

Present :—Justice Sir Nalini Ranjan Chatterjee, Kt., and Mr. Justice Cuming.

KAMAL KRISHNA KUNDU CHOWDHURY—APPELLANT

versus

CHATOORBHUJ DASSA AND OTHERS—RESPONDENTS.

Specific Performance, suit for—Contract of sale, subject to approval of Solicitors, if valid—Purchaser, if can pray for enquiry into vendors' title—Bankruptcy of plaintiff, effect of—Mutuality of contract, doctrine of, when applicable.

An agreement for sale subject to the approval of the Solicitors is a perfectly valid and enforceable agreement. [p. 961, col. 1.]

It is open to the purchaser to claim an enquiry into the title of the vendor of the property, but he must accept the title as it is, if he chooses to purchase the property. [p. 961, col. 1.]

If time be made the essence of the contract, that may be waived by the conduct of the purchaser ; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase then time is no longer of the essence of the contract. [p. 961, col. 2.]

Webb v. *Hughes*, (1870) 10 Eq. 281 ; 39 L. J. Ch. 606 ; relied upon.

But a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time. [p. 961, col. 2.]

Barclay v. *Messenger*, (1874) 43 L.J. Ch. 449 at p. 456; 30 L. T. 251 ; 22 W. R. 522, and *Haji Fakir Mahomed* v. *Shaik Abdulla*, 12 B. 615; 6 Ind. Dec. (N. S.) 922, relied upon.

If a plaintiff (purchaser) in a suit for specific performance becomes a bankrupt before the institution of the suit, he cannot have the contract enforced specifically. But it is otherwise if he becomes bankrupt after his suit has been decreed and the purchase money is deposited by him. [p. 965, col. 1.]

There is no authority for holding that the principle of mutuality applicable to suits for specific performance of contracts before the institution of a suit, applies to the parties after the suit has been decreed and the *money has been deposited by the purchaser* before he becomes a bankrupt. [p 965, col. 2.]

Babu *Rupendra Kumar Mitter*, for the Appellant.

Babus *Mahendra Nath Roy* and *Tarakeswar Pal Chowdhury*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract for sale of agarden called the "Kundu" grarden at Howrah. An agreement was entered into on the 10th June 1919 between the plaintiff (the vendee), now represented by the Official Assignee, and the defendant and the the terms of the contract are embodied in the receipt executed by the defendant (the vendor) which runs thus : " Received from Babu Chaturbhuj Dosa the sum of Rs. 2,001 " (rupees two thousand and one) only as earnest-money and in part payment of purchase-money in respect of my 22 *bighas* of land including land covered by water more or less at Salkea on Grand Trunk Road known as " Kundu Bagan " which I have agreed to sell and he has agreed to purchase free from all incumbrances but subject to approval of title by his Solicitors Messrs. Khaitan & Co. at the rate of Rs. 150 (one hundred and fifty) per *cottah*. I have agreed that all necessary parties will join in the conveyance and that the sale will be completed within one month from the date of delivery of title deeds. Time being of the essence of the contract."

The title-deeds were sent to the purchaser's Solicitors, on the 12th June 1919. Messrs. Chatterjee & Co., were the vendor's Solicitors and Messrs. Khaitan & Co. were the Solicitors of the vendee and for shortness' sake we shall in our judgment refer to them as Chatterjees and Khaitans. There was some correspondence between the Solicitors of the parties about the Surveyor who has to measure the land. Ultimately, it was agreed that there should be two Surveyors one Mr. C. K. Sarkar, for the vendor and Mr. Johnstone, for the purchaser, and that they would measure the land on the 5th July 1919. On that day some measurement was made which, however, was not completed because there was *jungle* on the land. It is said on behalf of the vendors that there were merely shrubs on the land. Whether they were shrubs or jungle, the measurement was not completed on that day, because the land was not cleared of them. The Khaitans, on the 9th July 1919, wrote to the Chatterjees that the shrubs should be cleared, and on the 11th July, they again enquired whether the jungle had been cleared

or not. The Chatterjees replied that the jungle had been cleared by the vendor on "last Sunday," that is, the 6th July. The evidence upon the question whether the further measurement was to be taken up within two or three days from the 5th July, or was to be made after the purchaser's Solicitors received intimation of the jungle having been cleared is conflicting. There is the evidence of Mr. Johnstone's man, Pramatha Nath Mukherjee, who was examined on behalf of the plaintiff, and evidence of Mooktaram Ghose, an assistant of the defendant's surveyor Mr. Sirkar, on the point. This much is clear from the evidence that the Survey could not be completed on the 5th July, and having regard to the fact that in the account-books of the defendant (the vendor), the expenses for clearing the jungle are entered on dates between the 6th July 1919, and that Rs. 38-10-0 was paid to 103 labourers at the rate of 6 annas per day for each, as appears from Ext. D (the account-books of the defendant) the defendant's story that the jungle had been cleared on the 6th July cannot be accepted. On the 12th July, the Chatterjees wrote to the Khaitans that their client had arranged with the Surveyor, Mr. Sirkar, to resume the Survey on Monday (the 14th July). Nothing appears to have been done on the 14th July, and on that day the Chatterjees wrote to the Khaitans that the time limited by the agreement had expired on Saturday the 12th; that the defendant was prepared, as a matter of grace, to allow the plaintiff to complete the measurement by "to-day," and that as the plaintiff had not availed himself of the period of grace, the defendant would stand upon his legal right to terminate the contract and asked for return of the title-deeds. The Khaitans evidently ignored the above letter and on the 17th July sent "requisition on title." On the 23rd July Khaitans wrote to Chatterjee that his client "has always been and still ready to complete the purchase." On the same day the Chatterjees asked Khaitans for return of documents without further delay, and the latter inquired whether they were required for drawing the conveyance.

It appears that on the 23rd July Khaitans received a letter from their Surveyor, Mr. Jhonstone, that the area of the land was 23 *bighas* 3 *cottas* 30 sq. feet and on 25th July wrote to Chatterjees that the area was 33 *bighas* 3 *cottas* 30 sq. feet and enquired whether their Surveyor agreed with the area. This (33 bighas) was evidently a slip. On the 26th July Khaitans sent a draft conveyance for approval of Chatterjee "subject to our requisitions." On the 29th July 1919, the Chatterjees wrote to the Khaitans that the vendor would be prepared to accept the area given by the purchaser's Surveyor, *viz.*, 33 *bighas* 3 *cottas* 30 sq. feet and to do all other things necessary for the completion of the transaction provided the purchase was completed within a fortnight of the approval of the draft conveyance, time being of the essence of the contract. This was stated to be "without prejudice." On the next day, that is, on the 30th July, the Khaitans wrote to the Chatterjees as follows:—"We accept your client's offer of completing the purchase within a fortnight after the approval of the draft conveyance. The area given by our Surveyor is 23 *bighas* 3 *cottas* 30 sq. ft." to which the Chatterjees replied as follows:—"Our letter of yesterday was written on the basis of the measurement given in your letter of the 25th instant, *viz.*, 33 *bighas* 3 *cottas* and 30 sq. ft. we are surprised to find that you say in your present letter that the area is 23 *bighas* 3 *cottas* 30 sq. ft." and that, in the circumstances, they would forward a copy of the letter to their clients and that unless confirmed by their clients "our letter of yesterday, as is obvious, will be inoperative." Some further correspondence followed, and on the 9th October 1919, the Khaitans wrote to the Chatterjees regretting unnecessary delay and intimating that if the latter did not complete the sale within a week, the plaintiff would institute a suit for specific performance. The correspondence ended on the 21st October 1919 on which day the Chatterjees wrote to the Khaitans that there was no subsisting contract between the purchaser and their clients and that further correspondence would be wholly useless.

The suit was instituted on the 22nd November 1919. The suit was decreed by the Court below, and the defendant has appealed to this Court.

KAMAL KRISHNA KUNDU CHOWDHURY *v.* CHATOORBHUJ DASSA

The first ground taken in the appeal is that the contract was not specifically enforceable because there was no mutuality, and that for two reasons. The first is, that the sale was to be subject to the approval of the Solicitars and, secondly, that the plaintiff had became an insolvent With regard to the first, the agreement for the sale of the property, "subject to the title being approved by the Solicitors," of the purchaser was a perfectly valid agreement, and with regard to the second, the bankruptcy took place after the suit had been decreed by the Court below.

The second contention is that specific performance ought to have been refused on the ground that the plaint was not a proper plaint for specific performance because the plaintiff prayed for an enquiry into the defendants' title to the property and for a decree for sale if the title was approved by the plaintiffs' Solicitors. But it is open to a party to claim an enquiry into the title of the vendor to the property only that he must accept the title as it is, if he chooses to purchase the property. (*See* Williams on Vendor and Purchaser, 3rd Edition, page 114). In the present case the purchaser by taking a decree has accepted the title.

The third ground taken is, that the question of waiver set up by the learned Subordinate Judge does not arise at all, and that, on the other hand, it was absolutely necessary for him to decide the last portion of issue No. 3, and that if there was no evidence on the point the suit should have been dismissed. Now, the fourth paragraph of the plaint set up an agreement for an extension of time and an issue was raised, namely, the third issue, on the point. The learned Subordinate Judge has dealt with the question of waiver and the question of extension of time together; and the question of waiver of the right of the vendor to have the contract completed within the time fixed is treated as substantially the same as the question of extension of time; as would appear from the concluding portion of the decision on issue No. 3.

The fourth ground is, that the learned Subordinate Judge is wrong in laying down as a proposition of law that, even if time is originally of the essence of the contract, the essentiality is destroyed by the extension of time, relying upon the case of *Webb* v. *Hughes* (1). In that case it was observed that, "if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase then time is no longer of the essence of the contract." That case is distinguishable because it was not a case where the time was extended for a *definite period* by agreement between the parties. In the case of *Barclay* v. *Messenger* (2), Jessel M. R. held that "a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time." That case was followed in *Haji Fakir* v. *Shaikh Abdulla* (3). Although that is so, in the present case the time was not extended only for two days (from the 12th to the 14th July) as contended on behalf of the appellant. In the letter dated the 12th July by the Chattejees to the Khaitans, it is stated that the Survey would be resumed on the 14th July. It does not mean that time for completing the contract was to be extended by two days only, but that the Survey was to be resumed on the 14th July and the subsequent correspondence goes to negative the case that time was extended by two days only. We, therefore, think that, although the learned Judge is not right in the view he has taken of the Law, it does not affect his decision.

The fifth ground taken is that the Subordinate Judge has taken a wrong view of the evidence in holding that the breach of contract was on the part of the defendants. We have referred to the correspondence and we have been shown that the land could not be surveyed within the time fixed because the jungle had not been cleared by the vendor.

The learned Vakil for the appellant has contended that Mr. Johnstone, the Surveyor, did not go upon the land at any time after the 5th July and that he submitted his report on the 25th July without going on the land again, which shows that the non-clearance of jungle was merely an excuse set up by the

(1) (1870) 10 Eq. 281; 39 L. J. Ch. 606; 18 W. R. 749.

(2) (1874) 43 L. J. Ch. 449 at. p. 456; 30 L. T. 351; 22 W. R. 522.

(3) 12 B. 658; 6 Ind. Dec. (N. S.) 922.

plaintiff. But there can be no doubt upon the evidence that the land could not be surveyed because the jungle was not cleared before the 12th July. The learned Subordinate Judge has discussed the evidence and has come to the conclusion that there were no laches on the part of the plaintiff and that the contract was not completed within the time fixed owing to the default of the defendant. The evidence has been discussed before us, and we are unable to differ from the view taken by the Court below.

Then, it is contended that the lower Court is wrong in holding that the preparation of a plan was necessary. Some authorities have been cited to us on the point, but it is unnecessary to discuss them having regard to the fact that in the present case, the parties contemplated preparation of a plan, as the letter dated the 21st June 1919, by the Khaitans to the Chatterjees expressly asked the latter to appoint a time for a Survey of the garden plot and the preparation of a plan.

The sixth ground taken is, that the plaintiff having become an insolvent, the decree for specific performance cannot be enforced and the learned Vakil has relied upon the principle of mutuality. There is no doubt that if the plaintiff had become a bankrupt before the institution of the suit, he could not have enforced the contract. We need only to refer to Fry on Specific Performance, 6th Edition, Article 949 and to Halsbury's Laws of England, Vol. 27, page 58. In the present case, however, the bankruptcy took place after the suit had been decreed.

The learned Vakil for the appellant relied upon Fry on Specific Performance, para. 951, where the learned author refers to section 55 of the English Bankruptcy Act, 1883 (the provisions of which correspond to a certain extent to the provisions of section 62 of the Presidency Towns Insolvency Act), and says: "Accordingly specific performance cannot be enforced against a purchaser's trustee in bankruptcy without his consent." Section 62 of the Presidency Towns Insolvency Act upon which also reliance is placed on behalf of the appellant runs as follows:—"Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the Official Assignee may, notwithstanding that he may have endeavoured to sell or have taken possession of the property, or exercised any act of ownership in relation thereto, but subject always to the provisions hereinafter contained in that behalf, by writing signed by him at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property."

It is contended that the principle of mutuality should also be extended after the decree for specific performance has been passed. But, in the first place, specific performance may be enforced against the trustee in bankruptcy of a vendor: See Fry on Specific Performance, paragraph 951. In the next place, in the present case, as already stated, the bankruptcy of the purchaser took place after the suit had been decreed, and *the money had been deposited by the purchaser*. No authority has been shown to us for holding that the principle of mutuality applicable to suits for specific performance of contracts before the institution of a suit, applies to the parties after the suit has been decreed and *the money has been deposited by the purchaser* before he becomes a bankrupt.

The last contention is that the decree for specific performance should not be allowed to be enforced for two reasons. The first is, that the time appointed by the Court below for payment of the money by the purchaser had expired before the money was deposited, and the Court had no power to extend the time fixed by the decree for the purpose. The question, whether the Court had the power to extend the time for payment fixed by the decree or not, is one which cannot be gone into in this appeal, but may be raised by the appellant in proper proceedings. The second ground is, that the plaintiff having withdrawn the money deposited by him in the Court below after the appeal had been preferred, the decree has become infructuous and the Official Assignee is not entitled to enforce the decree for specific performance. It appears that after the appeal had been filed and before the plaintiff became bankrupt he applied to this Court for taking back money which had been deposited by him in the Court below. This

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Court thereupon made an order that the plaintiff might withdraw the money at his own risk. The question, what is the effect of such withdrawal of money, however, may be raised by the plaintiff, when, and, if, the Official Assignee applies for enforcement of the decree for specific performance.

The learned Vakil for the Official Assignee intimated that his client is ready to deposit the amount decreed in the Court below, if so ordered by this Court. We cannot make any such order, as the learned Pleader for the defendants says that they would oppose any application for depositing the amount decreed by the Official Assignee and for enforcement of the decree for specific performance

In the result, the appeal fails and it is dismissed with costs. The respondent does not press the cross-objections. It is accordingly dismissed. We make no order as to cost.

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 126 OF 1923.

January 4, 1924.

Present :—Mr. Hallifax, A. J. C.

KUNDAN LAL—APPLICANT

versus

QADIR AHMAD ALI—NON-APPLICANT.

Contract Act (IX of 1872), s. 30—Wagering contract—Agreement not to make or demand delivery—Burden of proof.

If a person makes a bet and, in order to protect himself against a refusal by the other person to pay him if he wins, takes great care to clothe the transaction with the appearence of a valid contract and to create evidence to that effect, it is not easy for him, if he loses, to remove that clothing and rebut that evidence, and he cannot succeed unless he puts forward evidence to the contrary which is stronger than that which he deliberately created.

In order to establish that a contract is one of wagering it is not sufficient for the defendant to show that neither party intended or contemplated that there should be any delivery of goods, he must show that there was an agreement that neither party would have the right to make or demand delivery.

Sukdevadoss v. *Diwan Bahadur Govindoss*, 76 Ind. Cas. 893 ; 45 M. L. J. 716 ; 18 L. W. 911 ; (1924) M. W. N. 133 ; 33 M. L. T. 223, relied on.

Appeal against the decree of the Small Cause Court, Nagpur, dated the 28th March 1923 in Civil Suit No. 143 of 1922.

Mr. *Erachshah*, for the Applicant.

Mr. *R. N. Padhye*, for the Non-Applicant.

JUDGMENT.—This is one of the common type of cases in which the defendant relies on the plea, to which Coutts-Trotter, J., in *Sukdevadoss* v. *Diwan Bahadur Govindoss* (1) applies the not over strong term of "not over honest", that the reciprocal promises between himself and the plaintiff constituted nothing more than a wager and he cannot, therefore, be compelled to fulfil his promise, though he would have expected and done his best to compel the plaintiff to carry out his if things had gone the other way. This defence succeeded in the Small Cause Court, and the plaintiff has applied to this Court for revision of the decision.

The facts are these. On the 18th of February 1921 the defendant agreed to buy ten bales of yarn of a specified kind from the plaintiff at Rs. 263-7-0 each. The plaintiff agreed to deliver the yarn at that price on the 28th of March 1921 and to receive payment on delivery. The defendant also signed a "*chitthi*" or memorandum of the contract, in which the word "*hazar*" occurs. That means that the goods were to be actually delivered on the date stated. On that date the plaintiff sent three bales to the defendant in a cart and said he had the remaining seven ready for delivery, but the price had then fallen, and the defendant sold back five bales at Rs. 236 and five at Rs. 240 each. He again signed a "*chitthi*" in respect of each parcel of five bales and the word "*hazar*" appears in both of them. That left him owing Rs. 253-2-0 on the two transactions, and the plaintiff claimed that amount in the present suit.

In addition to his plea that the agreement was a pure wager and not an enforceable

(1) 76 Ind. Cas. 893 ; 45 M. L. J. 716 ; 18 L. W. 911 ; (1924) M. W. N. 133 ; 33 M. L. T. 223.

contract, the defendant alleged that he actually paid Rs. 215-10-0 on the day following the re-sale at the instance of the plaintiff and on his behalf to a third party, and that he had offered to pay the balance of Rs. 37-8-0 to the plaintiff if he would come to his shop and ask for it. The offer of the balance, coupled with an allegation of a payment of Rs. 215-10-0, certainly was made, but the payment itself never was.

In the Small Cause Court it has been held that the agreement was a pure wager, as neither party ever intended or contemplated delivery of the yarn; it was entirely a matter of the payment of the difference between the price stated in the agreement and that on the date stated in it. This finding is based on the fact that the plaintiff has frequently been a party to similar transactions in which no delivery has been made, or even offered or demanded, and the defendant is not a dealer in yarn and never bought or sold any before. The tender of the three bales and the offer of the rest are regarded by the learned Judge as a mere device to lend to the agreement the colour of an intention to deliver the goods, as "*peshbandi*" in short. It is clear that the burden of proof has been wrongly placed, or rather that all the evidence on the side of the plaintiff has been left out of sight and consideration, with the exception of the one item of the offer of delivery.

If a person makes a bet and, in order to protect himself against a refusal by the other person to pay him if he wins, takes great care to clothe the transaction with the appearance of a valid contract and to create evidence to that effect, it is naturally not easy for him, if he loses, to remove that clothing and rebut that evidence. It is, however, obvious that he cannot succeed unless he puts forward evidence to the contrary which is stronger than that which he deliberately created. It is also very foolish and short-sighted of him to attempt to do so, as, if he succeeds, the other party to some future similar bet which he wins is also likely to succeed in the same way, but with that we are not concerned in a civil suit.

Both parties to the present agreement said very clearly that it was an ordinary contract for the sale and purchase of yarn, which was to be delivered on payment on a future date, and they went through all the usual formalities of such a contract. To prove that neither of them meant what he said and that they really agreed, in direct contradiction of all their words and actions, that there should be no delivery but only a payment of the difference, would require a great deal more than the probability, which is hardly more than a possibility, arising out of the fact that there has been no delivery but only a payment of differences even in thousands of exactly similar transactions between themselves or between others. That is all there is in the present case to rebut the strong evidence created advisedly by the parties, of the contract being an ordinary sale of goods, and that evidence has been left entirely out of consideration. The offer of the three bales may not corroborate it strongly but it certainly does not contradict it.

But, further, as was pointed out by Coutts-Trotter, J., in the case already mentioned, it is not sufficient for the defendant in a case like this to show that neither party intended or contemplated that there should be any delivery of goods. He has to show, further, that there was an agreement that neither party would have the right to make or demand delivery. Any agreement or even understanding of that sort between the parties is very clearly disproved, not only by the evidence to the contrary which both of them were at such pains to create, but also by the admission of the plaintiff's right to deliver the yarn which the defendant made when the three bales were brought to his shop; his re-sale of the whole ten bales is an acceptance of delivery.

The decree of the lower Court dismissing the plaintiff's suit will be set aside. In place of it a decree will issue ordering the defendant to pay to the plaintiff the sum of Rs. 253-5-6, which includes the cost of a registered notice sent to the defendant, together with interest on that amount at 12 per cent. per annum from the date of the lower Court's decree to the date of payment, and all the costs incurred by the plaintiff in both Courts. The pleader's fee in this Court will be fifteen rupees.

Z. K. *Application allowed.*

SANDATTIKALAI PANDIA CHINNA THAMBIAR *v.* VEERAPPA GOUNDAN

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 45 TO 49, 51 TO 67, 69 TO 75, 77 TO 92, 95 TO 100 AND 102 TO 104 OF 1923.

January 29, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

SANDATTIKALAI PANDIA CHINNA THAMBIAR AVO.—PETITIONER

versus

VEERAPPA GOUNDAN AND OTHERS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 12, Sch. II, Art. 17, (iii), (vi)—Suit for commutation of rent—Appeal, valuation of—Court-fee payable—Order under s. 12—Revision, whether lies—Civil Procedure Code (Act V of 1908), s. 115.

Certain tenants filed a suit against their landlord for commutation of grain rents into money rents, and the Deputy Collector fixed the rate at which commutation was to be made. The landlord appealed on the ground that the rate fixed was too low and calculated the value of the relief sought at the difference between the amount fixed by the Deputy Collector and the amount which he alleged to be correct and paid *ad valorem* fees on that amount;

Held, that the provision applicable to the case was Article 17 (iii) or Article 17 (vi) of Schedule II to the Court Fees Act and Court-fees must be paid as laid down in that article.

Semble:—An order under section 12 of the Court-Fees Act is only final as regards the valuation of a suit and not when it relates to the category into which a suit falls. In the latter case the order is open to revision.

Case-law referred to.

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Tinnevelly, in Appeal Suits Nos. 312 to 316, 318 to 334, 336 to 342, 344 to 359 and 362 of 1920 and 142 to 146, and 148 to 150 of 1921 respectively.

Messrs. *A. Krishnaswami Aiyar* and *A. S. Visvanatha Aiyar*, for the Petitioner.

The Government Pleader (Mr. *C. V. Ananthakrishna Aiyar*), for the Respondents.

JUDGMENT.—All these petitions relate to suits filed by tenants against the landlord for commutation of grain rents into money rents. The Deputy Collector allowed this commutation and fixed the rate at which it was to be made. The landlord appealed to the District Judge on the ground that the rate fixed was too low and he calculated the value of the relief sought at the difference between the amount fixed by the Deputy Collector and the amount which he alleged to be correct and paid *ad valorem* fees on that amount. The District Judge has held that this is not correct but that a fee of Rs. 10 should be paid on each appeal under Schedule II of the Court-Fees Act, clause 17 (6), holding that it is a suit where it is not possible to estimate the money value of the subject-matter in dispute and which is not otherwise provided for by this Act. Now the petitioner applies to have the order of the District Judge set aside.

A preliminary objection is taken by the learned Government Pleader that no revision can be had in a case of this sort and he relies on two reported cases from the Patna High Court: *Chandramani Koer* v. *Basdeo Narain Singh* (1), and *Musammat Lachmibate Kunari* v. *Nana Kumar Singh* (2). It has, however, been held in *Lakshmi Amma* v. *Jamani Jayam Nambiar* (3), that an order under section 12 of the Court-Fees Act is only final as regards the valuation of the suit and not when it relates to the category into which that suit falls and in consequence of this it has been held in two cases in this Court that a revision petition will lie: *Muthu Pillai* v. *Muthu Pillai* (4), and *Dodda Sannekappa* v. *Sakravva* (5). These are decisions of Single Judges, but in other cases also revision has been granted without any discussion of the question of whether it is proper to do so. There is a definite conflict of opinion and we do not feel called upon now to decide the point in view of our decision on the merits.

(1) 49 Ind. Cas. 442; 4 P. L. J. 57.
(2) 56 Ind. Cas. 649; 5 P. L. J. 403; 1 P. L. T. 268; (1921) Pat. 166; 3 U. P. L. R. (Pat.) 38.
(3) 4 M. L. J. 183 (F. B.).
(4) 71 Ind. Cas. 173; (1922) M. W. N. 831; 17 L. W. 623; (1923) A. I. R. (M.) 270.
(5) 36 Ind. Cas. 831.

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This suit is in effect a suit for a declaration that the grain rent shall be commuted into money rent at a certain rate and the appeal is to the same effect, namely, that the commutation shall be at a certain rate higher than that fixed by the first Court. It is argued, first of all, that the case comes under the Court-Fees Act, section 7 (1), which relates to suits for money, but in this case there is no claim for money and certainly the landlord is not entitled to a decree for any amount whatever in this suit.

It is then suggested that clause (7) (iv) (*c*) is applicable, that is, a suit to obtain a declaratory decree or order where consequential relief is prayed. Here there is no consequential relief. It might be argued that in the original suit the prayer to enter the amount of rent in the *pattah* was a consequential relief but that is very doubtful, for the mere fact that the rent is determined *ipso facto* carried with it the necessity to enter it in the *pattah* that is issued, and there is no need for a prayer for the grant of *pattah*. At any rate, in appeal that question is not raised at all and no consequential relief is asked for.

Section 7 (iv) (*c*) is also suggested as governing this case, *i.e.*, a suit "for a right to some benefit (not herein otherwise provided for) to arise out of land."

In the margin we find the word "for easements" and it is quite clear that it must be some such benefit that is contemplated by this section; it cannot mean pecuniary benefit, because pecuniary benefits are otherwise provided for under other clauses.

Finally, the argument is put forward that section 7 (11) (*b*), namely, to enhance the rent of a tenant having right of occupancy, must be applied. The prior rent in this case was grain rent. The new rent asked for is a money rent, and it is not suggested that the money rent is any greater than the grain rent, but what is asked for is money rent equivalent to the prior grain rent and in that view it certainly is not a prayer to enhance the prior rent. It is merely a prayer to increase the rate fixed by the lower Court which has never actually been the rent levied prior to suit nor prior to the appeal.

These clauses all being inapplicable, we are left with Schedule II, Article 17 (iii), suits for declaration, or 17 (vi) the provision which has been applied by the District Judge. In both these cases, the fee payable is the same and whether it comes under one or the other, the fee ordered to be paid by the District Judge is the correct fee.

The petitions are, therefore, dismissed. There will be no order as to costs. Time for the payment of the proper fee will be extended by one month from this date.

V. V. N.
Z. K. *Petitions dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 301 OF 1923.

December 3, 1923.

Present:—Mr. Baker, J. C.

RAJABAI—PLAINTIFF—APPLICANT

versus

JAGANNATH *alias* MADHORAO NARAYAN GAHATE—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Order granting adjournment—Revision, whether lies.

Section 115 of the Civil Procedure Code refers only to cases of failure to exercise or improper exercise of jurisdiction. [p. 970, col. 2]

Balakrishna v. *Vasudeva*, 40 Ind. Cas. 650; 40 M. 793, 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628, 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48, 44 I. A. 261 (P. C.), followed.

The High Court has no power under section 115 or section 151 of the Civil Procedure Code to revise an order of a Trial Court adjourning the hearing of a suit or application, even where the order is inexpedient. [p. 970, col. 2]

Case-law referred to.

Revision against the order of the Additional District Judge, Nagpur, dated the 29th November 1923, in Civil Suit No. 43 of 1923, pending for 3rd December 1923.

RAJABAI *v.* JAGANNATH

Sir *B. K. Bose*, Messrs. *V. Bose, R. N. Padhye*, and *W. H. Dhabe*, for the Applicant.

Messrs. *D. P. Tiwari, M. R. Bobde, A. D. Mande*, and *S. K. Barlingay*, for the Non-Applicant.

ORDER.—This is a very peculiar application. The applicant who is a minor acting through his next friend has brought a suit in the Court of the Additional District Judge, Nagpur, against the non-applicant for possession of a large estate. The plaintiff is the daughter of the last owner and the defendant claims to be his adopted son. The written statement of the defendant has not yet been put in.

The applicant applied for the production of the account-books of the family business and their retention in Court, on the ground that there is a likelihood of their being tampered with or destroyed.

This application was filed on 18th October 1923 along with an application for the appointment of a Receiver. Notice was issued to the other side and the date of hearing fixed for 3rd November 1923. An order was issued to the respondent to produce the books in Court on 29th October 1923 and they were brought to Court, but were not placed in the Court's custody. According to the application, plaintiff's Counsel urged that the books should be retained, but nothing was done. On 3rd November 1923 the defendant filed objections and counter-statements and plaintiff's Counsel again urged that the account-books should be kept in Court, as there was an immediate danger of their being tampered with. No order was passed for their retention, though it appears from the order-sheet that certain copies of accounts were given to the plaintiff, and the case was fixed for 24th November 1923.

On that date the plaintiff put in a statement that some of the accounts had been destroyed and a report had been made to the Police by the defendant's agent that the accounts of the shop at Ajni had been stolen and burned, and reiterated the request for an immediate order for the production of the account-books. The case was adjourned to 15th December 1923.

On 29th November 1923 the plaintiff again put in a similar request. The Court ordered notice to be served on the defendant's Pleader and fixed December 3rd for the hearing as the defendant's Pleader asked for time to answer the allegations.

It may here be noted that 29th November 1923 was a Thursday. The 1st of December was a holiday for the elections and the 2nd December was Sunday. On the same day, 29th November, the plaintiff filed the present application for revision asking this Court to order the production and retention in Court of the account-books, or ordering the lower Court to pass such orders immediately.

As the application was represented to be of an extremely urgent nature, notice was ordered to issue to the defendant for hearing next day and the application was heard accordingly, but, even so, it was not possible, owing to two holidays intervening, to deliver the order before the 3rd December, the day fixed for hearing by the lower Court.

The order which is sought to be revised is an order adjourning the hearing of the application till 3rd December. There can be no doubt that there can be no revision of such an order. There is really no order to revise, as the lower Court has not yet decided the matter one way or the other.

The learned Counsel for the applicant is obliged to admit that, while the matter is under trial by another Court, this Court cannot order the production of the accounts. Nor can it order the Additional District Judge to pass an order to that effect.

The case obviously does not fall under section 115, Civil Procedure Code, and it has been held by the Privy Council in *Balkrishna* v. *Vasudeva*(1) that that section refers only to cases of failure to exercise or improper exercise of jurisdiction. There is nothing of the kind here. There is no case decided, not even the determination of an issue, and the only interlocutory order passed is to adjourn the matter to give the defendant time to reply, the adjournment being for four days. Even if the order was inexpedient, this Court could not interfere.

(1) 40 Ind. Cas. 650 ; 40 M. 793 ; 15 A. L. J. 645 ; 2 R. L. W. 101 ; 33 M. L. J. 69 ; 26 C. L. J. 143 ; 19 Bom. L. R. 715 ; (1917) M. W. N. 628; 6 L. W. 501 ; 22 C. W. N. 50 ; 11 Bur. L. T. 48 , 44 I. A. 26 ; P. C.

(2) 57 Ind. Cas. 556 ; 44 B. 619 ; 22 Bom. L. R. 801.

DIWAN CHAND *v.* HIRA NAND

It has been held in *Bai Rami* v. *Jagu Dullabh* (2) that the High Court has no power to call for the record in a pending case of this nature.

A large number of recent decisions have been quoted on both sides. The non-applicant relies on: —

1. *Sultanat Jahan Begam* v. *Sunder Lal* (3); 2. *Budhhu Lal* v. *Mewa Ram* (4); 3. *Jhunku Lal* v. *Bisheshar Das* (5); 4. *A. Subbarayudu* v. *T. Lakshminarasamma* (6); 5. *Balamony* v. *Ramasami Chettiar* (7); 5. *In the matter of the petition of Nawal Singh* (8).

The applicant relies on:—

1. *Bai Atrani* v. *Deepsing Baria* (9); 2. *Jagannatha* v. *Sarathambal* (10); 3. *The Secretary of State for India* v. *Narsibhai Patel* (11); 4. *Dhapi* v. *Ram Pershad* (12); 5. *Bhargava and Co.* v. *Jagannath Bhagwan Das* (13); 6. *Balakrishna* v. *Vasudeva* (1).

I have referred to all these decisions, but they all show that no such application as the present will lie, nor is the case covered by section 151, Civil Procedure Code.

The application must, therefore, be rejected with costs. I express no opinion on the merits, which must be left to be decided by the lower Court. I have no doubt that, in view of the applicant's allegations, the Additional District Judge will see that it is desirable that the question of the production of the accounts should be disposed of one way or the other as soon as possible.

(3) 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431.
(4) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558.
(5) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495.
(6) 22 Ind. Cas. 193; 38 M. 775; 15 M. L. J. 98; (1914) M. W. N. 147; 1 L. W. 59.
(7) 30 M. 230.
(8) 14 Ind. Cas. 766; 34 A. 393; 9 A. L. J. 481; 13 C. L. J. 302.
(9) 33 Ind. Cas. 358; 40 B. 86 at p. 91, 17 Bom. L. R. 1007
(10) 71 Ind Cas. 530; 46 M. 574 at p. 44 M. L. J. 202; 17 L. W 251, (1923) M W. N. 157; (1923) A. I. R. (M.) 321.
(11) 77 Ind. Cas 241, 25 Bom. L R 992 at pp. 999, 1000; (1924) A. I. R. (B.) 165.
(12) 14 C. 768, 12 Ind. Jur. 97; 7 Ind. Dec. (N. S) 50).
(13) 51 Ind. Cas. 331, 41 A. 602 at p. 608; 17 A. L J. 718; 1 U. P. L. R. (A) 120

It may, however, not be out of place to make a few remarks as to the general policy of the law with regard to such applications. It appears to me to be a sound rule that such applications should not lie, because if the conduct of pending cases is to be taken out of the hands of the trying Court at every step, by the applications for revision, no original suit would ever come to an end and the trying Judge would be deprived of all discretion. The result would be disastrous to the administration of justice. In the present case the trying Judge has not even had the opportunity of making up his mind and it is not the business of this Court to make up its mind for him.

The application is consequently rejected with costs. Pleader's fee Rs. 10.

Z. K. *Application rejected.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1325 OF 1923.

November 6, 1923.

Present: —Mr. Justice Martineau.

DIWAN CHAND AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HIRA NAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Pre-emption suit—Amount enhanced on appeal—Failure to pay enhanced amount—Dismissal of suit—Amount paid, whether can be withdrawn.

Where a pre-emption suit is dismissed automatically owing to the pre-emptor's failure to pay into Court the enhanced amount decreed on appeal, the pre-emptor is entitled, under section 144 of the Civil Procedure Code, to the return of the amount deposited by him in Court under the decree of the Trial Court.

Bhagwan Singh v. *Ummatul Hasnain*, A. W. N. (1896) 42, 18 A 262, 8 Ind Dec. (N. S) 881, relied on. *Abdulla* v. *Amir-ud-din*, 113 P. L. R. 1902; 76 P. R. 1902, distinguished.

DHARAMDAS THAWERDAS *v.* THE PERSIAN GULF STEAM NAVIGATION CO., LTD.

Miscellaneous second appeal from the order of the District Judge, Attock, at Campbellpur, dated the 30th April 1923, reversing that of the Subordinate Judge, 1st class, Attock, at Campbellpur, dated the 1st March 1923, and dismissing the application for refund of Rs. 7,000.

Mr. *D. R. Puri*, for the Appellants.

Messrs. *M. S. Bhagat* and *I. C. Chopra*, for the Respondents.

JUDGMENT.—A decree was passed for possession of land by right of pre-emption conditionally on payment of Rs. 7,000. The decree-holders paid the money and obtained possession of the land in execution, but, afterwards, on the appeal of the vendee, the amount payable to him was enhanced by Rs. 500, which the decree-holders were directed to pay by the 21st December 1922, and it was provided in the decree of the Appellate Court that if the money were not paid by that time the suit should stand dismissed with costs. The decree-holders did not pay the additional sum of Rs. 500 and they applied to the first Court for a refund of the Rs. 7,000 which they had paid. The Subordinate Judge granted their application but the District Judge on appeal held, following *Abdulla* v. *Amir-ud-din* (1), that the vendee had control of the purchase-money and that the decree-holders were not entitled to take it back. The latter have filed a second appeal in this Court.

The case relied upon by the learned District Judge was one in which, after a pre-emption decree had been passed, a reversioner of the vendor obtained a decree declaring that the sale should not affect his rights, and it was held that the pre-emptor was not entitled to cancel his purchase and take back the money. That case was clearly distinguishable from the present one as the decree for pre-emption was in no way affected by the decree subsequently obtained by the reversioner of the vendor. In the present case, on the other hand, the decree for pre-emption no longer exists and the suit of the pre-emptor has been dismissed. *Bhagwan Singh* v. *Ummat-ul-hasnain* (2) is a case in point in which, where a suit for pre-emption was dismissed on appeal, it was held that the plaintiff was entitled to a refund of the money which he had paid. Section 144 of the Civil Procedure Code applies, and it makes no difference that the dismissal of the suit has resulted automatically from the appellants' failure to pay the full price.

I accept the appeal, set aside the order of the lower Appellate Court, and restore the order of the first Court. The respondent Hira Nand will pay the appellants' costs in this Court and the lower Appellate Court.

Z. K. *Appeal accepted.*

(1) 76 P. R. 1902; 113 P. L. R. 1902.
(2) 18 A. 262, A. W. N. (1896) 42; 8 Ind. Dec. (N. S.) 881.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 546 of 1918.

October 17, 1922.

Present:—Mr. Aston, A. J. C.

DHARAMDAS THAWERDAS—PLAINTIFF

versus

THE PERSIAN GULF STEAM NAVIGATION CO., LTD., BOMBAY—DEFENDANTS

Ship—Deck Cargo—Jettison—Right of cargo owner, to contribution for general average—"At merchants' risk", meaning of—Bill of Lading, Office of—Exemption clauses.

A jettison of goods which are carried on deck, even without the consent of cargo owner, does not entitle their owner to contribution unless the carriage of goods on deck is permitted by the established custom of navigation or where the other cargo owners have consented that goods jettisoned should be carried on the deck of the ship. [p. 974, col. 2].

Wright v. *Marwood*, 50 L. J. Q. B. 643=7 Q. B. D. 62 and *Strong* v. *Scott*, 14 A. C. 601, relied upon.

Burton v. *English*, 12 Q. B. D. 218, not followed.

The office of a Bill of Lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution for general average. [p. 976, col. 1].

Burton v. *English*, 12 Q. B. D. 218, referred to.

The endorsement "at merchants' risk" on a Bill of Lading will not exempt a ship-owner from liability in a case of proper jettison but will exempt him from liability in case of an improper jettison. The words

cover a case not only of improper jettison but of a loss caused by a collision and stranding owing to the negligence of the Master or crew, in fact, any act which, being done by them as servants of the ship-owner, would otherwise make him liable. [p. 976, col. 1]

If a ship-owner wishes to introduce into his Bill of Lading so novel a clause as one exempting him from general average contribution, a clause which not only deprives the shippers of an ancient and well understood right but which might avoid his policy and deprive him also of all recourse to the Under-writer he ought not only to make it clear in words but also to make it conspicuously, inserting it in such a type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. [p. 976, col. 2].

Crooks v. *Allen*, (1880) 49 L. J. Q. B. 201, referred to.

Mr. *Rupchand Bilaram*, for the Plaintiffs.

Mr. *C. M. Lobo*, for the Defendants.

JUDGMENT.—This is a suit brought by the plaintiffs to recover Rs. 44,000 from the defendants as the value of 29 packages of piece goods jettisoned from the *SS. Paroo* on the 29th October 1917, being part of a consignment of sugar and piece goods belonging to the plaintiffs which the defendants had contracted to carry from Karachi to Bunder Abbas.

Plaintiff's *Munim* Bojumal admittedly got a shipping order from the defendant's agent on 9th July 1917. It is not in dispute that when the goods were taken on board the *SS. Paroo* the Chief Officer issued Mates Receipts containing a printed clause that the receipt was subject to all the conditions of the Company's Bills of Lading and that the words "On Deck at Shipper's risk" were written on the Mates Receipts. It is further not in dispute that the Mates Receipts bearing the words above referred to were surrendered to the defendant's agents in Karachi and that the plaintiff received in Exchange four Bills of Lading covering the cargo and that the Bills of Lading also contained the endorsement "On Deck at Shipper's risk."

The defendants contend that the cargo was carried on deck with the plaintiff's consent, that they are exempted from liability by virtue of a clause which reads 'Cargo on Deck to be at Shipper's risk and the Ship not to be liable for general average contribution in case of its being jettisoned, damaged or lost overboard." They further contend that they are exempted from liability by virtue of a clause in the Bill of Lading excepting *inter alia* the Act of God the King's enemies, accidents, jettison, Barratry of Master or Crew, bursting of Boilers, breakage of machinery or any latent defect in machinery, boilers, hull or appertenances, whether such defect existed before the commencement of or arose or developed during the voyage, unworthiness of ship, provided all reasonable means have been taken to provide against such unworthiness. Lastly, the defendants rely on a clause in the Bill of Lading limiting liability for any package to Rs. 500, unless its value has been declared prior to shipment and a special shipping order granted.

My findings on the issues are as follows :—

1. In the affirmative.

2. In the negative. This clause would not, in my opinion, have exempted the ship owner from liability, if any, to contribute in general average.

3. In the affirmative.

4. In the negative.

5. Does not arise ; see finding on issue No 4.

6. The jettisoning was due to an unforeseen and unavoidable accident and to latent defect in the No. 2 tank and ballast pump and to the high swells prevailing at the time.

7. In the affirmative.

8. The decision of this issue was by consent deferred.

9. In the affirmative.

10. In the negative.

11. In the negative.

12. In the affirmative.

With regard to the question whether the defendants were justified in carrying the cargo on deck, the evidence shows that the Mates Receipt contained an endorsement "On deck at Shipper's risk" in the hand-writing of Hendricks, the Chief Officer. The Mates Receipts were surrendered to the defendants without objection and Bills of Lading were received in lieu of the Mates Receipts also bearing the same endorsement. Bojumal alleges ignorance but the absence of a jot of documentary evidence to show that he protested or complained when Messrs. Donald Graham & Co. refused to insure his goods because they were on Deck at Shipper's risk strongly supports, in my opinion,

the defendant's contention that the goods were in fact carried on Deck at Shipper's risk with the defendant's knowledge and consent. Umerbux, the contractor, deposes to the fact that when the owners desired goods to be carried on Deck, they were so carried, otherwise not, and that in the absence of the owner his Tindal would not put goods on board to be carried on Deck. His evidence and that of Girja Shanker shows that certain goods were actually shut out from the *SS. Paroo*. In addition to this, there is the admitted fact that valuable specie worth Rs. 18,800 was also being carried for the plaintiff in the *SS. Paroo*. So it was highly probable that a responsible number of the plaintiffs' firm did go on board. I disbelieve the evidence of Bojumal that he complained to Chunilal. There are no doubt certain discrepancies in the evidence of Umer Bux and Jairam Purshotam, but taking the surrounding circumstances into consideration I am of opinion that it is established that the goods were carried on Deck at Shipper's risk with the knowledge and consent of the Shipper.

Apart from this, the Mates Receipts are dated 16th July ; the *SS. Paroo* did not sail till two days later and the evidence of Umer Bux shows that his clerk used to take the receipts to merchants on the day they were issued. The hand-writing on Ex. 30 in English is proved to be in Assanmal's hand-writing. So the plaintiff had an English knowing person in the firm and if plaintiff objected to the endorsement of the Chief Officer he had time to take action before the ship sailed. He would, in my opinion, in any event be estopped from denying the right of the defendants to carry the Cargo on Deck.

With regard to the question of seaworthiness, there was no doubt a heavy list to starboard on the voyage from Bombay to Karachi owing to the fact that heavy seas were shipped and that a part of the cargo in Nos. 2 and 3 between deck shifted. A list to starboard was also noticed soon after the *SS. Paroo* left Karachi when she encountered high swells and began pitching heavily and slipping water forward. It does not appear to me, however, that the *Paroo* was unseaworthy when she left Karachi, for the list was corrected, when Nos. 2 and 4's Port tanks were run up, and the ship was brought upright. The real trouble, it seems to me, did not occur, until two days after she left Karachi, *viz*, on July 20th, when Tank No. 2 leaked at high pressure, and the Ballast Pump would not work. This resulted in a sudden list of 9 or 10 degrees to port and the flooding of the Engine-room, rendering it necessary to stop the engines. At the request of the Engineers, the ship was heeled to starboard to enable them to pump the water out of the Engine-Room ; cargo being shifted for that purpose. Apparently, by an error of judgment, more cargo was shifted than was necessary, for the list to starboard increased to 22 degrees, rendering the position of the ship dangerous. Owing to the list, it was found impossible to shift the deck cargo to the port side, and the deck cargo was dangerous to passengers and crew. This deck cargo, it seems to me, in the circumstances was properly jettisoned, the causes of the jettisoning being an unforeseen and unavoidable accident to and latent defects in the tank and ballast pump and the high swells prevailing at the time.

In considering the question of liability it must be remembered that the deck is not a proper place for cargo. Goods placed there, as Mr. Carver points out in his work on Carriage by Sea, obstruct the working of the ship and are under peculiar risks (see Carver 6th Edition, page 501) ; and, thus, it is a general rule that a jettison of goods which were on deck does not entitle their owner to contribution : *Wright* v. *Marwood* (1). The rule does not, however, apply on voyages where the carrying of goods on deck is permitted by the established custom of navigation ; nor, where the other cargo owners have consented that the goods jettisoned should be carried on the deck of the ship : Carver, page 502 *Strang* v. *Scott* (2).

In 1917 there was a good market for goods in Basrah, but tonnage was scarce. Steamers used to arrive from Bombay with full cargoes and Karachi goods were shut out. The result was that merchants sometimes sent goods on deck, at their risk, rather than have them

(1) (1881) 50 L. J. Q. B. 643 ; 7 Q. B. D. 62 at pp 67, 68, 71 ; 45 L. T. 297 ; 29 W. R. 673 ; 4 As p. M. C. 451

(2) (1890) 14 A. C. 601 ; 59 L. J. P. C. 1 ; 61 L. T. 597 ; 38 W. R. 452 , 6 Asp. M. C. 419.

shut out. This, it appears to me, was not an established custom of navigation and plaintiff does not allege any, and there is no evidence that other cargo owners consented to plaintiff's goods being on deck.

Mr. Rupchand for the plaintiffs, while conceding that the other cargo owners would not be liable to contribute, contends that the ship owner at any rate was liable, since the latter through his servants consented to the stowage on deck. He points out that the view taken by Lord Bramwell in *Wright* v. *Marwood* (1) that the liability to contribute to general average arises out of implied contract did not commend itself to the Master of the Rolls in *Burton* v. *English* (3) where it was pointed out that the liability was derived from the Old Rhodian Laws. Lord Justice Bowen, however, observed that once a principle of the law of commerce and the sea is established as a part of the law, you may imagine that those who place their property on board a ship and the ship owner who puts his ship by the Quay to receive cargo, bind themselves by an implied contract which embodies the principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. He also observed that the Master as Agent both of the cargo owner and of the ship owner jettisons cargo on the implied basis that contribution will be made by the ship and by the other cargo owners. On equitable grounds, I think, it must be conceded that since the ship and the cargo owners were both parties to the stowage on deck and the ship owner received full freight and was benefited both by the stowage of the cargo on deck, and by the sacrifice, it is only fair that he should contribute towards the loss. But the reason thus would be to apply equitable principles to an Old Law of the Sea. All the writers and authorities, as Lord Bramwell pointed out, appear to be agreed, that, under this law of the sea, a cargo owner is not entitled to contribution in general average if cargo is carried on deck, even if it is carried there without the cargo owner's consent: *Wright* v. *Marwood* (1). Lord Bramwell was unable to find any authority in our law to justify the claim, while the law and practice of foreign countries are decidedly to the contrary *Wright* v. *Marwood* (1) see also Scrutton, 10th Edition, page 301; Carver, 6th Edition, pages 501—502.

I am of opinion, in the circumstances, that the plaintiff is not entitled to any contribution from the defendant by way of general average.

But in case I am wrong in my view, it is desirable to consider the rights and liabilities of the parties under the clauses relied on by the defendant, exempting the ship owner from liability.

These are four in number, *viz*:—

1. Endorsements on the Mates Receipts and Bills of Lading, "On deck at Shipper's risk."

2. A clause in the Bill of Lading excepting *inter alia* "The act of God, the King's enemies, accidents, jettison, or barratary of the Master or Crew, bursting of Boilers, breakage of machinery, or any latent defect in machinery, boilers, hull or appertenances, whether said defect existed before the commencement of or arose or developed during the voyage, unseaworthiness of ship, provided all reasonable means have been taken to provide against such unseaworthiness."

3. A clause in the Bill of Lading to the following effect:—"Cargo on deck to be at Shipper's risk and the ship not to be liable for general average contribution in case of its being jettisoned, damage or lost overboard."

4. A clause in the Bills of Lading as follows:—

"The Company will not be accountable for gold, silver, bullion, specie, jewellery, precious stones, plated ware, or other valuables unless the declaration of the value of such goods has been made prior to shipment and a special shipping order granted for the same with which the Bill of Lading shall correspond. The Company will not be liable to pay more than Rs. 500 per freight ton or relatively for any portion of any cargo not expressly declared as aforesaid."

The law bearing on the rights and liabilities of the parties appears to me to be very clearly laid down in the case of *Burton* v. *English* (3), where the Court of Appeal, Brett, M. R., Baggally, L. J., and Bowen, L. J., reversed the decision of the Divisional Court. Several important principles appear to me to have been established by that case.

(3) (1884) 12 Q. B D. 218; 53 L J. Q. B. 133; 49 L. T. 768; 32 W. R. 655 5 Asp. M. C. 187.

There is the great authority of Lord Justice Bowen, that it is a practical canon, but not a rule of legal interpretation, that the office of a Bill of Lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and that it is not concerned with liabilities to contribution in general average. It is clear from his judgment, that the question whether an exemption clause covers the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. There is nothing to prevent a ship owner from making an exception in his own favour by which he is to be relieved from the ordinary laws of the sea, but if he wishes to do so, he ought to do so in clear words. The words "At merchant's risk" will not exempt a ship owner from liability to contribution in a case of proper jettison but both the Master of the Rolls and Lord Justice Bowen concurred in the view of the Divisional Court that the words "would exempt the shop owner from liability in the case of an improper jettison." The words, as Lord Justice Brett pointed out, would not only cover a case of improper jettison but also a loss caused by a collision or stranding owing to the negligence of the Master or Crew. In fact, any act of the Master or Crew which being done by them as servants of the ship owner, would otherwise make him liable.

Since, in the present case, the jettison was proper, and was not caused by the negligence of the Master or Crew or any unlawful act or default on their part, the words "on Deck at Shipper's risk" in the Mates Receipt and Bills of Lading would not, in my opinion, exclude the right of the plaintiff, if any, to general average contribution. They would, in my opinion, have excluded such right, had plaintiff succeeded in the alternative contention in para 6 (*d*) of his plaint, that the jettisoning was due to improper stowage.

With regard to the second clause relied on by the defendants, I am of opinion that the context shows that the word jettison means "improper jettison." The word is immediately followed by the words "or barratary of the Master or Crew." This clause, it appears to me, has nothing to do with the right of the cargo owner to contribution in general average in a case of proper jettison. I am fortified in this view by the fact that provision is expressly made in the Bill of Lading for general average, it being declared that general average, if any, is to be according to York-Antwerp Rules This clause would, however, in my opinion, cover the liability of the ship owner for Tank No. 2 leaking at high pressure on July 20th and the Ballast Pump getting out of order and the consequent damage sustained.

With regard to the third clause relied on by the defendants, I cannot do better than cite the words of Lush, J., in *Crooks* v. *Allen* (4), which are as follows :—

"The long list of excepted perils and the much longer list of exemptions and qualifications of which the clause in question is one and which seemed designed to exonerate the ship owners from all liability as carriers and to reduce them substantially to the condition of irresponsible bailees are printed in type so minute though clear, as not only not to attract attention to any of the details but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small type lines without a break sufficient to attract notice. If a ship owner wishes to introduce into his Bill of Lading so novel a clause as one exempting him from general average contribution, a clause which not only deprives the shipper of an ancient and well understood right, but which might avoid his policy and deprive him also of all recourse to the underwriter, he ought not only to make it clear in words but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care, could not fail to see it."

Plaintiff has deposed to the fact that he was unaware that the Bill of Lading contained this clause. I see no reason to doubt his statement and I am of opinion, for the reasons so ably expressed by Mr. Justice Lush, that the exemption clause did not protect the ship owner from his liability, if any, to contribute in general average.

With regard to the fourth and last exemption clause, I think it is established that plaintiff was well aware of this provision in the Bill of Lading. Plaintiff's firm were regular Ship-

(4) (1880) 49 L. J. Q. B. 201 ; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304 ; 4 Asp. M. C. 216.

pers to the Persian Gulf and had been shipping goods from 1915 or 1916. On the voyage, the subject of the suit, they shipped a valuable consignment of Specie under a special Shipping Order.

In the absence of an established custom to carry cargo on deck, I am of opinion, for the reasons already mentioned, that a cargo owner would not be entitled to general average contribution in respect of goods carried on deck without the consent of the other cargo owners.

If the doctrine of general average is applicable to such circumstances, I am of opinion that the clause limiting the liability would clearly apply to the rights and liabilities of the parties in general average, as well as to their other rights and liabilities under the contract, for no ship owner in his senses would agree to cargo of value being carried on deck, when, as Lord Bramwell points out, it would be liable to special risks, including the liability to be jettisoned first of all, and the question of the value of the cargo would also be a factor influencing the owners of the other cargo in giving or withholding thir consent. Certain contentions were raised in the written statement of the defendant, but they are not seriously pressed by Mr. Lobo, who called no evidence with regard to them. It was contended, for instance, that no claim for short delivery having been made within a month, the ship owner was absolved from liability. The claim of the plaintiffs, however, was not a claim for short delivery, but for general average or for the value of the goods jettisoned. Plaintiffs made a claim on the defendants through their agents when they became aware of the loss. The goods were shipped in Karachi and the amount was payable according to the Bills of Lading either at Bombay or at the Port of Shipment. A part of the cause of action clearly arose in Karachi and this Court, in my opinion, has jurisdiction.

For the reasons I have mentioned, I dismiss the plaintiff's suit with costs.

P. B. A. *Suit dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1755 OF 1921.

November 15th, 1923.

Present :—Mr. Justice Stuart.

MUSAMMAT FAIZ BIBI—PLAINTIFF—APPELLANT

versus

QUDRAT ULLAH—AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Marz-ul-maut, *what is —Deed executed by old man suffering from carbuncle a few days before death, validity of.*

A feeble old man of over eighty years of age who was suffering from a carbuncle, from which he eventually died, executed a deed of gift a few days before his death ;

Held, that the gift was invalid having been executed during *marz-ul-maut.*

Hasrat Bibee v. *Ghulam Jafar* 3 C. W. N. 57 relied on.

Second appeal against the decree of the 1st Additional District Judge of Aligarh, dated the 7th of June 1921.

Mr. *Iqbal Ahmed*, for the Appellant.

Mr. *S. Abu Ali*, for the Respondent.

JUDGMENT.—The remand findings have now been received. They are to the effect that the deed in suit was executed during the death illness of Sadal Khan. Much that has been said by the learned District Judge who has arrived at the remand finding would go to show that Sadal Khan was not in a condition to know what he was executing on the date when the alleged deed of gift is said to have come into being. But it is not open to the Court to arrive at a decision to the effect that he was not in a condition to know what he had executed, in view of the finding of Mr. Hunter. That finding cannot be attacked in second appeal. On the remaining point, however, as to whether the deed is of no effect under the doctrine of *Marz-ul-maut* it is for this Court to arrive at a finding The deed was executed on the 23rd August 1919. From the copy produced and from the evidence it appears that it was not signed by Sadal Khan but that it bore his thumb-impression. Sadal Khan died according to the plaintiff-appellant on the 27th August

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1919 and according to the defendants-respondents on the 2nd September 1919. There is no finding of the Courts as to when he died. He was a very old man of over 80. He was suffering from a carbuncle. According to the evidence of Mumtaz Khan, Hakim, which Mr. K. C. Banerji believes, Sadal Khan was delirious some days before his death. The point which I have to decide is whether, on the finding of Mr. Banerji, the deed is invalid under the doctrine of *Marz-ul-maut*. Sadal Khan was certainly suffering at the time from a disease which was the immediate cause of his death. The disease was such as to incapacitate him from the pursuit of his ordinary vocation or standing up for prayers. In a man of his advanced age such an illness was alwas likely to end fatally and it is impossible to conceive that such a possibility would not have been present to his mind. The presence of a carbuncle is always dangerout even in a middle-aged man of robust health and is occasionally fatal, and a carbuncle is very frequently the cause of death in the aged. Any Indian of advanced years would know this and would be apprehensive when suffering from such an ailment as to its possible consequences. Applying the principles that were laid down in *Hasrat Bibi* v. *Ghulam Jafar* (1), the disease from which Sadal Khan was suffering undoubtedly came within the category of a *Marza-ul-mout* illness. I, therefore, accept the findings of Mr. Banarji and upon these findings I allow the appeal. I restore the decision of the learned Munsif setting aside the decision of the District Judge. The defendants Qudratullah and Amanullah will pay their costs and those of the appellant in all Courts. These costs will include in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 3 C. W. N. 57.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 36 OF 1920.

December 4, 1923.

Present:—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.

ISHAK—DEFENDANT—APPELLANT

versus

FATMA AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) ss. 96, 97—Preliminary and final decrees — Appeal against preliminary decree—Final decree passed after filing of appeal—Procedure.

Where the dates of a preliminary decree and a final decree permit an appellant to challenge both decrees within the time allowed by law, it is unreasonable to allow him to avoid the provisions of the Court-Fees Act and to obtain a reversal of the final decree by a circuitous method by appealing against the preliminary decree only, when the direct method is open. In such a case the proper course is to allow the appellant a reasonable time within which to amend his appeal. [p. 980, Col. 2.]

Where, however, an appeal against the preliminary decree is filed before the final decree is made and the dates of the two decrees do not allow an appeal against both being filed, the subsequent passing of the final decree would not render the appeal against the preliminary decree nugatory, and the final decree would depend on the preliminary decree and if the latter is set aside the former would fall with it. [p. 980, Col. 2.]

Case-law discussed.

Appeal against the judgment and decree of the Additional Judicial Commissioner, dated the 12th April, 1920.

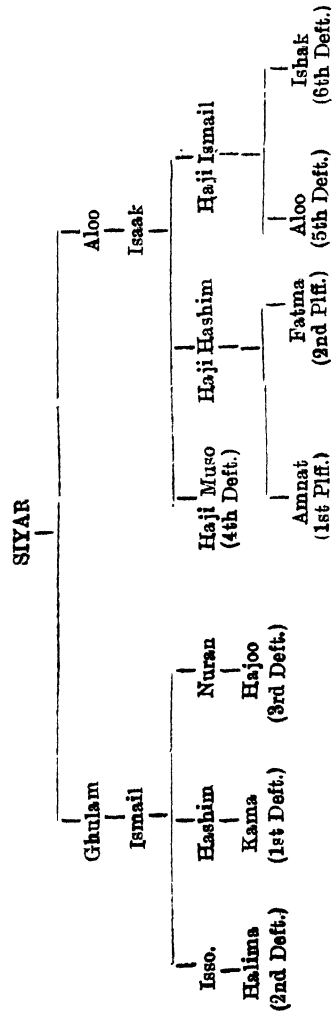
Mr. *E. Castolline*, for the Appellant.

Mr. *Tahilram Maniram*, for the Respondent No. 1.

JUDGMENT.—Two Muhammadan sisters, Amnat and Fatma, in the year 1918 filed a suit in the Court of the Judicial Commissioner of Sind against six defendants, Halima, Kama, Hajoo, Haji Muso, Aloo and Ishak, praying that their one-sixth share in certain property in the Lyari quarter, Karachi, might be partitioned and given to them.

ISHAK *v.* FATMA

For greater clearness the following geneological table is here inserted showing the names and relationship of the parties :—



The second and sixth defendants, Halima and Ishak, who is the appellant, in their written statements denied that plaintiffs were the descendants of Siyar to whom the plot originally belonged and alleged that they had been in adverse possession since the death of Isso, the father of Halima, who had been in possession before them. They further alleged that the suit was time barred. In February 1919 the first defendant, Kama, died. On the 26th March an application was made to join Hajoo, the 3rd defendant, as her heir and legal representative and a notice was ordered to issue to Hajoo. On the 7th May 1919 Halima, the second defendant, died. On the 10th May an application was made to join Haji Muso as her heir and legal representative and a notice was ordered to issue to Haji Muso. On the 31st October 1919 the first plaintiff died. On the 12th November an application was made by the second plaintiff to join herself and Haji Muso as her heirs and legal representatives and they were brought on the record without any notice issuing. On the 12th April 1920 the learned Additional Judicial Commissioner gave a preliminary decree for partition by metes and bounds of one-sixth share in the plaint property. In his judgment he mentioned that of the line of Ismail only Hajoo the third defendant was left and that he was absent, that of the line of Ishak the second plaintiff had died, Haji Muso and Ishak the fourth and sixth defendants were absent and that Aloo the fifth defendant had no objection to the claim.

Against this judgment and decree the sixth defendant has appealed on 26th July 1920. On the appeal being called on two preliminary objections were raised by the respondent, namely, that the appeal was time barred and, secondly, that no appeal having been filed against the final decree made on 9th August 1920 an appeal against the preliminary decree must also fail.

With regard to the first of these objections the record shows that copies were applied for on 30th June 1920, on the 14th July this office sent for expenses, that is to say, the applicant was informed what the cost of preparing the copies would be and required to pay them. Expenses were paid on the following day and the copies were ready on 17th July. Under section 12 of the Limitation Act, 1908, the 17 days requisite for obtaining copies must be excluded in computing the period of limitation. The appeal is, therefore, clearly within time.

With regard to the second objection, it was held by the Allahabad High Court in *Kuria Mal* v. *Bishambhar Das* (1) that, after the passing of the final decree in a suit for partition, no

(1) 5 Ind. Cas. 276 ; 32 A. 225; 7 A. L. J. 210.

appeal would lie which did not challenge the final as well as the preliminary decree. The Chief Justice and Mr. Justice Piggott there followed a decision of the Calcutta High Court in *Mackenzie* v. *Narsingh Sahai* (2), in which the principle was laid down that just as the right of appeal from interlocutory orders ceases with disposal of the suit the right of appeal from a preliminary decree ceases on the passing of a final decree. Their decision, however, was distinguished and impliedly dissented from in *Mohamad Akhtar Husain Khan* v. *Tasaduk Husain* (3), where the necessity of appealing against a final decree, merely to keep alive an appeal against a preliminary decree was questioned, and it was overruled by a Full Bench of the Allahabad High Court in *Khanaiya Lal* v. *Tirbeni Sahai* (4) which followed *Mohamad Akhtar Husain Khan* v. *Tasaduk Husain* (3) and a ruling of the Madras High Court in *Lakshmi* v. *Maru Devi* (5) and affirmed the principle that, when an appeal has once been filed and is pending against the preliminary decree in a suit for partition the passing of a final decree does not render the appeal nugatory. The final decree depends on the preliminary decree and if, as the result of an appeal, the latter is set aside the former must fall with it. See also *Ram Nath Singh* v. *Basanta Narain Sing* (6) and *Atul Chandra Singh* v. *Kunja Behari Singh* (7), *Lakshmi* v. *Maru Devi* (5) was followed by a later decision of the Madras High Court in *Ramuvien* v. *Veerappadayan* (8), in which it was held that it is competent to a party to prefer an appeal against the preliminary decree in a redemption suit though, before the appeal is presented, the final decree has been passed. On the other hand, the Calcutta High Court in *Kulada Prasad Cowdhury* v. *Ramananda Pattanaik* (9), following *Mackenzie* v. *Narsingh Sahai* (2), held that where after the passing of the final decree a party appealed from the preliminary decree but did not also appeal from the final decree the appeal from the preliminary decree was incompetent. *Mackenzie* v. *Narsingh Sahai* (2), was also followed in *Abdul Jalil* v. *Amar Chand Paul* (10) and by Mr. Justice Broadway of the Lahore High Court in *Ganda Ram* v. *Sunder Lal* (11), where it was held that after a final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree without challenging the final decree cannot be entertained.

We agree with the view expressed by the Bombay High Court in *Dattatraya Ramchandra Savale* v. *Ajmuddin* (12), and *Balwant Singh Ramchandra* v. *Sakharam Manchiaram* (13) that, where there has been a preliminary decree and a final decree and the dates permitted the appellants to challenge both the preliminary decree and the final decree within the time allowed by law it is unreasonable to allow the appellant to avoid the provisions of the Court-Fees Act and obtain a reversal of the final decree by a circuitous method when the direct method was open, and that the proper course is to allow the appellant a reasonble time within which to amend his appeal.

In the present case the appeal against the preliminary decree was filed before the final decree was made and the dates did not allow of an appeal against both the preliminary decree and the final decree. We agree with the view expressed in *Kanhaiya Lal* v. *Tirbeni Sahai* (4), *Ram Nath Singh* v. *Basanta Narain Singh* (6) *Atul Chandra Singh* v. *Kunja Behari Singh* (7), that the subsequent passing of the final decree did not render the appeal against the preliminary decree nugatory but that the final decree depended on the preliminary decree and if the latter was set aside the former would fall with it.

In the circumstances, it is necessary to consider the appeal on the meits. In this connection, Mr. Castallino contends, and I think correctly, that the heir and legal representative of Kama was not Hajoo, the third defendant,

(2) 1 Ind. Cas. 419; 36 C. 762; 10 C. L. J. 118.
(3) 16 Ind. Cas. 157; 34 A. 493; 10 A. L. J. 19.
(4) 24 Ind. Cas. 827; 36 A. 532; 12 A. L. J. 876.
(5) 12 Ind. Cas. 604; 37 M. 29; 21 M. L. J. 1068; 10 M. L. T. 487.
(6) 19 Ind. Cas. 630; 17 C. W. N. 868; 18 C. L. J. 209.
(7) 80 Ind Cas. 321; 22 C. L. J. 90.
(8) 14 Ind. Cas. 394; 37 M. 455; 11 M. L. T. 69; 22 M. L. J. 217; (1912) M. W. N. 117 and 580.
(9) 61 Ind. Cas. 923; 48 C. 1036; 33 C. L. J. 414; 25 C. W. N. 776.
(10) 21 Ind. Cas. 510; 18 C. L. J. 223.
(11) 67 Ind. Cas. 278; 2 L. L. J. 673.
(12) 33 Ind Cas. 146 18 Bom. L. R. 76.
(13) 33 Ind. Cas. 137; 18 Bom. L. R. 80 Note.

but Halima, the second defendant, since Halima was the daughter of Kama's paternal uncle Isso, while Hajoo was the daughter of Kama's paternal aunt Nuran. He further contends, and I think rightly, that the heir and legal representative of Halima was not Haji Muso the fourth defendant but Hajoo the third defendant. Since Hajoo was the son of Halima's paternal aunt while Halima was the second cousin once removed of Haji Muso. Similarly, we think that Mr. Castallino correctly contends that the heir and legal representative of the deceased plaintiff Amnat was the second plaintiff Fatma, her sister, and not Fatma and Haji Muso, since Fatma was entitled as a sharer and as a residuary to the whole of Amnat's estate. With regard to the irregularity in joining Hajoo instead of Halima as the heir and legal representative of Kama and Haji Muso as the heir and legal representatives of Halima instead of Hajoo, the record shows that Halima and Hajoo were already on the record in their personal capacities Hajoo was evidently not contesting the plaintiffs' claim for he absented himself at the hearing. Ishak, the appellant, was not the heir and he was not affected. The irregularity does not appear to us to have affected the merits of the case and it was, in our opinion, cured by section 99 of the Civil Procedure Code. It is next contended on behalf of the appellant that since notices were not issued to himself and several of the other parties when the heirs and legal representatives of Kama and Halima purported to be joined and since no notices were issued when the heirs and legal representatives of the first plaintiff were joined the subsequent proceedings were void. There is no provision, however, in the Code of Civil Procedure making it obligatory in the Court to issue a notice. This appears to us a matter for the Court's discretion. Lastly, it was contended that the appellant was prevented from attendance at the hearing owing to the date of hearing being altered in consequence of an interlocutory application of which no notice was given to the appellant. Had this been a *bona fide* contention we are of opinion that the appellant would have taken steps to apply, under O. IX, r. 13, for the setting aside of the *ex parte* decree, but no such application was made. The reason alleged for the omission to apply under O. IX, r. 13 is that the appellant became aware of the *ex parte* decree after the expiry of the time for applying to set it aside but there appears to us no force in this argument since the application could, under the provisions of section 5 of the Indian Limitation Act, have been admitted after the period of limitation had expired on sufficient cause being shown. It was nowhere specifically stated that the appellant attended on the adjourned date, the suit was not called out and that appellant was unable to ascertain the date of hearing and, for the purpose of the appeal, steps were not even taken to get the orders relating to the dates of hearing typed and embodied in the Paper-Book.

Appellants brother, Aloo, attended at the hearing though he was not served with any notice. We are of opinion that it is not established that appellants absence at the hearing was due to his having been misled or to his having been prevented by want of notice from ascertaining the date. Taking all the circumstances into consideration, we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 27 OF 1921.

November 27, 1923.

Present :—Mr. Prideaux, A. J. C., and Kinkhede, A. J. C.

JUMILAL AND ANOTHER - APPELLANTS

versus

Mt. HALKI—RESPONDENT.

Admission, effect of—Status, question of—Judgments, inter partes, admissibility of—Specific Relief

JUMILAL v. HALKI

Act (I of 1877) s. 42—Declaration, suit for—Discretion of Court—Relief, when to be refused

An admission operates merely to shift the *onus* and raises only a rebutable presumption. [p. 986, Col. 2.]

Where the question in issue is the status of one of the parties to the suit, judgments and orders in previous suits and proceedings between the parties in which the question of status was in issue are admissible in evidence to prove the fact, nature and result of the previous litigation, and may raise a presumption in favour of one of the parties so as to shift the burden of proof. [p. 985, Col. 2.]

Sakharam v. *Shriram*, 10 Ind. Cas. 700 ; N. L. R. 23 ; *Lachman Gobind* v. *Amrit Gopal*, 24 Bom. 591 ; 2 Bom. L.R. 386; 12 Ind. Dec. (N. S.) 924; *Neemat Ali* v *Gooroo Doss*, 22 W. R. 365, relied on.

The relief of declaration is more or less a discretionary relief, and the Courts are not ordinarily prepared to grant such relief where it would be only by way of anticipation or where the main heads of the plaintiff's complaint failed. [p. 987, Col. 2.]

Janaki Ammal v. *Narayanaswamy Aiyar*, 37 Ind. Cas. 161 ; 39 Mad. 631, 20 M. L. T. 168 ; 31 M. L. J. 225 ; 14. A. L. J. 997 ; (1916) 2 M. W. N. 188 ; 20 C. W. N. 1323 ; 18 Bom. L. R. 856 ; 24 C. L. J. 309 ; 4 L. W. 530 ; 43 I. A. 207 (P. C.), followed.

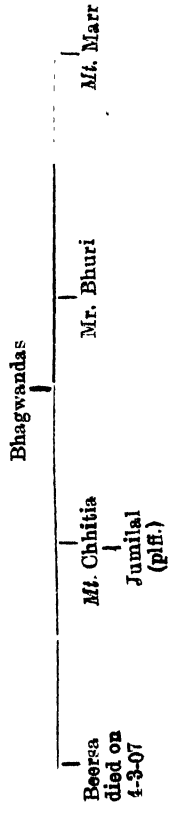
For instance, where in a suit for a declaration of plaintiff's character as a reversioner and an injunction to restrain waste by the defendant, who is the widow of the last male holder, the plaintiff fails to make out a case of waste, the declaratory relief will not be granted. [p. 987, Col. 1.]

First Appeal No. 27 of 1921 decided by Mr. F. W. A. Prideaux and Rao Bahadur M. B. Kinkhede, Additional Judical Commissioners, Central Provinces, on the 23rd November 1923.

Dr. *H. S. Gour*, for the Appellants.

Messrs. *M. Gupta* and *T. S. Sheorey*, for the Respondents.

JUDGMENT.—The following genealogical tree will explain the relationship of plaintiff No. 1 with one Beersa, the last male-holder of the property in suit, on the basis of which he claims the property as Beersa's sister's son.



Beersa left at his death a large estate consisting of both moveable and immoveable property including seven *malguzari* villages. That property is in the possession of *Mt.* Halki, the defendant, from the date of Beersa's death which took place on 4th March 1907. The plaintiff says *Mt.* Halki is not the lawfully wedded wife of Beersa but was a mistress in his keeping and as such was not entitled to the property. Plaintiff No. 1, therefore, claims that he became owner of that property by inheritance to Beersa, the defendant being a trespasser. This suit was insti-

tuted two months and 16 days before the expiry of 12 years from 4th March 1907 when the cause of action arose. The plaintiff No. 1 having no funds of his own has, by means of a registered sale-deed dated 10th October 1918, Exhibit P-1, sold portion of the property which is the subject of the dispute to plaintiffs Nos. 2 and 3 in consideration of their undertaking to finance the present litigation. The defendant *Mt.* Halki being a trespasser, plaintiffs sue to eject her, and in the alternative, pray that if it be held that she was a married wife of Beersa, plaintiff No. 1's rights as next reversioner may be declared and *Mt.* Halki restrained from committing waste in respect of the property in her possession.

Mt. Halki's defence is that she was married wife to Beersa in *Kare* form of marriage and as such succeeded to his estate on his death. She also challenged the plaintiff No. 1's relationship with Beersa and denied that plaintiff No. 1's mother *Mt.* Chitia was born of Bhagwandas. It was alleged that she was born of her mother by another husband before her mother was married to Bhagwandas and that as she lived with Bhagwandas after her mother's marriage with him she was looked upon as sister of Beersa and, in that sense, Beersa was maternal uncle of plaintiff No. 1. These two points formed the subject of issues Nos. 3 and 4:—

"3. Is the plaintiff Jumilal the son of Beersa's sister?

"4. Is *Mt.* Halki, defendant, the widow of Beersa having been married to him by *kari* form?"

The lower Court, in a long and elaborate judgment, has come to a finding on issue No. 4 that *Mt.* Halki was lawfully married to and is the widow of Beersa. In view of this finding the Court below thought it unnecessary to record any finding on issue No. 3 and has dismissed the suit of all the three plaintiffs with costs. Against this dismissal plaintiffs Nos. 1 and 2 alone appealed. Plaintiff No. 3, Beharilal, was not joined even as co-respondent when the appeal was filed on 2nd April 1921. Beharilal presented an application on 6th April 1923 to be joined as an appellant on the ground that he is interested in the result of the appeal. This application was rejected on the ground that any appeal by him or at his instance on 6th April 1923 would have been barred by limitation. During the pendency of this appeal the appellant No. 2, Manoolal, died on 28th January 1923 and his widow Jawahar Dulaiya *alias* Saraswati was, on her application, brought on record as the legal representative of the deceased appellant.

The pleadings gave rise to some other issues also. The question of limitation as regards recovery of moveable property has been decided against the plaintiffs. Similarly, the question of the alleged waste by Beersa has also been decided against the plaintiffs. The question of limitation for recovery of moveables is not raised, the one about the waste though taken up as a ground is not pressed. Grounds Nos. 1 and 6 deal with the question of Halki's status and ground No. 8 with the omission to decide issue No. 3. The only two points, therefore, pressed before us are (1) that *Mt.* Halki has failed to prove that she was the married wife of Beersa, and (2) that issue No. 3 which affected the plaintiff's right of suit should not have been left undecided but that the decision on it should be in plaintiff's favour. This being primarily a suit in ejectment it would have been proper for the lower Court, first, to take up the question of the plaintiffs' right to sue and then, if necessary, decide the question of defendant's status. For the purpose of this appeal we think we can, for the sake of argument, safely assume that plaintiff No. 1 was the sister's son of Beersa and proceed to examine the correctness of the lower Court's finding on issue No. 4. We are fully alive to the circumstance that Mr. Ally Raza who decided the case was not the Judge who heard the evidence and he was not, therefore, in a better position than ourselves in judging of the oral testimony adduced in the case.

The appellants complain that the lower Court has wrongly drawn certain inferences adverse to the plaintiffs from the fact of the delay in filing this suit. The interval between the date of death of Beersa and the filing of the suit is 11 years, 9 months and 14 days and another 2 months and 16 days would have put the claim beyond time. They also complain that plaintiff No. 1's conduct after Beersa's death in connection with certain previous litigation between defendant Halki and himself and certain admissions, have been improperly construed and erroneous inferences

have been drawn therefrom and, further, that certain facts which had an important bearing on the status of *Mt.* Halki have been ignored by the Court below with the result that the decision has gone wrong on the point of defendant's status. The question of delay is so mixed up with the question of plaintiff's conduct that we think that we should take up the two questions together. We shall at the outset set out certain undeniable facts which are patent on the face of the record.

On plaintiff's own admission the defendant was a relation of Beersa's former wife and was looking after him and his household and actually lived with him for over two years prior to his death. Further, she was successful in securing mutation of names in her own favour in respect of the several *malguzari* villages in place of the deceased whom she called her husband. These mutation proceedings were started upon a petition dated 16th April 1907 by *Mt.* Halki describing herself as the widow of the deceased Beersa, (Exhibit P-6). This petition was made through Mr. Jeewan Chander Mukerjee, Advocate (P. W. 1). The plaintiff No. 1 had in those proceedings denied her status as the widow of Beersa and contested her right to have the mutation in her own name; but he was unsuccessful as the report dated 20th December 1907 (Exhibit D-5) and the order dated 7th January 1908 Exhibit D-6) show. *Mt.* Halki collected the rents and managed the villages and paid revenue into the Government Treasury and also established by evidence the fact of her marriage in *kari* form with Beersa, and succeeded in defeating the objections of the present plaintiff No. 1 against her name being mutated in the Revenue Records. Early in 1908 she made an application, dated 20th February 1908, (Exhibit P-8) for succession certificate being granted to her for debts and securities amounting to Rs. 10,527 and succeeded, in spite of plaintiff's opposition, in getting it. In assertion of her own right to present possession as widow of Beersa she remained in peaceful enjoyment of the whole of the property including the moveables belonging to the deceased and appropriated the whole of the income derived therefrom to herself practically unmolested by any of the rival claimants all these 11 years. We cannot ignore these things which clearly prove long silence and inaction on the part of the plaintiff No. 1. This is not all. *Mt.* Halki, in fact, sued plaintiff No. 1 for arrears of rent (Civil Suit No, 384 of 1908, Exhibit D-4) and for possession of a portion of a house (Civil Suit No. 67 of 1915, Exhibit D 8) in her capacity of the widow and heiress of the late Beersa and obtained decrees in both the suits. Further, she got from him some property in consideration of her giving him a discharge from liability for certain arrears of rent in 1910 by means of a registered sale-deed dated 12th December 1910 (Exhibit D-9), wherein he admittedly described her as the widow of Beersa.

It will be seen that in the Revenue as also in the Civil proceedings in which plaintiff No. 1 and defendant figured as parties the latter was always successful as against the former. It passes one's comprehension to find that a person like plaintiff No. 1 who denied defendant's rights to the property of Beersa and claimed for himself the position of the proprietor and landlord of the villages should meekly submit to the humble position of a mere tenant in the villages, and seek a settlement of his liabilities as such tenant with a person who, to his knowledge, had absolutely no right thereto. Again, why should he submit to a decree for possession of a house being passed against him and in favour of Halki in 1915 if he was the owner thereof. Between the years 1907 and 1912 *Mt.* Halki had employed one agent who had misappropriated or, at any rate, had not duly accounted to her for the property he used to look after in his capacity as her agent. This was really an inroad on his title and on the right of enjoyment of the property which he claimed as his own. why does the plaintiff No. 1 sleep over his rights, and stand by and suffer heavy losses in this manner, if he regarded himself as the owner of the whole of the inheritance and *Mt.* Halki was nobody? It was the defendant who, on 24th September 1912, started an expensive litigation against the said agent Karanju. From the nature of the claim, as we gather from Exhibits P-4 and P-9, it appears that she had entrusted her agent with properties worth Rs. 33,250 including ornaments, cash and other moveables. She sought to recover back all her property and asked for an account of

the 6 years village profits that came to his hand for the period of agency which came into existence on 22nd April 1907 and she succeeded in obtaining a decree on 3rd March 1915 for Rs. 11,477-10-0 which was confirmed in First Appeal No. 39 of 1915 on 30th October 1915 by this Court (Exhibit P-3). Every moment he was losing property, as also the profits accuring therefrom, and the moveables were practically vanishing. The *malguzari* villages were apparently very valuable. The assessment of land revenue paid out of collections during the agent's 6 years management itself came to Rs. 8,655-11-5+ Rs. 3,947-12-0, total Rs. 12,603-7-5, *i. e.*, a little over Rs. 2,000, a year as Exhibit D-1 which is a certified copy of the judgment in First Appeal No. 39 of 1915 of this Court would show. Batten and Stanyon, A. J. Cs., observed towards the end of their judgment as follows: "the learned Judge has fixed Rs. 2,950 in round numbers as the profits for the six years. Having regard to the revenue paid by the plaintiff during these years, namely, Rs. 12,605-7-5, it may safely be inferred that this finding involves a loss to the plaintiff and a dishonest gain to the defendant (agent) of not less than Rs. 10,000 and that he has got off extremely lightly. It is preposterious to suppose that seven village shares during years of average agricultural conditions in respect of which the revenue paid was over Rs. 2,000 per annum, only yielded a net profit of less than Rs. 500 per annum." This by itself shows that the plaintiff No. 1, unless he was convinced as to the untruth of his own allegations, would not have sat quiet and allowed himself to be robbed so largely by the defendant and her unscrupulous agent. The excuse advanced for explaining away the irresistible adverse inference deducible from his inaction, is that the plaintiff could not command sufficient funds for such a big and expensive litigation. But plaintiff No. 1 dare not go into the box to give it. It is an explanation given at the bar before us. He dragged the defendant into the box but was himself afraid of entering it. This clearly shows the weakness of the plaintiff's case and he thought it safer to be out of the box than get his own case damned by his own testimony. We are not prepared to accept the explanation offered at the bar under such circumstances, and we think the lower Court was perfectly justified in drawing adverse inferences against the plaintiff from these and other undeniable facts.

It is ingenuously argued that the judgments and orders in the mutation case, the succession certificate case, the rent suits, as also in the suit for possession of a portion of a house, are not admissible in evidence. We fail to see why they should be held inadmissible to prove the fact and nature of the litigation and its result. In our opinon, they all show the recognition of defendant's status as Beersa's widow; see *Sakharam* v. *Shriram* (1) and, as pointed out in *Lakshman* v. *Amrit* (2) and *Neamut Ali* v. *Gooroo Doss* (3), they are of high evidentiary value, and in any case constitute proof sufficient to shift the burden. If we look to the stand which the present plaintiff No. 1 had taken in the mutation proceedings we are surprised to see to what degree of falsity that man had gone to secure his own end. We have it from the report, Exhbit D-5, dated 20th December 1907, in the mutation proceedings that the present plaintiff had then laid claim to a part of the property under an oral gift to himself from Beersa and another portion for his daughter, and to a third portion as a *Wahiwatdar* of a temple, and his father (Ghashete) had the effrontery to depose that Beersa had taken Jumilal away with him 12 years before his deposition and kept him with himself with a view to make him the owner of the estate presumably by adopting him. The more we think of these facts the more do we get convinced of the falsity of the plaintiff's insinuation that defendant was not the lawfully wedded wife of Beersa. All this delay and long silence and inaction clearly amount to acquiescence on the part of plaintiff No. 1 in the right of *Mt.* Halki to lawfully enjoy the whole of Beersa's estate as his widow.

The oral evidence about the celebration of marriage of Beersa with the defendant is bound to be discrepant after this long length of time, and, standing by itself, no one would accept it and we think the Subordinate Judge was perfectly right in not attaching much importance to it. But, judged in the light of the documentary evidence and of the undeniable

(1) 10 Ind. Cas. 700 ; 7 N. L. R. 28.
(2) 24 B 5 ; 91 ; at. p. 599 2 Bom. L. R. 886 ; 12 Ind. Dec. (N. S.) 924.
(3) 22 W. R. 365.

facts, we think the oral testimony gains in weight and clearly supports the defendant's status, as Beersa's lawfully wedded wife during his lifetime, and, further, as his widow legally entitled, after his death, to succeed to the whole of his estate. The oral evidence adduced by the defendant in support of her status as Beersa's wife is both direct as well as circumstantial. It consists partly of the testimony of persons who have actually attended the marriage and the feast given by Beersa in connection with the marriage and partly of the recognition and the treatment the married couple received in their society after the alliance and the reputation *Mt.* Halki enjoyed as the wife of Beersa. The marriage was not got through secretly but the evidence shows it was performed with great pomp and publicity befitting Beersa's position. It is argued that Beersa's own leprotic condition of health, as also his old age, were factors which favoured the plaintiff's contention that a young woman like *Mt.* Halki would very likely be willing to live as a mistress rather than as a wife of Beersa. We rather think that these conditions would themselves be a very good temptation to an ambitious or adventurous woman like the defendant to get herself married to an old and helpless man only to smoothly pave her way to the whole of the inheritance to which she as a kept mistress could lay no pretensions after the man's death. We are not, however, prepared to hold that the plaintiff has very satisfactorily established that, when Beersa performed his marriage by *kari* form with the defendant, he suffered from leprosy of a virulent type as alleged. There is ample evidence to the contrary and we need only refer to the evidence of D. W. 1, D. W. 2, D W. 3, D. W. 4, D. W. 9 and D. W. 17. That Beersa and Halki lived as husband and wife and they were both in caste and were not excluded from their social and other functions of the community is amply borne out by the evidence of defendant's witnesses Nos. 1, 2, 3 and 9.

It is next argued that the Court below has not taken into consideration the evidence on record which tends to prove that Halki was of bad character and Beersa, who was a respectable man, would not give shelter to a woman who was kept by a Muhammadan. Our attention is drawn to the evidence of P. W. 4, P. W. 5 and P. W. 8 in this connection, and we are asked to accept it as pointing to the greater likelihood of her having in all probability preferred to live with Beersa as his mistress rather than as his lawfully wedded wife. We have read through the evidence carefully and we have no hesitation in at once discarding it as totally false and unreliable. The witnesses are men of no status practically, and we do not attach any value to their concocted evidence. Added to this, we have the declarations and conduct of plaintiff No. 1 himself all these 11 or 12 years which very clearly establish that he regarded and dealt with her as the lawfully wedded wife of Beersa Patel. The description of defendant Halki as the widow (*Bewa*) of Beersa by plaintiff No. 1 himself in the saledeed dated, 12th December 1910, Exhibit D-9, which he executed in favour of defendant contains a clear admission on plaintiff's part of her status as the lawfully wedded wife of Beersa : see *Sakharam* v. *Shriram* (1). It is contended that it was a loose expression and no presumption can, therefore, be based thereon. We cannot belittle the importance of such an admission particularly when we remember that the plaintiff No. 1 had repudiated that status of the defendant on previous occasions and he would, therefore, be the last person to make such an admission if he had a mind to establish his own title to the property of Beersa as against the rival claim of the defendant. No doubt, an admission operates merely to shift the onus and raises only a rebuttable presumption. We consider that the evidence adduced by the plaintiff even taken as a whole does not rebut the presumption. Most of the evidence is of a partisan character and no weight can, therefore, be attached to it. After taking into consideration the whole of the evidence both oral and documentary and the probabilities of the case we hold, concurrently with the lower Court, that the defendant's status as the lawfully wedded wife of late Beersa is amply established and the plaintiffs have failed to establish the contrary.

The necessary result of this finding is that, in the absence of any issue of Beersa, the defendant as his widow was legally held entitled to succeed to his estate and that the plaintiffs' primary claim for recovery of possession of the property, therefore, fails.

MUNNA *v.* SUKLAL

The alternative claim for a declaration that plaintiff No. 1 is the sister's son of Beersa and as such his next reversionary heir after the death of *Mt.* Halki needs no adjudication in view of the decision of the first Court on the question of waste alleged to have been committed by the defendant not having been challenged before us. In *Janaki Ammal* v. *Narayanasami Ayer* (4) it was urged before their Lordships of the Privy Council that the plaintiff was entitled to a declaration that he was the next presumptive reversioner beause his claim to be such had been disputed. It was held that the Courts in India having held that the case of waste was not established and the plaintiff having thus failed to make good the main heads of his complaint no such declaration ought to be granted to him. The relief of declaration is more or less a discretionary relief, and the Courts are not ordinarily prepared to grant such reliefs where it would be only by way of anticipation or where the main heads of the plaintiff's complaints have failed. For these reasons we do not think it necessary to give any finding on the point covered by issue No. 3, or to give any declaration as prayed for. If any finding be deemed necessary we are prepared to hold on the oral evidence coupled with the defendant's own admissions contained in the pleadings in the previous Civil and Revenue litigation that plaintiff No. 1 is the sister's son of Beersa and as such is a reversionary heir to his estate. We may simply refer to the admissions contained in clause (*c*) of the verified petition dated 20th February 1908 exhibit P-8 in the succession ceritificate case, and also to the admission made on 7th July 1915 in the suit brought by her for possession of the house (Exhibit P-2) in support of our view.

The result is that we confirm the dismissal of the plaintiffs' claim and dismiss the appeal with costs to be borne and paid by the appellants in both the Courts.

Z. K. *Appeal dismissed.*

(4) 37 Ind. Cas. 161; 39 M. 684; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2. M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1923.

March 8, 1924.

Present:—Mr. Hallifax, A.J.C.

Mt. MUNNA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUKLAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata between co-defendants, requisites of—Limitation Act (IX of 1908), Sch. I, Arts. 14, 118, 119, applicability of—Suit for possession—Adoption—Mutation—Limitation—Ejectment—Improvements made by person without title—Compensation, whether can be awarded.

Where it is absolutely essential for the determination of a suit to decide a question *inter se* between co-defendants and the question is decided after contest between the co-defendants it operates as *res judicata* between the contending co-defendants. [p. 989, col. 2.]

Articles 118 and 119 of Schedule I to the Limitation Act apply only to a suit for declaratory relief pure and simple, and have no application to a suit for possession even though the defendant is in possession under an adoption or the plaintiff's title is based upon an adoption. [p. 989, col. 2.]

Tribhuvan Bahadur Singh v. *Rameshar Bakhsh Singh*, 28 A. 727 ; 3 A L. J. 695 ; 10 C. W. N. 1065 ; 8 Bom. L. R. 722 ; 16 M. L. J. 440 ; 4 C. L. J. 405 ; 1 M. L. T. 265 , 9 O. C. 377 ; 33 I. A. 156 (P. C.) , *Muhammad Umar Khan* v. *Muhammad Niazud-Din Khan*, 13 Ind. Cas. 344 ; 39 C. 418 ; 6 P. W. R. 1912 , (1912) M. W. N. 77 ; 11 M. L. T. 76 , 9 A L. J. 137 ; 15 C. L. J. 172 ; 12 P. L. R. 1912 ; 22 M. L. J. 240 , 14 Bom. L. R. 182 ; 16 C. W. N. 158 ; 126 P. R. 1912; 39 I. A 19 (P. C.), followed.

Article 14 of Schedule I to the Limitation Act applies to acts and orders done in the exercise of powers legally exercisable by the Executive, and can only be applied where the order is one which needs to be set aside. If in fact there is no provision of law for setting it aside, the Article cannot apply. [p. 990, col. 1.]

Though an order in a mutation case directing mutation in the name of a particular person cannot be directly impugned in a civil suit, yet another person can show by a civil suit that he is the real owner of the property mutated, and, having established his claim in that suit can then go to the Revenue authorities and ask that mutation be made in his name. Article 14 of Schedule I to the Limitation Act is not applicable to such a suit. [p. 990, col. 1.]

Where a person in possession of land knowing that he has no title to the land plants trees on the

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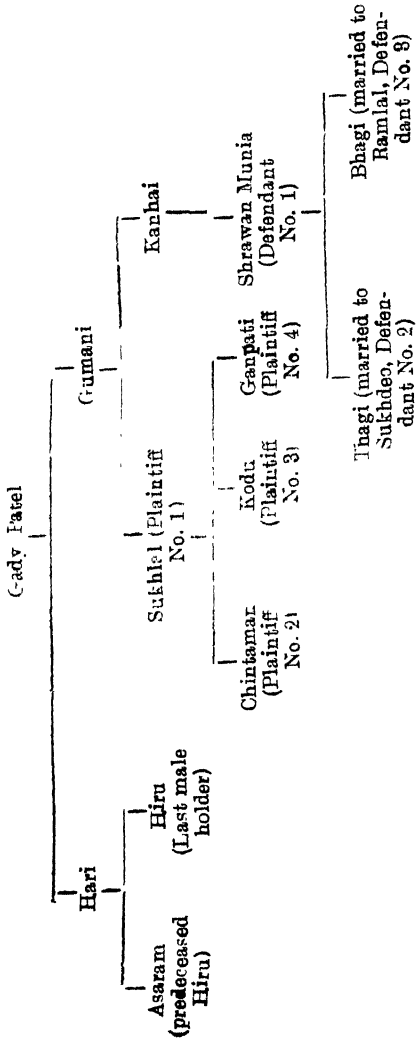
land or makes other improvements he cannot claim compensation for the improvements on ejectment. [p. 990, col. 2.]

Appeal against the decree of the 1st Subordinate Judge, Nagpur, in Civil Suit No. 48 of 1921, dated 3rd November 1922.

Messrs. *P. C. Dutt Chowdhary* and *R. B. Gadgil*, for the Appellants.

Messrs. *M. Gupta* and *M. K. Padhye*, for the Respondent.

JUDGMENT.—The following genealogical tree helps to explain the present suit :—



Hiru died on 1st May 1911. In Civil Suit No. 44 of 1917, a suit brought by mortgagees, the plaintiffs and the defendant No. 1's husband Shrawan were on the same side as defendants, and in that case the alleged relationship of the plaintiff with Hiru was found established and Shrawan's allegation that he was the adopted son of Asaram was held not proved. The present case is brought by plaintiffs for possession of a *malik makbuza* field No. 31 of *mouza* Walni, tahsil Saoner, as the heir of Hiru.

The defendants denied the claim. They questioned the correctness of the genealogical tree filed by the plaintiff; they denied the right of plaintiffs Nos. 2 to 4 to sue; and denied the right of the plaintiffs to inherit the field and stated that Shrawan inherited it as the adopted son of Asaram. They further denied that the decision in the former suit on the question of adoption and relationship of the plaintiffs is *res judicata*, and contended that Gumai shown as the father of Sukhlal in the tree was not the son of Gady Patel but was the son of one Bhoja, the former husband of Gady Patel's *pat*-wife, and that Hari and Gumani were half-brothers through their mother and not through their father. It was further contended that the plaintiffs were estopped from denying the title of Shrawan, that the defendants improved the field at their own cost and that possession could not be given unless they reimbursed the same: limitation was also pleaded and they contended that the plaintiffs' suit to set aside the adoption was not in time. It was also stated that, shortly after Hiru's death, there was an arrangement between Sukhlal, plaintiff No. 1, and Shrawan, by which Shrawan was allowed to retain the field in suit along with other property, and that plaintiffs were now estopped from laying any claim to the estate in dispute.

Plaintiffs in reply denied the allegations and the lower Court's findings may be summarised as follows. The question as regards Shrawan's alleged adoption and plaintiffs' relationship to Hiru was found *res judicata* on account of the decision in suit No. 44 of 1917, a decision affirmed in appeal. It was held that plaintiff No. 1 did depose in Civil Suit No. 53 of 1914 that Shrawan was the adopted son of Asaram and that he did not do so in the mutation

case. Mutation was not effected on the basis of the statement of plaintiff No. 1. The two wells in the field in dispute dated from the time of Hiru. The garden in dispute is now in possession of a Receiver appointed by the Court, and the number of trees as counted when it was placed in his possession, including the orange trees is found to be 340, 300 being orange trees and 40 of other kinds. Shrawan made no improvements and the existing plants, wells and dikes were at the time of Hiru. In any case, the expenditure incurred by the defendants in the shape of manure, bullocks, watering, digging, clearing the ground and raising its level has been paid off by the fruit of the trees in the garden for the years preceding the three years for which plaintiffs may claim profits. Dealing with the question of estoppel, the Judge of the lower Court writes :—

> " Any representation by the plaintiffs by their conduct or acquiescence to the effect that Shrawan was the adopted son could not have caused any belief of the fact in the mind of the latter as he knew very well if he was the adopted son or not. But what action was intended? What action of Shrawan was the result or was caused by the representation? What is there to show that he believed the representation to be true and acted upon it? I do not see how there is any estoppel. I thus hold that the plaintiffs are not estopped nor barred, . . . "

As regards the question of limitation the Judge thinks that the finding that Shrawan is not the adopted son of Asaram is *res judicata* between the parties and the adoption cannot be pleaded for the purposes of limitation. The question of having the adoption set aside does not arise. In the present case the claim for possession is governed by 12 years. Hiru died within 12 years of the suit, and the claim is thus within time. As to the family arrangement, the Judge held that the evidence is insufficient to support the plea raised, and that the dispute settled by an arrangement come to related to the five fields of *Mst.* Thama, widow of Kashinath, son of Ganesh, and another brother of Hiru. Plaintiffs were given a decree and against that decree the present appeal has been filed.

The first question argued is, whether the lower Court's finding as to the question of adoption and plaintiffs' relationship to Hiru being *res judicata* is correct. It only requires a perusal of the judgment in Civil Suit No. 44 of 1917 and of the judgment of this Court in appeal to see that both questions are *res judicata*. It was absolutely essential for the determination of that suit to decide these questions *inter se* between the defendants. They had to be decided and they were decided, and, as regards the present plaintiffs and the representatives of Shrawan, are binding. I have no doubt that the lower Court's decision on this question is correct.

The learned Pleader for the appellants divides his remaining arguments into four parts : (*a*) limitation, (*b*) family arrangement, (*c*) estoppel, and (*d*) the costs of improvements. As regards the limitation, there seems to me absolutely no force in the arguments advanced. It is contended that under Article 118 of the Limitation Act six years is the time within which to obtain a declaration that an alleged adoption is invalid or never, in fact, took place, and that plaintiffs having failed within that period to obtain this declaration are now debarred from contesting the alleged adoption. But it seems that the High Courts in India, except that of Bombay, hold that a suit for possession like the present is not subject to the limitation prescribed by Articles 118 and 119 even though the defendant is in possession under an adoption or the plaintiffs' title is based upon an adoption. The Articles apply only to a suit for declaratory relief pure and simple and not to a suit for possession. The rulings of their Lordships of the Privy Council in *Tribhuwan Bhadur Singh* v. *Rameshar Bakhsh Singh* (1) and *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (2) affirm the principle above referred to.

It is further contended that Article 14 of the Limitation Act precludes the present suit, but that Article applies to acts or orders done in the

(1) 28 A. 727 ; 3 A. L. J. 695 ; 10 C. W. N. 1065 ; 8 Bom. L. R. 722 ; 16 M. L. J. 440 ; 4 C. L. J. 405 ; 1 M. L. T. 265 , 9 O. C. 377 ; 33 I .A. 156 (P.C.).

(2) 13 Ind. Cas. 314 ; 30 C. 418 ; 6 P. W. R. 1912 , (1912) M. W. N. 77 ; 11 M. L. T. 76 ; 9 A. L. J. 137 ; 15 C. L. J. 172 ; 12 P. L. R. 1912 ; 22 M. L. J. 240 ; 14 Bom. L. R. 182 ; 16 C. W. N. 458 ; 126 P. R. 1912 ; 39 I. A. 19 (P.C.).

exercise of powers legally exercisable by the Executive, and before it can be applied the order must be one which needs to be set aside. If, in fact, there is no provision of law for setting it aside, Article 14 cannot apply. It is clear that though an order in a mutation case directing mutation in the name of a particular person cannot be directly impugned in a civil suit, yet another person can show by a civil suit that he is the real owner of the property mutated, and having established his claim in that suit can then go to the Revenue authorities and ask that mutation be made in his name. The argument based on Article 14 of the Limitation Act is futile.

I now come to the question of family arrangement. The Judge of the lower Court has discussed this in paragraph 15 of his judgment. The evidence for the present appellants has been very carefully scrutinized. D. W. 2 Mahadeo says that in his presence Thama made no arrangement in regard to her lands and that no *panchayat* was held in regard to them. The witness had given evidence for Shrawan in three previous cases. D. W. 3's evidence is apparently hearsay. He states that Thama gave one field called Kharda to Shrawan. D. W. 4 speaks of a *panchayat* at which it was settled that the first plaintiff No. 1 should take the estate of Thama and that Shrawan should take the estate of Asaram. He also speaks to there being a *panchayat*, therefore, contradicting the two previous witnesses. He has also given evidence three or four times for Shrawan D. W. 6 Dhondba says that Mst. Thama had four or five fields and that Shrawan cultivated one of them, and also that plaintiff No. 1 cultivated the others. He speaks to a *panchayat* being held where it was settled that Shrawan should take the estate of Thama. He further states that Shrawan got one field of hers and that plaintiff No. 1 and Shrawan agreed to this arrangement. From his cross-examination it appears that the *panchayat* held was about *Mst.* Thama's estate. D. W. 7 apparently knows nothing about the matter. The evidence of D. W. 13 goes to show that there was a settlement as regards the lands of Thama, while D. W. 14 speaks to both Thama's and Hiru's fields being in dispute. D. W. 17 speaks about the settlement which seems to have been about Thama's lands. Reliance is placed on the evidence of witness No. 2 for the plaintiffs. He does not say that any settlement was come to as regards Hiru's lands. I think that the decision of the lower Court that the dispute relating to the fields of *Mst.* Thama is correct, that she gave one field called Kharda to Shrawan and her remaining four fields were to be taken by Sukhlal, that there was no dispute as regards Hiru's fields or the field in dispute, and that plaintiff No. 1 believed that Shrawan was the adopted son of Asaram and also that it was not until the time of his evidence in suit No. 44 of 1917 that he awoke to the fact that the alleged adoption of Shrawan could be successfully impeached.

As to the improvements the costs of which are claimed by the appellants from the plaintiffs, reliance is placed on Exhibit P-25, *khasra* for the year 1908-08 and Exhibit P-6, *khasra* for the year 1914-15, showing increase in the number of trees. But it seems to me that Shrawan must all along have known that he was not the adopted son of Hiru, and as such had no valid title to the field in suit. And if he then plants trees on another person's land, he cannot, in my opinion, demand compensation for the loss. The two wells were in existence at the time of Hiru and Shrawan and his heirs must have recouped the expense of planting from the usufruct of the trees. Most of the defendants' witnesses do speak to the planting of trees and to money spent on the improvement of the garden though they naturally can give no very accurate estimate of the sums thus expended. As Shrawan lived with Hiru it is more than possible that many of the improvements deposed to were done in the lifetime of that person. I do not think that the appellants are entitled to any money on account of the alleged improvement.

Now, as to the question of whether there has been any estoppel and whether by any act of Sukhlal's, Shrawan or his successors have acted to their own prejudice. Shrawan must have known that he was not the adopted son to Hiru, and I do not think that, because he may have improved the garden, it can be said that he did so because Sukhlal led him to believe that the field was his. Shrawan had lived for many years with Hiru and was looking after the property of the latter and apparently con-

tinued to cultivate this field after Hiru's death. But it seems to me that any money he spent on the land has been amply repaid, and that he spent much money entirely at his own risk.

The result is that the appeal fails and it is dismissed with costs. The appellant will pay the respondents' costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 63 OF 1923.

November 27, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice leRossignol.

DIWAN CHAND
—PLAINTIFF—APPELLANT
versus
NIZAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption (Act I of 1913) s. 8 (2)—Village immoveable property—Village, what is—Machine Mohalla of Jhelum City whether village.

The expression "village" ordinarily connotes an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto.

That part of village Pira Ghaib which is included in the Machine Mohalla, has become a part of Jhelum Town and can no longer be regarded as village immoveable property within the meaning of section (2) of the Punjab Pre-emption Act.

Appeal, under section 10 of the Letters Patent, from the decree of Mr. Justice Abdul Raoof, passed in Civil Appeal No. 1390 of 1922 on the 26th January 1923, affirming that of the District Judge, Jhelum, dated the 10th March 1922, dismissing the plaintiff's claim with costs in both Courts.

Lala *Mool Chand, B. S.* for the Appellant.

Malik *Barkat Ali*, for the Respondents.

JUDGMENT.—This appeal arises out of an action brought for the pre-emption of a plot of land which is entered in the Revenue Records as a part of the estate called Pira Ghaib. This estate is situate near the town of Jhelum, and it appears that about 3|4ths of its area has been included in the Machine Mohalla which has been held by the Courts below to be a suburb of the Jhelum town.

The question, upon which we are invited to express our opinion, is whether the property in dispute is to be deemed to be village immoveable property as contemplated by the Punjab Pre-emption Act. There can be no doubt that the land now occupied by the Machine Mohalla, including the property in dispute, was at one time a part of the village Pira Ghaib, but the facts found by the Courts below justify the inference that it has ceased to be a part of the village and must now be regarded as urban property. The expression "village" connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. Now, the Mohalla in question is within the limits of the Municipality of Jhelum and is occupied by persons who are engaged mainly in commercial pursuits. The reported cases contain many instances of rural areas in the vicinity of a town which have ceased to be rural and have grown into a suburb of the town. Such areas have been held to be governed by rules applying to urban properties.

We accordingly concur in the conclusion of the Single Judge and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 219-B OF 1923.

February 14, 1924.

Present:—Mr. Baker, J. C. and Mr. Prideaux, A. J. C.,

FIRM JOHARMAL RUDMAL, ADTIA—
DEFENDANT—APPELLANT
versus
SUNDERLAL NARAYANDAS—
PLAINTIFF—NON-APPLICANT

Civil Procedure Code (Act V of 1908) s. 20 (c)—Place of suing—Goods sent for sale—Conversion—Suit to

FIRM JOHARMAL RUDMAL ADTIA *v.* SUNDERLAL NARAYANDAS

recover value of goods—Jurisdiction—Cause of action meaning of.

Plaintiff sent certain bales from a place within the jurisdiction of the Akola Court to defendants in Bombay. The bales were to be sold by the defendants in accordance with instructions to be sent by the plaintiff, and accounts were to be rendered and money was to be paid to the plaintiff at the place of despatch. Plaintiff did not desire the bales to be sold and asked the defendants to return them and on their failure to do so, sued them at Akola for the value of the bales :

Held, that the cause of action arose in part within the jurisdiction of the Akola Court and that Court could, therefore, entertain the suit.

Case-law referred to.

The expression "cause of action" means the whole bundle of relevant facts which the plaintiff must allege and prove in order to succeed.

Dulichand Chaudhari v. *Lalah Kurmi*, 1 N. L. R. 4, followed.

Revision against the order of the Second Additional District Judge, Akola, in Civil Suit No. 30 of 1922, dated 27th October 1923.

Mr. *A. V. Khare*, for the Applicant.

Sir *B. K. Bose*, and Mr. *V. Bose*, for the Non-Applicant.

ORDER.—The plaintiff is a cotton merchant, residing at Khamgaon, in the Buldana District, while defendants are a firm of *adtias* or commission agents at Bombay. The plaint states that the plaintiff sent 97 bales of ginned cotton to the defendants at Bombay from Khamgaon about May 1920. They were to be sold when the plaintiff would direct the defendants. Order for sale was, however, never given, and, about the 10th of October of 1921, the plaintiff asked the defendants to return to him his bales. Later on a notice was sent to the defendants on the 12th October of the same year. In reply to the notice the defendants informed the plaintiff that they had already sold the bales. The plaintiff, therefore, claims Rs. 14,000 as the value of the bales after deducting Rs. 5,400 for expenses and *adat* charges and advances made to the plaintiff. The plaintiff further states :—

> " As the bales were sent to the defendant from Khamgaon, as it was agreed to render accounts thereof, and to pay money to the plaintiff at Khamgaon, and as such also is the market practice, the cause of action accrued at Khamgaon, within the local limits of this Court's jurisdiction, on 12th October 1921. "

The defendants urged *inter alia* that the suit as laid was not triable in the Akola Court on the grounds that the suit was for damages caused by the non-delivery of the bales, and that the bales having come into the defendants' possession at Bombay where they were entrusted to him, the cause of action accrued at Bombay under section 19 of the Civil Procedure Code. The lower Court has held that as the bales were sent from Khamgaon to be sold according to the plaintiff's instructions, and as accounts were to be rendered by the defendants to the plaintiff, and the money was to be paid to the plaintiff at Khamgaon, the suit has been rightly instituted in the Akola Court. The question before us is whether this suit should be tried at Akola or at Bombay.

It is argued for the applicants that the case is one for damages by wrongful conversion, that the goods were delivered to the applicants in Bombay for sale, and, therefore, the price when sold was payable to the plaintiff at Bombay. It is admitted that after the defendants sold the bales, they sent a copy of the accounts and a cheque for what they considered due to the plaintiff to Khamgaon. The following cases are quoted for the applicants : *Salig Ram* v. *Chaha Mal* (1), *Lalta Prasad* v. *Ram Sarup* (2), *Manjappa* v. *Rajagopalachariar* (3), *Muhammad Shaffi* v. *Karamat Ali* (4), *M. V. Rowther* v. *K. M. M. Rowther* (5), *Kamisetti Subbiah* v. *Katha Venkatasawmy*, (6), *Firm of Asa Ram Kalu Ram* v. *Firm of Bakshi Ram-Kanhiya Ram* (7). Page 889 of the 27th volume of Halsbury's Laws of England is also quoted to show what acts amount to conversion. It is admitted for the applicants that if the money for the bales was payable in Khamgaon, the present suit has been rightly instituted in the Akola Court. Some of the cases quoted for the applicant

(1) 11 Ind. Cas. 712; 34 A. 49 at p. 52; 8 A. L. J. 1160.
(2) 40 Ind. Cas. 505.
(3) 45 Ind. Cas. 779; at p. 780; (1918) M. W. N. 378; 24 M. L. T. 95.
(4) 76 P. R. 1896.
(5) 55 Ind. Cas. 266; 12 Bur. L. T. 198.
(6) 27 M. 355.

were under the old Code of Civil Procedure. The present section 20 (*c*) states that "*every* suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, *wholly or in part*, arises." There is evidence on record called by the plaintiff to show that the Bombay *adtias* rendered accounts and sent money to their constituents at the places where the latter reside. The present applicants have called no evidence to the contrary. There can be little doubt that the finding that the defendants were bound under the contract to render accounts and pay money at plaintiff's place at Khamgaon is correct. The finding is based on evidence, and it is contended for the non-applicant that this being a Civil Revision, that finding concludes the case. It is not denied that the defendants did render accounts and sent a cheque for what they considered was due to the plaintiff at Khamgaon. The term "cause of action" is not defined in the Code, but various rulings have defined it as the whole bundle of relevant facts plaintiff must allege and prove to enable him to succeed : see *Dulichand Chaudhari* v. *Lalah Kurmi*, (8) The following facts give the Akola Court jurisdiction. The cotton was sent for sale from Khamgaon, the instructions how it was to be dealt with proceeded from that place, the defendants were merely the holders of the bales and were to await instructions as to the sale, and in default of sale the defendants were bound to return the bales or their value. The accounts were to be rendered and money to be paid at Khamgaon. *Motilal Pratabchand* v. *Surajmal Joharmal* (9) is quoted, and it is stated that it is a settled principle that the debtor has to seek out his creditor and that the agent's liability is a matter of statute, and under section 213 of the Contract Act he is bound to render proper accounts to his principal on demand.

It seems to us that the fact that cotton was sent from Khamgaon and was to be dealt with under instructions from the plaintiff from that place, and the defendants' liability to render accounts and pay money at Khamgaon are sufficient to show that part of the cause of action accrued in the Buldana District, and that the lower Court is right in holding that it can try the case.

(8) 1 N. L. R. 4.
(9) 30 B. 107 ; 6 Bom. L. R. 1038.

The application therefore fails and is dismissed with costs. The applicants will pay the non-applicant's costs. We fix pleader's fees at Rs. 50.

Z. K. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

REVIEW APPLICATION NO. 42 OF 1923.

January 25, 1924.

Present :—Mr. Kennedy, A. J. C.

SALLEH MAHOMED UMOR DOSSAL—APPLICANTS

versus

NATHUMAL KISSAMAL—OPPONENT.

Civil Procedure Code (Act V of 1908), O XLVII, r. 1 —Review—Error of Law, whether sufficient ground.

A Court is not competent to review its judgment which is erroneous on a point of law in view of the exposition of law on the subject by a superior tribunal subsequent to the delivery of the judgment sought to be reviewed.

Waghela v. *Masludin*, 13 B. 330 ; 13 Ind. Jur. 391 ; 7 Ind. Dec. (N.S.) 219 ; *Ramlal* v. *Kalka Prasad*, 10 Ind. Cas. 244 ; 33 A. 566 ; 8 A. L. J. 584, and *Murari Rao* v *Bala Vanth Dikshit*, 76 Ind. Cas. 342 , 46 M. 955 , 45 M. L. J. 309 ; 18 L. W. 363 , (1924) A. I. R. (M.) 98 ; (1923) M. W. N. 761.

Application to review the judgment of the Division Bench in Revision Application No. 13 of 1921, dated the 6th April 1924.

Mr. *T. G. Elphinston*, for the Applicant.

Mr. *Kimatrai Bhojraj*, for the Opponent.

JUDGMENT.—In this case, there was a dispute between the present applicants Salleh Mahomed and the present opponent Nathumal in respect of a consignment of certain bales of newspapers. In consequence of that dispute, parties went to arbitration and the arbitrators having disagreed, the matter was referred to an umpire who published an award, directing Nathumal to pay Rs. 29,000 odd with interest and costs.

Nathumal applied to have this award taken of the file but his application was rejected by a Judge of this Court.

The applicant, therefore, made a revisional application to this Court which revisional application was heard by Mr. Kemp and myself, and we, forming the opinion that the umpire had committed an error of law patent on the face of the award, ordered this award to be taken off the file. The present applicant now comes here asking for review, Mr. Kemp having, in the meantime, ceased to be a Judge of this Court.

The sole question for my decision at present is whether any ground is shown for granting the application for review. It may be admitted for the present purposes, that our decision proceeded largely on the same grounds as commended themselves to the High Court of Bombay in *Jivraj Baloo Spinning and Weaving Co. Ltd.*, v *Champsey Bhara* (1). Those grounds did not commend themselves to their Lordships of the Privy Council and the judgment of the High Court of Bombay was reversed. That judgment of their Lordships of the Privy Council was delivered on the 6th of March 1923, *Champsey Bhara & Co.* v. *Jivraj Baloo Spinning and Weaving Co.*, (1), and at the time we heard the revisional application in question it had not reached India. It may be assumed for present purposes that had that judgment been placed before us at the hearing, our judgment would not have proceeded on the lines on which it did proceed.

The question remains whether that is a circumstance which would justify me in granting review of the order of this Bench.

Now, review can only be granted in three cases (1) when new and important matter or evidence is discovered, (2) on account of some mistake or error apparent on the face of the record and (3) for any other sufficient reason. It is clear to me neither the first nor the second ground exist because it is obvious that discovery by a Judge that he was in error on a point of law would not be a discovery of new and important matter or evidence because the law itself is always the same and the discovery by the Judge subsequent to the delivery of the judgment that his judgment is not in accordance with the true interpretation of the law or any Statute which is in existence cannot be held to be a discovery of new and important matter of evidence. Otherwise, every judgment will be liable to be attacked by a series of applications for review on the ground that the Judge had taken an erroneous view of the law. It would only be necessary to find some authority which had not been quoted at the time of hearing to enable a dissatisfied party to present an application for review. Nor is it possible to suppose that a mistake or error made by a Judge as to the law can be a mistake or error apparent on the face of the record, for the same reason.

The third ground is "for any other sufficient reason" which of course must be a mere general form of the error referred to in the two specified instances given. I have not been able to find any case in which the exposition of the law by a superior tribunal subsequent to the delivery of the judgment objected to has been held to be a sufficient reason except where the two litigations were so closely connected that the judgment of which review is asked for is to all intents and purposes in continuation of the first litigation. Such is the case in *Vaghela* v. *Masludin* (2), and *Ramlal* v. *Kalka Parsad* (3), is very similar. In this case of course the judgment of the Privy Council is in an entirely different litigation. And it seems to me to admit a review on the ground that their Lordships have expounded the law as to powers of arbitrators in a manner which was contrary to the law as laid down in the authority cited before us would be to open a door to the same objection, namely, the possibility of numerous applications for review which would be the case if it were held that any error by the Judge in respect of law is sufficient to enable the Court to review its own judgment. The parties have their remedy against legal error by the Judge and must have a recourse to that.

The case quoted in *Murari Rao* v. *Balavanth Dikshit* (4), is perhaps somewhat in

(1) 53 Ind. Cas. 799 ; 44 B. 780; 21 Bom. L. R. 1037. 73 Ind. Cas. 436 ; 44 M. L. J. 706 ; 25 Bom. L. R. 588 ; (1923) A. I. R. (P. C.) 66 ; (1923) M. W. N. 596 ; 50 C. 130 ; 47 B. 578 ; 33 M. L. T. 419 ; 28 C. W. N. 307 (P. C.)

(2) 13 B. 330 ; 13 Ind. Jur. 301 ; 7 Ind. Dec. (N.S.) 219.

(3) 10 Ind. Cas. 244 ; 33 A. 566 ; 8 A. L. J. 584.

(4) 76 Ind. Cas. 342 ; 46 M. 955 ; 45 M. L. J. 309 ; 18 L.W. 363 ; (1924) A. I. R. (M.) 98 ; (1923) M. W. N. 761.

favour of granting a review. But, if I correctly understand the facts of that case, the judgment sought to be reviewed contained an error which, at the time when the judgment was passed, was patently gross and manifest. The learned Judges who delivered the judgment of the High Court themselves laid down clearly enough that a mistake of law is not sufficient ground for granting review, but in that particular case the error of law was of such a type that they did hold its discovery a sufficient reason for granting review. The error in the judgment which I am now asked to review, is not of that type. The law laid down by us may be erroneous but the error was not of the same obvious character as the error referred to in the Madras case, our decision being in accordance with the law then laid down recently by the Bombay High Court to the decisions of which tribunal we always pay extreme respect.

On the whole, I find that this is not a case in which I should grant the review and I, therefore, dismiss this application.

P. B. A. *Review disallowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1378 OF 1923.

November 6, 1923.

Present :—Mr. Justice Martineau.

POHLO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DALIP SINGH—DEFENDANT—RESPONDENT.

Custom—Gift to collateral in presence of nearer collateral—Mutti Jats *of Hoshiarpur District.*

Among *Muti Jats* of the Hoshiarpur District a gift of ancestral property in favour of an agnate in the presence of a nearer agnate in consideration of services rendered to the donor is valid by custom.

Atma Singh v. *Nand Singh*, 102 P. L. R. 1901; 61 P. R. 1901, relied on.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 16th January 1923, affirming that of the Subordinate Judge, 2nd class, Hoshiarpur, dated the 21st February 1922, dismissing plaintiffs' suit with costs.

Lala *Fakir Chand*, for the Appellants.

Lalas *Madan Gopal* and *Nanwa Mal*, for the Respondent.

JUDGMENT.—The first defendant, Nihal Singh, adopted the second defendant, Dalip Singh, and made a gift to him of the land that he owned as well as of his occupancy rights in other land. In the present suit the plaintiffs, who are collaterals of Nihal Singh, contend that Dalip Singh is not entitled to succeed to the occupancy rights and that the gift of those rights was invalid. The District Judge has found that Dalip Singh was not formally adopted in the manner prescribed by Hindu Law, but that the adoption was the customary appointment of an heir, and that, therefore, Dalip Singh is not entitled to succeed to the occupancy rights under section 59 of the Tenancy Act; but he holds, in agreement with the first Court, that the gift was made for services rendered by Dalip Singh to Nihal Singh and is, therefore, valid by custom. The suit has, consequently, been dismissed and the plaintiffs have presented a second appeal, having obtained a certificate from the District Judge on the question of custom.

The parties are *Mutti Jats* of the Hoshiarpur District. Dalip Singh is a collateral of Nihal Singh, one degree more remotely related than the plaintiffs. In *Atma Singh* v. *Nandh Singh* (1) it was held that among *Dhat Jats* of the Hoshiarpur District a gift to an agnate in the presence of a nearer agnate in consideration of services rendered to the donor was valid by custom. The learned Judges remarked in their judgment, after referring to a number of rulings on the point, that the powers of alienation possessed by the *Jats* of the Hoshiarpur District were extensive, and no evidence has been produced in the present case to show that *Jats* of the *Got* to which the parties belong follow customs different from those obtaining among *Dhat Jats*. *Atma Singh* v. *Nandh Singh* (1) appears to be a sufficient authority for holding

(1) 61 P. R. 101; 102 P. L. R. 1901.

that the gift by Nihal Singh of his proprietary land was valid, and I agree with the learned District Judge that if Nihal Singh was competent to make a gift of his proprietary land in consideration of the services rendered by Dalip Singh there is no reason why he should not also be competent to make a gift of his occupancy rights.

I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 15-B OF 1923.

February 7, 1924.

Present :—Mr. Kinkhede, A. J. C.

PANDU AND ANOTHER—DEFENDANTS —APPELLANTS

versus

RAJESHWAR AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 33, O. XVI, r. 9, O XLI, r. 1, O. XLVIII, r. 1 (4)—Limitation Act (IX of 1908) ss. 5, 12—Judgment—Decree not drawn up—Duty of Court Appeal—Limitation, commencement of—Appeal, whether can be preferred without decree—Copy, application for, when to be made —Process-fees, order directing immediate payment of, validity of.

A memorandum of appeal is not a good memorandum in law unless it is accompanied by a copy of the decree appealed against. The Appellate Court cannot dispense with a copy of the decree and a copy of the judgment only is not sufficient [p. 998, col. 2.]

The right of appeal, therefore, does not come into play until a proper decree comes into existence. [p. 998, col. 1.]

Where a Court writes a judgment which should be followed by a decree but fails to draw up such decree, the remedy of the party who wants the decree for the purpose of appeal or execution, is to apply for it, and if it is refused, to move the High Court in revision. But until the decree has been drawn there can be neither appeal nor execution. [p. 998, col. 2.]

Where the law creates a limitation and a party is disabled to conform to that limitation without any default in him, and he has no remedy over it, the law will ordinarily excuse him. [p. 998, col. 1.]

There can be no legal obligation on a litigant to apply for a copy of a decree which is non-existent; the existence of a decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring the appeal will commence to run only from that date. [p. 998, col. 1; p. 999, col. 2.]

Case-law discussed.

An order to a party to pay process-fees "at once" militates against both the spirit and the letter of O.XLVIII r. 1 (2) or the Civil Procedure Code. The fixation of time within which to pay process-fees conveys an idea of giving reasonable facilities to a litigant who seeks the help of the Court in the matter of summoning witnesses, to obey the order. This means that the Court with due regard to the provisions of O. XVI, r. 9 of the Code makes terms with the party who requires its help and declares to him that it will try to procure the attendance of witnesses to be summoned for the hearing provided the process-fees are paid within the time fixed by it, and that if he delays such payment he does so at his own risk. To call upon him to pay process-fees *at once* is virtually to insist on immediate payment of process-fees and to decline to help in the matter of enforcing the attendance of witnesses and in effect to penalise the default by dismissing the suit ultimately. [p. 1000.]

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 50 of 1923, dated 21st June 1923.

Mr. *N. R. Bobde*, for the Appellants.

Mr. *D. P. Diwari*, for the Respondents.

JUDGMENT.—This appeal raises some nice points of law.

(1) Whether a party aggrieved by a judgment of a subordinate Court not followed by a decree has got a right of appeal, and, if so, when does the limitation prescribed for filing such an appeal, commence to run, does it run even before the decree is actually drawn up in pursuance to a direction of the High Court?

(2) Whether in the particular case an appeal presented to the District Judge's Court on 16th March 1923 against the decree bearing date 24th August 1921 on which the judgment was pronounced but drawn up and signed on 17th February 1923 could be admitted as not barred by limitation, without the aid of section 5 of the Limitation Act, 1908?

(3) If not, was there any sufficient cause for excusing the delay?

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(4) Was the first Court right in dismissing the suit for delay on plaintiffs' part to obey an order to pay "process at once ?"

A few facts must be briefly stated.

The suit out of which this second appeal arises was instituted on the basis of a mortgage for the recovery of Rs. 1,000 by the grandfather of the minor plaintiffs-respondents on 1st April 1921, in the Court of the Munsif, Yeotmal. The Munsif, after framing certain issues on 27th July 1921, fixed the case for evidence of parties for 24th August 1921, and in the order-sheet of that date, directed payment of process-fee in these words "process at once," instead of paying "process at once" the plaintiff paid it on 11th August 1921. The result was that no witnesses attended at the hearing on 24th August 1921. The plaintiff also was not personally present to explain why the payment of *talbana* was delayed and why the witnesses also did not turn up. The Court, therefore, passed the following order:

"Plainttff by Mr. Bapat. Defendants by Mr. Pande. Plaintiff is not himself present and he paid process just after a fortnight to cite the witnesses. So within 13 days it is impossible that witnesses could be served. Sufficient time was given. I have seen the parties invariably neglecting the orders. Process was ordered to be paid at once and it was not paid till after 13 days. I dismiss the suit for not paying process in time, *vide Mote* v. *Kanhya* (1). The defendants cited no witnesses."

An appeal was preferred against this decision to the Court of Additional District Judge, Amraoti, who dismissed it on 23rd November 1921 on the ground that no appeal lay against it. This Court was, therefore, moved by a petition for revision dated 29th November 1921, and the following order was passed on 17th January 1923:—

"It is said that the Munsif should have proceeded under O. XVII, r. 3, first Schedele, Civil Procedure Code. It appears to me that he has done so and his order is in effect a judgment. The Munsif should have proceeded to draw up a decree. This it is still open to him to do. The applicant should move him for a decree to be drawn up. He will then be entitled to appeal from the decree. The application is dismissed. No order as to costs."

The Court of first instance was then moved on 31st January 1923 to draw up a decree and the same was drawn up on 17th February 1923 after the record was perused. Against the decree so drawn up the appeal was filed in Additional District Judge's Court on 16th March 1923. It has been entertained as being in time and was allowed and the case was remanded to first Court for giving plaintiff opportunity to prove his case. Against this order of remand the present miscellaneous appeal is filed.

It will be seen from the above that this Court had to point out to the Munsif that he had failed to perform the imperative duty which the law had cast on him in the matter of drawing up a decree in terms of his judgment as a necessary step for the termination of the suit pending before him. The failure on the part of the Court of first instance to follow up its judgment by a decree necessarily caused delay and suspended the right of appeal of the party aggrieved by the decision. Moreover, if we are to go only by the decision already given, it will be seen that the words "he will then be entitled to appeal from the decree" in the above Order amount to a clear adjudication between the parties that the appeal already preferred was premature; neither party can now go behind that adjudication and the defendants cannot say that plaintiff was entitled to appeal from the decree even before it was drawn up.

But it is argued that, as required by O. XX, r. 7, Civil Procedure Code, the decree must be dated the day on which the judgment was pronounced, that is, as soon as it was drawn up, it must be treated as if it had been in existence since 24th August 1921 and, consequently, the limitation for filing an appeal against it must be counted as if it had commenced from 24th August 1921 and not from the date on which it was actually drawn up and signed by the Court. Under ordinary conditions, where the decree is drawn up within the period of limitation prescribed for

(1) 4 Ind Cas. 797 ; 5 N. L. R. 181.

an appeal this argument may hold good. But if I were to uphold this contention in cases where, as here, there is a failure on the Court's part to perform its own duty and the mistake had to be pointed out and corrected by this Court and this took up nearly 17 months, and thereafter the decree was drawn up, or, in other words, where the delay on the part of the Court in drawing up its decree is so enormous as to extend even beyond the usual period of limitation, I would be putting a premium upon default on the part of a Judge of the Subordinate Court in the performance of his imperative duty to pass a decree, which the Statute—section 33, Civil Procedure Code—has imposed on him, and thus victimatize a litigant for the Judge's failure, and that, too, simply because, for no fault of his own, he could not apply for, and obtain, a copy of a non-existent decree, and lodge his memorandum of appeal without such a copy.

"Let not the act of the Court harm anybody" is the maxim which must come to the appellant's help in such cases. In my opinion the suit must in such cases be treated as being pending before the Court until it actually draws up and signs the decree. In a case reported in *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap* (2) the Judges of the Calcutta High Court held that in order to be operative, a final decree in a partition-suit, must, under the Stamp Act, be engrossed on stamp-paper as required by that Act, and until the Judge signs the decree so engrossed, the suit could not be said to have terminated. This necessarily involved the position that the adjudication contained in the judgment does not decide the suit, until the Court frames and signs an operative decree. The law gives a right of appeal not against the judgment merely but against the decree. No right of appeal could, therefore, come into play until a proper decree comes into existence. See in this connection section 96 of the Code of Civil Procedure which gives a right of appeal against the *decree*.

The Limitation Act presupposes the existence of a decree. The starting point of limitation as given in the third column against Article 152 is the date of the decree appealed from. Where the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over it, the law will ordinarily excuse him. O. XLI, r. 1, Civil Procedure Code, lays down that every memorandum of appeal shall be accompanied by a copy of the decree appealed from * * * A memorandum of appeal is not a good memorandum of appeal in law unless it is accompanied by a copy of the decree appealed against. The Appellate Court cannot dispense with it, and a copy of the judgment only is not sufficient: *Chamela Kuer* v. *Amir Khan* (3), *Bhawani Prasad* v. *Kallu* (4), *Qasim Ali Khan* v. *Bhagwanta Kunwar* (5), Sir Henry Drake-Brockman, J. C., in *Parashram* v. *Likhan* (6) also accepted this view as correct. In *Mahu* v. *Kishan* (7) Stanyon, A. J. C., has pointed out that "the drawing up of a decree is a conscious, intentional, and formal act whereby the Court notifies its disposal of matters in controversy in accordance with its adjudication thereupon; and no right of appeal under section 97, Civil Procedure Code, arises until a decree has been draw nup." The learned A. J. C. makes the following observations at pp. 95 and 96* "If a Court having written a judgment which should be followed by a decree fails to draw up such decree, the remedy of the party who wants that decree whether for appeal or for execution, is to apply for it, and if it is refused to move the High Court in revision. But until the decree has been drawn there can be neither appeal nor execution. * * * It is clear that as regards the final decree, the Court has no option. Section 33, Civil Procedure Code, clearly refers to the final disposal of a suit by the Court trying it and it is imperatively laid down that such disposal shall be by a judgment followed by a decree."

The necessary outcome of all these decisions is that, so long as there is no decree duly drawn up and signed there is no right of appeal, and that no valid memorandum of appeal can be lodged without a copy of the decree which must accompany it. This neces-

(2) 32 C. 483 at p. 491.

(3) 16 A. 77; 93 A. W. N. (1893) 223; 8 Ind. Dec. (N. S) 51.

(4) 17 A. 537 at p. 553; A. W. N. (1895) 212; 8 Ind. Dec. (N. S) 670, (F. B.).

(5) 42 Ind. Cas. 888; 40 A. 12; 15 A. L. J. 801.

(6) 10 Ind. Cas. 866; 7 M. L. R. 67.

(7) 15 Ind. Cas 935; 8 N. L. R. 92 at p. 95.

* Pages of 8 N. L. R.—[ED.]

sarily involves a further position that there can be no legal obligation on a litigant to apply for a copy of a decree which is non-existent ; the existence of the decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. He is in no way responsible for the delay in making his application for a copy of the decree if his right to apply has remained suspended in the air, by reason of the delay on the Court's part to draw up and sign its decree.

It is, however, argued that the law casts upon him the duty to move the Court to pass a decree and that if he had done so early enough before the expiry of 30 days from 24th August 1921 all this delay would have been avoided. I can find no appropriate or direct authority in support of this contention. On the contrary, there is authority the other way. In *Kaluram Pirchand* v. *Gangaram Sakharam* (8), it was held that there is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal, and, further, tha tunder section 97 of Civil Procedure Code his right to appeal arose only when there was a decree based on the findings on preliminary issues.

The quotation from *Mahu* v. *Kishan* (7), also does not show that it is the duty of the party to move. It simply indicates how a litigant may proceed. I am, therefore, of opinion that it was not the plaintiffs' duty to apply for the drawing up of the decree, but that a duty was cast by the State on the Court to draw it up. The plaintiffs are not, therefore, to blame for not having applied. I further hold that they were under no obligation even to apply for a copy of the decree even until the Court drew it up and that they are entitled to the exclusion of the whole of the time, between 24th August 1921 and 17th February 1923, apart from the provisions of section 5 of the Limitation Act. I am fully alive to the view taken in *Seth Jagannath* v. *Gangaram* (9), which has been recently followed by Kotval, A. J. C., in *Narayan* v. *Ramdulare* (10). The following passage in *Seth Jagannath* v. *Gangaram* (9), goes against the view I have taken : —

> " I think that the time requisite for obtaining a copy must be taken to commence only when the applicant does something in order to obtain the copy and to end when he obtains the copy. If a decree has not been drawn up and signed at the time when an application for a copy of it is made, and the making of the copy is thereby delayed, such period of delay must be allowed for in computing the time which was requisite for obtaining the copy. But it could never have been intended that a would-be appellant should be allowed to sleep over his right of appeal and then to claim extension of the period of limitation by taking advantage of a delay with which he had no direct concern.
>
> "Under ordinary circumstances, therefore, I should have held that the present appeal was time-barred. I have, however, ascertained that it has always been the practice of this Court to reckon limitation from the date on which the decree purports to have been signed and this erroneous practice is to some extent countenanced in a Circular which has only recently been amended. I have no doubt but that the appellant was misled by the previous practice of this Court and I must, therefore, declare, under section 5 of the Limitation Act, that the appeal has been presented within the period of limitation prescribed therefor."

With due respect to the learned Judge who made these observations, I express my dissent from them particularly in view of the Statute contained in sections 96 and 97, Civil Procedure Code, and the more recent pronouncements based upon the right construction of those sections.

In this view, no question of excusing the delay under the discretion vested in the Appellate Court by section 5 of the Limitation

(8) 23 Ind. Cas. 605; 38 B. 331, 16 Bom. L. R. 67.

(9) 13 C. P. L. R. 78.

(10) 66 Ind. Cas. 7 ; (1923) A. I. R. (N.) 113.

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Act arises in the case. Even taking the case as coming under that section, the rulings in *Karsondas Dharamsey* v. *Bai Gangabai* (11), and *Bhimrao* v. *Ayyappa* (12), cannot be said to militate against the view taken by me as the delay here is not due to any default or gross neglect on the part of a litigant but it is due to the Court's neglect to do its duty. Consequently, it ought to constitute sufficient cause for excusing the delay.

It is, however, argued that had the respondents moved the 1st Court as soon as this Court passed its order dated 17th January 1923, the decree would have been drawn up earlier, *i.e.*, this delay was not such as was unavoidable and the same should not, therefore, be excused. But this contention has no substance. The plaintiffs-respondents had to obtain a copy of this Court's order and this naturally took some time. They moved the 1st Court on 31st January 1923 but the Court could not pass the decree without the record. It appears the record was received on or about 17th February 1923 and without any further delay the Court passed the decree on 17th February 1923. It is next said that they should not have delayed the filing of the appeal against the decree so passed till 16th March 1923 after having obtained a copy thereof on 24th February 1923. But counting the 30 days' limitation from 17th February 1923 the last date up to which they could have filed the appeal was 19th March 1923, even if we do not give them the concession to which they may be entitled under section 12 of the Limitation Act. I think the Judge of the lower Appellate Court has rightly exercised his discretion in the matter. This disposes of the first three points set out at the beginning of this judgment.

The only point that remains to be considered is whether the lower Appellate Court was right in interfering with the 1st Court's decree dismissing the suit for plaintiffs' failure to obey its order to pay "process at once." I think there is no warrant for visiting the extreme penalty of a dismissal of a suit upon a plaintiff, for a failure, to obey an unreasonable order such as this. The lower Appellate Court has correctly pointed out that an order to pay "process at once" militates against both the spirit and the letter of O. XLVIII, r. 1 (2), Civil Procedure Code. The fixation of time within which to pay process, conveys an idea of giving reasonable facilities to a litigant who seeks the help of the Court in the matter of summoning witnesses to obey the order. I understand this to mean that the Court with due regard to the provisions of O. XVI, r. 9, Civil Procedure Code, makes terms with the party who requires its help and declares to him that it will try to procure the attendance of the witnesses to be summoned for the hearing provided the process-fee is paid, within the time to be fixed by it and that if he delays such payment, he will do so at his own risk. To call upon him to pay process *at once* is virtually to insist on immediate payment of process and to decline to help in the matter of enforcing the attendance of witnesses and in effect to penalize the default by the dismissal of the suit ultimately : Compare *Dhanu Ran Mahto* v. *Musli Mahto* (13).

I am not, therefore, prepared to uphold an order which would work such injustice to the litigants. The lower Appellate Court has given very good reasons for differing from the Munsif on this point and for excusing the technical default on plaintiffs' part and for giving the parties an opportunity to fight out the case on the merits. I, therefore, decline to interfere. The appeal fails and is dismissed with costs. The costs in the Courts below will abide the result of the suit.

Z. K. *Appeal dismissed.*

(11) 30 B. 329 ; 7 Bom. L. R. 965.
(12) 31 B. 33 ; 8 Bom. L. R. 858.

(13) 1 Ind. Cas. 366 ; 56 C. 566 ; 13 C. W. N. 525 ; 11 C. L. J. 150.

NARAIN DASS DUTT *v.* BANKU BEHARY CHATTOPADHYA

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 355 OF 1921.

January 28, 1924.

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

NARAIN DASS DUTT AND ANOTHER— APPELLANTS

versus

BANKU BEHARY CHATTOPADHYA AND OTHERS— RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 183—Mortgage-decree in favour of several mortgagees—No community of interest among mortgagees—Revision in favour of one, whether of avail in favour of another mortgagee—Revivor, test of—Civil Procedure Code (Act V of 1908)—Objections to execution, etc., which Court to decide.

The test whether an order is an order of revivor or not is whether it decided that the decree is still capable of execution and the decree-holder is entitled to enforce it. [p. 1005, col. 2.]

Chutterput Singh v. *Sang Jumari Mull*, I. L. R. 43 Cal. 903, referred to.

Under the scheme of the Civil Procedure Code the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation.

Such objection should be taken before, and be heard and determined by, the Court to which the decree is transmitted as the Court of execution. Orders of transmission are treated as *quasi*-administrative orders and, on the original side, are made by the Registrar who is vested with jurisdiction to decide such objections. [p. 1005, col. 2.]

Where several mortgagees, whose interests are not at all joint are made plaintiffs and for convenience their claims are tried in one suit and dealt with in one decree, an order operating as a revivor in favour of one of the mortgagee decree-holders can be of no avail to any of the other mortgagee decree-holders. [p. 1006, col. 2.]

Appeal against the order of the Subordinate Judge, 2nd Court, Hooghly, dated the 2nd August 1921.

Babu *Ramchandra Mazumdar*, with Babus *Rupendra Kumar Mitra*, *Nalin Chander Paul* and *Devendranath Mandal*, for the Appellants —In this case, of the four mortgagees in the original suit, three have been satisfied. The fourth is now trying to have execution, and the present proceedings arise at his instance and he, therefore, is the principal respondent. The original suit was instituted on 27th August 1902. A decree was passed by this Honourable Court in the usual terms. The Registrar's certificate bears the date of 3rd September 1903. The order absolute was made on the 4th February 1905. In August 1905, the properties mortgaged to the first mortgagee were sold and he was paid off in full. In 1917, many other properties were sold at the instance of the second and third mortgagees and their debts were paid off in full. The mortgagor died in 1919. In the meantime, the fourth mortgagee had purchased the mortgagor's rights of the security, for a certain amount against his dues. After mortgagor's death, he applied for bringing on the record the legal representatives and for execution of decree. The decree was transmitted to the Hooghly Court and properties of the mortgagor not comprised within the mortgage were attached. Notice of this was given to the widow and appellants, who preferred objection to the High Court under O. XXI, r. 22 of Civil Procedure Code. On this petition of objection a consent order was passed. The learned lower Court has held that there has been revivor. Revivor can take place only when a notice has been issued and served upon the judgment-debtor : *Jagendra Chundra Roy* v. *Syam Das* (1), and O. XXI, r. 22. The issue of notice itself is not sufficient to revive : *Monohar* v. *Futteh Chand* (2). Service of notice is necessary : *Guru Das Biswas* v. *Bhowanipore Zemindary Co.* (3). Before revivor can take place, he must show that notice has been served. Mere order for issue of notice is not sufficient. These are facts and your Lordships cannot from mere order presume service. These things must be proved by actual evidence before the lower Court. As such it is not a pure question of law. The decree was not a joint decree. The decree-holder himself admits it in petition for execu-

(1) 1 Ind. Cas. 168 ; 36 C. 543 ; 9 C. L. J. 271.
(2) 30 C. 979 : 7 C. W. N. 793.
(3) 64 Ind. Cas. 476 ; 25 C. W. N. 972.

tion. The decree itself shows that there are four separate and distinct decrees. The words of the decree are inconsistent with any idea of jointness. Separate accounts were to be taken. The real test is whether one mortgagee could proceed to execution of the decree irrespective of the others: O. XXXIV, r. 1. If the fourth mortgagee had a suit the prior mortgagees would not have been necessary parties. Let us reverse the positions. If the first mortgagee brought a suit, he could ask the puisne mortgagees to redeem only those properties which come within his mortgage and not other properties.

If it was not a joint decree, there would be no revivor. Article 182 of Indian Limitation Act Explanation 1 and Article 183, Indian Limitation Act. These two show that where there is a joint decree in favour of some, application by one should enure for the benefit of all. There is no such provision in Article 183. So in case of separate decrees application by the second mortgagee did enure in favour of all: *James Russel Mclaren* v. *Veeriah Naidu* (4), and *Krishnayah* v. *Gajendra Naidu* (5). The case of joint debtors stands on the same footing as the case of a joint creditor. That seems to be the intention of the Legislature. As to the construction of Article 183, the directions of the decree show that it is separate decree. The present decree-holder could apply for execution in 1905 and the period would run from that time. It was not necessary that they should be able to execute the personal part of the decree: *Chutterput Singh* v. *Sait Sumari Mal* (6).

Mr. *Maiti*, with him Babus *Apurba Charan Mukherjee* and *Manmatha Nath Ganguly* for the respondents—The way in which the decree was drawn up clearly shows that it was meant to be a joint decree and as such the steps taken by any of them would revive the decree in favour of all. The separateness is merely one for the purpose of accounting. It cannot have any other effect. Moreover, the consent order revived the decree. Articles 182 and 183, Indian Limitation Act, O. XXI, r. 22. Notice was issued. Reads order sheet. That should be sufficient for all purposes. It was not obligatoy at all to prove service, specially when the court has ordered, issue of notice. The learned Judge was perfectly right in holding as he has done. As regards limitation it must be noted that it was the execution of the personal part of the decree that was sought for. At that time the personal part of the decree could not be executed.

Babu *Ramchandra Mazumdar*, gave a reply.

(4) 32 Ind. Cas. 1003 ; 38 M. 1102.
(5) 40 Ind. Cas. 608 ; 40 M. 1127 ; 22 M. L. T. 20 ; 6 L. W. 290 ; 33 M. L. J. 533.
(6) 36 Ind. Cas. 602 ; 43 C. 903 ; 23 C. L. J. 645 ; 20 C. W. N. 889.

JUDGMENT.

Richardson, J.:—This appeal arises out of an application for the execution of a mortgage-decree and is from the order of the Subordinate Judge of Hooghly, dated 22nd August 1921, directing that execution should proceed. The appellants are the sons and representatives of the mortgagor defendant in the suit in in which the decree was made. It will be convenient to distinguish the plaintiff in that suit as the first mortgagee and the three several puisne mortgagees who were also impleaded, as the second, third and fourth mortgagees respectively. The principal respondent, Banku Behari Chattopadhya, is the fourth mortgagee, at whose instance the learned Subordinate Judge made his order and to whom I shall refer as the respondent. The other respondents are formal parties representing the other mortgagees whose claims have been satisfied.

The question for decision, whether the application for execution was in time, is governed by Article 183 of the Schedule to the Limitation Act of 1908. The material facts are as follows:

Apparently, two properties had been mortgaged to the first mortgagee and one of these and thirty-two others to the second martgagee and again to the third mortgagee, while all thirty-four properties had been mortgaged to the respondent together with certain mortgage-rights belonging to the mortgagor. A doubt was suggested whether the respondent's security did not also comprise one or two additional properties but the point is of little importance.

The mortgage-suit was instituted on the Original Side of the High Court in 1901. On the 27th August 1902, a decree was made therein. The decree is in common form and its scheme is quite simple ; but for purposes which will appear, I will state its substance. It was referred to the Registrar to ascertain and certify the amounts due on foot of each of the

four mortgages. The usual period of six months was to be allowed for redemption computed from the date on which the Registrar's certificate should be confirmed and countersigned by a Judge. Provision is then made, in case the mortgagor should default in paying the certified sums within the period of grace, for the calculation of the aggregate amount payable in respect of each of the mortgages. In that connection the very general direction is given that, " in the event of such default.....the said several mortgaged premises be sold with the approbation of the said Registrar to the best purchaser or purchasers that can be got for the same, provided that the said Registrar shall consider that a sufficient sum has been offered." The sale proceeds of the two properties were to be carried to a separate account bearing the name of the first mortgagee, the sale proceeds of the thirty-two properties to another account bearing the names of the second and third mortgagees and the sale proceeds of the properties exclusively mortgaged to the respondent to a third account bearing his name. Then follow directions as to the application of the sale proceeds under which any balance remaining after the first, second and third mortgagees had been satisfied were to be added to the sale proceeds of the properties exclusively mortgaged to the respondent and applied in satisfaction of his dues. In conclusion, the right to a personal remedy against the mortgagor is conferred on each mortgagee in case his security should prove insufficient.

The Registrar, having taken the necessary accounts, brought in his certificate in due course and it was countersigned by a Judge on the 3rd September 1903. The certificate states that there would be due to the respondent on the 2nd March 1904, the sum of Rs. 78,239-6-3. It is common ground that on the same date, apparently by private treaty, the mortgagor sold to the respondent the mortgage-rights included in his security, it being agreed that the price, Rs. 35,000, should be set off against his mortgage-debt.

Nothing further seems to have been done by the mortgagor in the way of payment and, on the 4th February 1905, an order absolute for sale was made, the terms of which have not been printed or placed before us. In August 1905, the two properties mortgaged to the first mortgagee were sold and he was fully paid off, a balance being left over which, presumably, went to the second mortgagee.

No further steps were taken till 1917 when, doubtless at the instance of the second and third mortgagees, or one or the other of them, it is not suggested that the respondent moved in the matter—twenty-eight other properties were sold. The proceeds were only sufficient to satisfy the second and third mortgagees and there was no balance over.

In April 1919, the mortgagor died and in the following month the respondent, who had done nothing since his purchase of the mortgage-rights in 1903, applied to the High Court, praying that the mortgagor's widow and his two sons, the present appellants, be substituted on the record in his place; that satisfaction of the decree in his favour be entered to the extent of Rs. 35,000; that he be at liberty to execute the decree for the sum of Rs. 82,725-11-3, being the balance of the principal and interest calculated up to the 22nd May 1919, the date of the application, and that the respondent having been credibly informed that there were no assets available for the satisfaction of the decree within the original jurisdiction but that there were assets available in the Hooghly District, the decree be transmitted to the Hooghly Court for execution in respect of the balance claimed.

No notice of this application was given to the widow or the appellants, nor does the law require that in such cases such notice should be given. On the 27th June 1919, an order was made signed by the Registrar, but not by a Judge, under which the respondent was to be at liberty to execute the decree against the widow and sons, and a copy of the decree, together with a copy of the Registrar's certificate counter-signed on the 3rd September 1903, and " a certificate of partial satisfaction to the extent of Rs. 35,000 " was to be transmitted to the Hooghly Court for execution.

There was some delay in preparing the latter certificate. The document is dated 27th July 1920, and it certifies under the signature of a Judge, that satisfaction of the sum of Rs. 82,725-11-3 "has not been obtained within the local limits of the jurisdiction of this Court and that no order has been made by this Court for execution of the said decree,"

NARAIN DASS DUTT *v.* BANKU BEHARY CHATTOPADHYA

The decree having been transmitted to the Hooghly Court, the respondent, on the 4th July 1920, filed in that Court a formal application for execution in the prescribed tabular form. Execution was sought by the attachment and sale of six properties which admittedly were not properties comprised within the respondent's security. The respondent, therefore, was, and is, relying on his personal remedy against the mortgagor or against assets of the mortgagor in the hands of his representatives.

Notice of this application having been given to the widow and the appellants under O. XXI, r. 22 of the Civil Procedure Code, they brought in their objections not to the Hooghly Court but to the High Court. The objections are stated in a petition dated 26th February 1921, which asserts *inter alia* that the mortgagor had left no assets in the Hooghly district, or any that had come to the petitioners' hands; that all the properties comprised in the respondent's security had not been sold ; that his widow was not one of the mortgagor's legal representatives, and that execution was barred by the law of limitation.

The petition came before Pearson, J., on the 8th March 1921, and a consent order was made in terms which were subsequently reduced to writing. The order as drawn up bears date the 22nd April 1921, and, as it seems to me, its only appreciable effect was to amend the order of 27th June 1919, the order for the transmission of the decree by striking out the name of the mortgagor's widow. I shall come a little later to my reasons for regarding the other amendments made as immaterial.

I have now stated the facts to which Article 183 of the Limitation Act has to be applied. Under that Article the period of limitation for an application "to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary Original Civil jurisdiction" is twelve years running from "the time when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right." Under the proviso to the Article, "when the judgment, decree or order has been revived," the twelve years are to be computed from the date of such revivor. I need not read the whole of the proviso because the respondent does not set up any payment or acknowledgment by the mortgagor within any period now material.

If, then, on the 4th February 1905, when the order absolute for sale was made, a present right accrued to the respondent to enforce the decree of 27th August 1902, and he did nothing which can be construed as an application for the enforcement of the decree until he applied to the High Court in 1919 for the transmission of the decree to Hooghly, he is clearly out of time, unless he can show that, within the twelve years before he so applied, something was done or some order was made which operated to revive the decree in his favour. The learned Subordinate Judge accepted the respondent's contention that the order of 27th June 1919, coupled with the consent order of April 1921, and as amended thereby, constituted a revivor. That view, as it appears to me, entirely misconceives the nature of the consent order and the effect of the amendments made. As I regard the matter, the parties or their legal advisers recognised when they came before Pearson, J., that what I may call the substantial objections of the appellants to the execution of the decree fell to be decided not by the learned Judge but by the Hooghly Court to which the decree had been transmitted. The agreement arrived at related merely to the form of the order for the transmission of the decree and not to its substance. When the original order, made without notice to the appellants, gave liberty to the respondent to execute the decree against them, such liberty was merely a liberty to the respondent to proceed in execution subject to all just exceptions on the part of the appellants and it would, perhaps, have obviated misunderstanding if some such words had been introduced.

The amendments in no way altered the meaning of the original order in this respect. The widow's name was struck out because every one was agreed that the mortgagor was fully represented by his sons and that a mistake had been made in including the widow as legal representative. The amendment in no way affected the rights of the respondent as against the appellants, though the result might have been to drive the respondent to separate proceedings against the widow, if any, of the mortgaged properties not already sold had found its way into her possession.

Then, again, when liberty was given in the amended order to execute the decree against the appellants " to the extent of the property of the said Sarat Chundra Dutt, the mortgagor, which has come to their hands and has not been duly disposed of," these added words were clearly intended not to give the respondent any right which he did not otherwise poss ess but to protect the appellants. The words are taken from section 50 of the Civil Procedure Code by which the Court of Execution and the respondent would have been bound, whether the words were in the order or not. Their insertion, therefore, made no difference one way or the other.

If further illustration be needed of the kind of thing the parties were thinking about, it will be found in the alteration of the words of the original order imputing that there were, in fact, assets available in the Hooghly District into words imputing that the respondent alleged that there were such assets. Obviously, the appellants were anxious that nothing in the order for the transmission of the decree should prejudice them when they brought their substantial objections before the Hooghly Court for decision. The fact that the amendments introduced were misunderstood in that Court shows that there is a danger in being too meticulous in matters of mere form. In my opinion, however, the further consideration that the consent order left intact the certificate of the 13th July 1920, with the statement therein that no order had been made by the High Court for execution puts the true effect of the amendments beyond all doubt or dispute. The order of the 27th June remained after amendment, as it was before amendment, a mere order for the transmission of the decree to the Hooghly Court. Apart from the effect of removing the widow's name, the order decided nothing of any materiality as to the rights of the parties.

The decision of the Full Bench in *Chutterput Singh* v. *Sait Sumari Mal* (6), is clear authority for the proposition that such an order does not constitute a revivor. That was a strong decision because there, in accordance with the practice which then prevailed, notice of the decree-holder's application for the transmission of his decree to another Court had been given to the judgment-debtor. The practice has since been changed (see notes to Chapter XVII, Rule 1, p. 253 of Mr. Heehle's Rules and Orders of the Original Side). The point is, that section 39 of the Code does not require notice to be given to the judgment-debtor before a decree is transmitted to another Court, while O. XXI, r. 10, expressly provides that if the decree has been transmitted to another Court, the application for execution shall be made to that Court and in cases where notice under O. XXI, r. 22 has to be given that Rule provides that the notice shall be issued by the Court executing the decree. Under the scheme of the Code, the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of Execution. Orders of transmission are treated as *quasi*-administrative orders and on the Original Side are made by the Registrar who is vested with jurisdiction to decide such objections. But if the Code be followed, the nature of an order of this kind should be the same whether it is made by an officer of the Court or by a Judge.

In the present case the order of 27th June 1919, was, as usual, made by the Registrar and if, as the result of the proceedings before Pearson, J., the order in its amended form was adopted by the learned Judge that in no way affected the character of the order as a mere order transmitting the decree to the Hooghly Court. The learned Judge was, no doubt, entitled under section 50 of the Code to decide who were the proper representatives of the deceased judgment-debtor, though I do not say whether or not the Hooghly Court had, under O. XXI, r. 22, a concurrent jurisdiction in this respect. The point does not arise because this question of parties has been finally settled by agreement.

In my opinion, therefore, the order of 27th June 1919, whether in its original or in its amended form, did not amount to an order of revivor. It does not fulfil the test laid down by Sir Ashutosh Mookerjee in an earlier case and adopted by the learned Chief Justice in the Full Bench case. The order did not decide " that the decree is still capable of execution and the decree-holder is entitled to enforce it."

I have said enough to show that, in my view, the suggestion of the learned Counsel for the respondent that by agreeing to the amendment of the order of 27th June, the appellants "waived" this objection to the execution of the decree is a complete travesty of what occurred before Pearson, J. Assuming that an objection on the ground of limitation can be waived, neither the learned Judge nor any body else at the time could have attributed any such effect to the consent order.

The conclusion of the learned Subordinate Judge that the application for execution was in time cannot be supported on the grounds on which he put it.

I have still, however, to deal with certain contentions which were raised for the first time in the appeal.

It was contended that, inasmuch as the respondent is a *puisne* mortgagee, time did not begin to run against him from the date of the decree but from 1917 when the decree was executed by mortgagees whose interests were prior to his own. In the alternative, it was suggested that if time ran against him from the date of the decree or the date of the order absolute, the orders for execution which must have been made in 1905 at the instance of the first mortgagee and in 1917 at the instance of the second and third mortgagees were orders reviving the decree to the benefit of which he is entitled.

As it appears to me, neither of these contentions can be accepted. Upon the terms of the decree of 1902, the substance of which I have already set out, the respondent had as much right to enforce it as any of the other mortgagee-decree-holders. It is immaterial whether the decree became enforceable on the date it bears or on the 4th February 1905 when the order absolute was made. I can see no reason why, after the latter date at any rate, the respondent could not have applied to the Court for the execution of the decree. If he might have so applied, then, in the language of Article 183, a present right accrued to him on that date (if not before) to enforce the decree, a right which he was capable of releasing. It may be that any of the prior mortgagees who desired it might have obtained the carriage of the proceedings but that does not affect the respondent's right to apply for execution. It is absurd to suppose that if none of the prior mortgagees had desired to take any steps, the respondent would have had to fold his hands and do nothing. Nor have the directions in the decree as to the application of the proceeds of execution any bearing on the point. Any costs the respondent might have incurred in executing the decree would have been a first charge on those proceeds.

As to the execution in 1905 and 1917, that in 1905 cannot in any case help the respondent who took no steps till 1919. But, wholly apart from any question of time, why should an order operating as a revivor in favour of one of the mortgagee-decree-holders be of avail to any of the others? In substance, as against the mortgagor, all the mortgagees were plaintiffs. For convenience, their several claims were tried in one suit and were dealt with in one decree. But their interests are in no sense joint; the subordination of the rights of each puisne mortgagee to those of the mortgagee or mortgagees prior to him does not denote any community of interest. The fallacy of the argument would be apparent if it were suggested that an acknowledgment or payment to one mortgagee operated as an acknowledgment or payment to the others. For the present purpose an order amounting to a revivor and an acknowledgment or payment belong to the same category.

For the reasons indicated, I am of opinion that the respondent's application for execution was out of time and should have been dismissed.

The learned Subordinate Judge dealt with another objection on the part of the appellants that the respondent was not entitled to proceed against assets of the mortgagor not forming a part of his security till he had exhausted his demands against the properties mortgaged. Apparently, there were four properties mortgaged to the respondent which have not been sold in execution of the decree. The learned Judge refused to entertain this objection but his reasons are here also open to criticism. His conclusion depends to some extent at any rate on his view, which I hold to be mistaken, of the consent order of 1921. The result at which I have already arrived makes it unnecessary to pursue this point further.

I will only add that, if the respondent had applied for execution during the mortgagors' lifetime instead of waiting, as he did, till the mortgagor died, information might have been available as to the four properties and possibly as to other matters now concealed from us.

In my opinion this appeal should be allowed with costs here and below—hearing fee in this Court 10 gold mohurs.

Page, J.—I agree.

S. D. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 73 OF 1922.

October 15, 1923.

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

AKKANNA CHETTI—APPELLANT

versus

CHANDU CHETTY—RESPONDENT.

Landlord and Tenant—Lease containing forfeiture clause—Non-payment of rent—Suit for rent and forfeiture—Decree directing payment within certain time—Amount enhanced on appeal—Forefeiture, relief against.

In cases where forfeiture is sought to be enforced by a landlord under the terms of a decree, the landlord should prove conclusively that the decree which he is executing has given him that right. The Court ought to lean in favour of the tenant against forfeiture rather than in landlord's favour in such cases.

In a suit by a landlord for recovery of rent and for enforcing the right of forfeiture for non-payment of rent under the lease deed the Court of first instance decreed a certain sum of money for rent and directed that if the amount was paid within a month from the date of decree the forfeiture would be relieved against. The tenant paid the sum within time but on appeal the amount payable was increased by a small sum, the time for payment one month from the date of the appellate decree. In other respects the lower Court's decree was confirmed.

Held, that the payment of the said excess sum within one month from the date of the appellate decree as directed by the Appellate Court was not a condition precedent to the forfeiture being relieved against.

Appeal against the order of the District Court of South Kanara, dated 9th day of March 1922 in A. S. No 311 of 1921, preferred against the order of the Court of the District Munsif of Udipi, dated the 31st day of August 1921 in E. A. No 241 of 1921 (in O. S No. 530 of 1919 and A. S. No. 153 of 1920 on the file of the Court of the Subordinate Judge of South Kanara).

Messrs. *B. Sitaram Rao* and *K. Srinivasa Rao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondent.

JUDGMENT.—This appeal raises the question whether the respondent, the tenant, has lost his right to hold possession of the property by forfeiture. The suit was brought by the landlord, the appellant before us, for recovery of rent and also for enforcing the right of forfeiture which he had under the lease-deed for non-payment of rent. The first Court decreed a certain sum of money for rent and directed that if that amount was paid within one month from the date of the decree the forfeiture would be relieved against. Accordingly, the tenant paid a sum over Rs. 200 into Court in time: but, unfortunately for him, there was an appeal to the Sub-Court and that Court increased the amount of rent payable by about Rs. 21. The question we have to consider in this case is whether by the decree of that Court, the payment of Rs. 21 within one month from the date of that Court's decree was a condition precedent to the forfeiture being relieved against or not. The Munsif held that it was, and the money not having been paid in time, he enforced the forfeiture and directed possession to be given to the landlord of the lands in suit. On appeal, the District Judge has held that the decree of the Appellate Court is not so clear as to make it necessary to construe it as leading to forfeiture if the extra money that was ordered to be paid by that Court was not paid within one month from the date of its decree. The matter is not very clear on the wording of the Appellate Court's decree or of its judgment. What the Court said in its appellate judgment, after deciding that Rs. 21 more should be paid was, "time for payment, one

month from this date." That is the last sentence in that judgment but it did not say anything about non-payment leading to forfeiture being enforced. In the decree that was drawn up, the language used is not any the clearer. It says "that the defendants do pay to the second plaintiff within one month from this date Rs. 21 for sundries claimed in the plaint in addition to the money already decreed by the lower Court." Then it says lower down, after making an order as to costs, "that in other respects the lower Court's decree is confirmed." The matter, we think, is left in ambiguity as to whether the non-payment of the extra Rs. 21 would lead to forfeiture or not. In cases of this sort where forfeiture is sought to be enforced by a landlord under the terms of a decree we think it right that he should prove conclusively that the decree which he is executing has given him that right. The Court ought to lean in favour of the tenant against forfeiture than in the landlord's favour in such cases. We are not prepared to say that the District Judge is wrong in holding in this case that the decree does not make it clear that forfeiture will be involved if the extra Rs. 21 is not paid within one month. What exactly was meant by a month's time being given is not very clear.

In these circumstances, we are not prepared to differ from the District Judge in his construction of the decree. We must, therefore, dismiss the appeal, but in the circumstances of the case as neither of the parties can be said to be free from fault, we direct that each party do bear his costs throughout.

V. N. V.
S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 620 OF 1922.
July 17, 1923.

Present :—Mr. Justice Sulaiman.

SURJAN SINGH AND OTHERS—DEFENDANTS —APPELLANTS
versus
UMARI SINGH AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Agra Tenancy Act (II of 1901) s. 167—Jurisdiction of Civil and Revenue Courts—Suit between rival claimants to occupancy holding, whether cognisable by Civil Court—Matter decided finally by Revenue Court—Jurisdiction of Civil Court, whether barred.

A suit between rival claimants to an occupancy holding is triable exclusively by a Civil Court and is not covered by section 167 of the Agra Tenancy Act. [p. 1010, col. 1.]

Bhup v. *Ram Lal*, 11 Ind. Cas. 268; 8 A. L. J 1009; 33 A. 795; *Jagarnath* v. *Ajudhia Singh*, 17 Ind. Cas. 876; 35 A. 14; 10 A. L. J 408; *Ganesh* v. *Kundan*, 15 Ind. Cas. 33; *Inayat-un-nissa* v. *Salim-un-nissa*, 29 Ind. Cas. 568; *Najibullah* v. *Gulsher Khan*, 1 Ind. Cas. 594; 31 A. 348; 6 A. L. J. 343, followed.

Once, a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. [p. 1010, col. 1.]

Kishore Singh v. *Bahadur Singh*, 48 Ind. Cas. 470; 16A. L. J. 933; 41 A. 97; *Mollo* v. *Ram Lal*; 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191; followed.

When a matter has not been finally decided in a Revenue Court, for instance where an appeal is pending against the decision of an Assistant Collector, and the same question arises in a suit filed in a Civil Court over which the latter Court has jurisdiction, it is not precluded from deciding the question merely by reason of the fact that it has already been decided by a Revenue Court of first instance.

Jaigopal Narain Singh v. *Umandat*, 10 Ind Cas. 573, 8 A. L. J. 695 at p 699, followed

Second appeal against the decree of the District Judge of Farrukhabad, dated the 28th of January 1922.

Mr. *Baleshwari Prasad*, for the Appellants.
Mr. *Durga Prasad*, for the Respondents.

JUDGMENT.—This is a complicated case in view of the multiplicity of the rulings of this Court, some of which are not easily reconcilable with others.

The present defendant No. 1 instituted a suit in the Revenue Court for arrears of rent against the plaintiffs, and the Assistant Collector by a judgment dated the 21st of January 1921 decreed the claim for Rs. 3-5-4. His judgment proceeded mainly on the presumed correctness of the entries of the Revenue papers and his finding in effect was that plot No. 211|3 which was in dispute in that case was a *sir* plot belonging to the present defendant No. 1. An appeal was filed from that judgment and was pending in the Court of the Collector when the present suit was instituted in the Civil Court for a declaration that the said plot No. 211|3 as well as two other

plots Nos. 211|1 and 211|2 were occupancy holdings of which the plaintiffs and the defendants were joint tenants. The cause of action alleged in the plaint was the decree for arrears of rent passed by the Assistant Collector which was said not to have become final inasmuch as an appeal from that decree was pending in the Appellate Court on the revenue side.

The defendants again asserted that all these three plots were the *sir* plots of the defendants, the plaintiffs being only *shikmi* tenants. There were also pleas raised to the effect that the claim was barred by section 11 of the Code of Civil Procedure as well as by section 167 of the Agra Tenancy Act.

The earned Munsif who tried the case overruled the legal objections and decreed the suit on the merits holding that the plaintiffs and the defendants had a joint interest in the lands which were occupancy holdings. On appeal the findings and the decree of the first Court have been upheld by the learned District Judge.

I may mention that, simultaneously with these proceedings, the proceedings in the Revenue Court have continued. After the passing of the first Court's decree the Collector appears to have set aside the decree of the Assistant Collector and to have dismissed the suit for arrears of rent. A second appeal from that order is, I am informed, still pending before the District Judge. It is not quite clear whether the District Judge on the revenue side has or has not stayed proceedings to await the result of the final decision in the civil suit.

The main point raised in this appeal is that the claim was barred by section 167 of the Agra Tenancy Act. In cases arising under this section there have been such a large number of rulings of this Court that it is practically impossible to summarise or even to refer to them. If the matter had been *res integrum* I would have had no hesitation in saying that the present suit was not cognisable by a Civil Court. Section 167 consists of two parts. The first part directs that "all suits and applications of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts." This apparently gives jurisdiction to the Revenue Courts to try not only suits and applications mentioned in the fourth schedule but also all such as are of the nature specified therein. The second portion of it says that "no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made". This confers exclusive jurisdiction on the Revenue Courts. And, therefore, all Courts other than Revenue Courts must refrain from trying such questions. It is noteworthy that the expression used is not " suits and applications" but " any dispute or matter in respect of which any such suit or application might be brought or made." The section has been obviously made very comprehensive in order to include all cases in which disputes arise in respect of a matter which can be disposed of by the Revenue Courts. The object of the section to my mind clearly is that all suits, no matter in what way the plaints are framed, should be instituted in a Revenue Court provided the dispute is such as can be disposed of by that Court.

If this were the correct view there is no doubt that the true test to apply in all such cases would be to ask the question 'whether the dispute which arises in the present case is one *in respect of which any suit or application could have been brought in the Revenue Court*?' It is true that a suit for a mere declaration against the defendant only to the effect that the parties are joint tenants of a holding is not one which falls within the fourth schedule. But if a suit were brought under section 95 of the Tenancy Act impleading the *zemindar* and asking for a declaration that the plaintiff was a tenant of the *zemindar* jointly with the *pro forma* defendant such a suit would clearly be exclusively triable by the Revenue Courts. It is also apparent that a mere declaration obtained in a Civil Court against the defendant would in no sense be binding on the landlord, who is no party to those proceedings and who may very well not recognise the present plaintiffs as his tenants. As against the landlord the Civil Court decree would be futile and a fresh litigation in the Revenue Court would be necessary. This being so, one would expect that the proper course to adopt in disputes about tenancy rights is to obtain a declaration in the Revenue Court both against the landlord and the rival tenant. In that view of the matter, I would have had no doubt that the dispute which arises in the present suit is one

in respect of which a plaint if properly framed, could and ought to have been filed in the Revenue Court.

However, sitting as a Single Judge, I am bound to follow Division Bench cases of this Court. The series of authority against my view is overwhelming and I am bound to submit to the rule of law laid down therein. In *Bhup* v. *Ram Lal* (1), *Jagannath* v. *Ajudhia Singh* (2), *Ganesh* v. *Kundan* (3), *Inayat-un-nissa* v. *Salim-un-nissa* (4), and *Najibullah* v. *Gulsher Khan* (5) it has been held by this Court that a suit between rival claimants to a tenancy lies exclusively in a Civil Court and that such a suit is not one which is covered by section 167 of the Agra Tenancy Act. That being the recognised interpretation of section 167, it must be held that the present suit, being in its nature one for a declaration of title against a rival claimant, was a suit which could only have been brought in the Civil Court.

This, however, does not dispose of the whole difficulty as previous to this suit the dispute with regard to plot No. 211|3 had in a different form been raised in a Revenue Court. What I have, therefore, further to see is the legal effect of that previous litigation. Although it has been held that section 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless, it *has also been held that once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court.* This view is not based on the provisions of section 167 nor on the principle of *res judicata*, but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final and binding on the parties. I refrain from referring to any apparent inconsistency. That this is the view of the law is clear from the case of *Kishore Singh* v. *Bahadur Singh* (6), which has been followed in the recent Full Bench case of *Mollo* v. *Ram Lal* (7).

(1) 11 Ind. Cas. 268 · 8 A. L. J. 1009; 33 A. 795.
(2) 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408.
(3) 15 Ind. Cas. 33.
(4) 29 Ind. Cas 568.
(5) 1 Ind. Cas. 594; 31 A. 348 ; 6 A. L. J. 343.
(6) 48 Ind. Cas. 470; 16 A. L. J. 933; 41 A. 97.
(7) 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191.

In the present case, however, the Revenue Court has not yet arrived at any final decision. The matter, as I have remarked above, is still pending before the District Judge. The question is whether this fact makes any difference or not.

The present suit relates to three plots Nos. 211|1, 211|2, and 211|3. It cannot be doubted that, so far as the two former plots are concerned, the previous proceedings in the Revenue Court cannot in view of the rulings of this Court be a bar to the present claim. The decree of the learned District Judge *qua* these two plots must therefore, stand as being based on a finding of fact which cannot be challenged in second appeal. The contention of the learned Vakil, can, therefore, be sustained, if at all, in respect of plot No. 211|3 only which was in dispute in the previous proceedings in the Revenue Court.

I find, however, that in at least one case *Jaigopal Narain Singh* v. *Umandat* (8) a Bench of this Court disposed of a civil suit finally on the ground that, although a similar dispute had been raised in a suit in the Revenue Court that suit was still pending, as the Board of Revenue *in revision* had postponed their final decision and were awaiting the decision of the civil suit. Whether a valid distinction can be drawn when the matter is pending not in an Appellate but a Revisional Court is not a question which I take upon myself to decide. There is the precedent quoted above which I can follow.

I have already remarked that in the previous case the judgment of the learned Assistant Collector proceeded mainly on the presumed correctness of the entries in the revenue papers, whereas the judgment of the Collector on appeal was based entirely on the decree of the Munsif in the civil suit. The only Court which has really gone into the merits of the case thoroughly is the Civil Court and in this civil litigation there are the concurrent findings of two Courts on the merits to the effect that the plaintiff and the defendant are jointly entitled to the lands which are really occupancy holdings and not *sir* plots.

If it were the fact that the final decision of the Revenue Court has been intentionally withheld with a view to see the result of the

(8) 10 Ind. Cas. 573; 8 A. L. J. 695 at p. 699.

Civil Court litigation, I would have no hesitation in affirming the decree of the District Judge and leaving the revenue case to be disposed of in accordance with this decision. As, however, there are no materials on the record which would show to me the stage at which the second appeal before the District Judge has reached, I direct that the parties should file before me affidavits within a month from this date explaining the true situation. If on the perusal of those affidavits I am satisfied that the decision of the other case has been intentionally postponed awaiting the result of this suit I would then pass the final order dismissing the appeal.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 18-B OF 1923.
January 31, 1924.

Present:—Mr. Hallifax, A. J. C.

HEMRAJ—PLAINTIFF—APPELLANT
versus
TRIMBAK KUNBI—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882) s. 54—Sale-essential constituents—Test.

The two essential constituents of a real sale are the transfer of ownership and the payment or promise of payment of price; a transaction from which either of these is absent is not a sale at all.

Therefore, a sale-deed which recites that the vendee has already spent a thousand rupees on the vendor's litigation and that the vendor has "this day" received another thousand rupees and deposited the money with the vendee for defraying the further costs of the same litigation, and purports to make a transfer of ownership for a price paid and not for a price promised or part-paid and part-promised does not satisfy more than half the definition of a sale and is not a sale at all

Appeal against the decree of Additional Sub-Judge, Akola, dated the 22nd December 1922, in C. S. No. 182 of 1920.

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

Mr. *M. B. Niyogi* and *V. K. Rajwade*, for the Respondent.

JUDGMENT:—The first contention in this appeal is that the payment of the full consideration or at least of a considerable part of it has been proved. The evidence given by the plaintiff-appellant himself goes a long way to prove that he never actually paid a single rupee to the defendant or to anybody else on his behalf. But even if he had produced fairly good evidence of payment it would be nullified by his failure to produce his account-books and by the circumstances in which that failure occurred which put it beyond doubt that he could have produced them but intentionally refrained from doing so. I have no hesitation in finding that no part of the consideration was ever paid.

It is next contended that an executed transfer by sale is not valid for want of consideration as an executory contract is. Several rulings of the High Court have been cited in support of this proposition but they very naturally fail to support it as it is directly contradictory of the clear terms of section 54 of the Transfer of Property Act. That section defines a sale as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised and lays down that such transfer in the case of property of the kind with which we are concerned, can be made only by a registered instrument. The two essential constituents of a real sale are, therefore, the transfer of ownership and the payment of a promise of price and a transaction from which either of these is absent is not a sale at all.

In all the rulings cited as apparently contradictory there was a transfer of ownership made in the prescribed manner which is the first of the two essentials of a sale. But in every case in which there was a promise of payment it is held that the second essential of a sale is present and the whole definition is satisfied whether that promise was subsequently kept or broken. So also in each case in which there was neither payment nor promise it is held that the second essential is absent and the definition is not satisfied.

The sale-deed in the present case recites that the vendees have already spent a thousand rupees on the vendor's litigation and the vendor has "this day" received another thousand rupees and deposited the money with

vendees for defraying the further costs of the same litigation. The deed then purports to make a transfer of ownership for a price paid and not for a price promised or part-paid and part-promised. It has already been found that there was no payment of the price or of any part of it, so that neither alternative of the second essential of a sale is present. The transaction does not, therefore, satisfy more than half the definition of a sale and is not a sale at all.

The transaction is also undoubtedly void under section 6 (*h*) (2) of the Transfer of Property Act, read with section 23 of the Contract Act, and probably also on the ground of fraud. The purchasers were buying property in litigation worth more than twenty-five thousand rupees for two thousand from a young Kunbi five weeks after his eighteenth birthday. The chance of success in the suit was more than good when the suit was filed and it had become a practical certainty on the day on which the sale-deed was executed. The cost of that litigation was actually Rs. 16 with whatever may have been paid to a pleader, and it was never likely to exceed three or four hundred rupees but the plaintiff himself has stated that he never had any intention of paying anything more than what the actual costs might amount to. There are also other circumstances proving that the transaction was of such a champertous nature that its object must be regarded as immoral and opposed to public policy.

There is also much evidence to support the vendor's statement that he signed the deed on a fraudulent representation by the plaintiff that it was a deed of quite another sort. It is, however, unnecessary to go into those matters. There was no sale because there was neither payment nor promise of the price and the plaintiff's suit was rightly dismissed. The appeal will accordingly be dismissed and the plaintiff-appellant will be ordered to pay all the costs in both Courts.

S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 288 OF 1922.

October 10, 1923.

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

R.D.K. VENKATALINGAMA NAYANUM BAHADUR VARU—APPELLANT

versus

M. A. R. N. ARUNACHELLAM CHETTIAR —RESPONDENT.

Madras Impartible Estates Act (II of 1904), s. 4—Personal decree against predecessors-in-title of proprietor—Estate, when liable to be proceeded against in execution—Legal necessity.

Under s. 4 of the Madras Impartible Estates Act, before any part of an impartible estate can be taken in execution of a decree for a personal debt against the predecessor-in-title of a proprietor, it must be shown that the debt for which the decree was passed was such as would be binding upon an ordinary joint family estate when incurrred by the managing member, in other words, that there was legal necessity for creating the debt

Appeal against the order of the Court of the Subordinate Judge of Chittoor, dated 10th January 1922 in C. M. P. No. 52 of 1921 in E. P. No 15 of 1921, in O. S. No. 19 of 1921

Mr. *A. Ramachandra Iyer*, for the Appellant.

Mr. *N. Chandrasekhara Iyer*, for the Respondent.

JUDGMENT.—This is an appeal that arises in execution of the decree in O. S. No. 19 of 1922 on the file of the Sub-Court of Chittoor. The appeal is by the son and legal representative of the late judgment-debtor the Raja of Kalhasti. The respondent is the decree-holder in the suit. The Raja having died, it was contended by his son and legal representative that the group of villages called Chembedu group could not be attached in execution of the decree as the assets of his father in his hands as they were part of the impartible estate of Kalhasti of which he was at the time the proprietor. It is not denied that this group of villages called Chembedu group forms part of the Kalhasti *Zemindari* and is governed by the Madras Impartible Estates Act, II of 1904. By sec-

tion 4 of that Act it is enacted that, "the proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of joint Hindu family, not being the father or grandfather of the other co-parceners to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent." That section clearly governs the present case. Under that section before any part of the impartible estate of Kalhasti can be taken in execution of a decree for a personal debt against the predecessor-in-title of the present proprietor, it must be shown that the debt for which the decree was passed was such as would be binding upon an ordinary joint family estate when the debt was incurred by the managing member, in other words, that there was legal necessity for creating the debt. The question whether the successor is a son of the predecessor or any other co-parcener makes no difference whatever, for the section does away with the special obligation as between sons and grandsons and their fathers and grandfathers based upon the theory of pious obligation in the Hindu Law. It is clear, therefore, that, before the decree-holder in this case could attach the property and bring it to sale, it was incumbent on him to establish that the debt for which this decree was passed was a debt incurred for the necessity of the impartible estate itself.

There is at present no such proof on record. In fact, it is said that the decree was obtained for a sum of money which the father of the present *Zemindar* had obtained as a trustee of a temple and misapplied himself, the debt thus being practically the result of a breach of trust. Such a debt as that can hardly be treated as a debt binding upon the successor-in-title to the *Zemindari* for it would not be a debt which, if incurred by the managing member of a joint Hindu family, would be binding upon the other-co-parceners.

It was very strenuously pressed on us that a fresh opportunity should be given to the decree-holder respondent to prove in the lower Court that this debt had the character of being one that would bind the co-parceners if it had been incurred by the managing member; but knowing the nature of the debt so far as it apppears from the record, there is hardly any room for doubt as to its character. Furthermore, if the decree-holder had intended to put forward any case under section 4 of the Impartible Estates Act, he should have done so in the first instance in the lower Court. He should have stated that, though the property attached was *Zemindari* property, the debt for which the decree was obtained was binding on the *Zemindari* estate, because it was incurred for proper and legal necessity. He never put forward a case like that and we do not think that he should be given any fresh opportunity in the matter.

The Subordinate Judge has given a decision in favour of the decree-holder on grounds which we are unable to follow. He says that the income from the trust funds were blended with the income from the *Zemindari* and for some reason or other the debt resulting from the management of the trust property should be held binding on the *Zemindari* estate. It is very difficult to follow this argument; whatever blending there might have been between the income of the impartible estate and that of the trust funds, the decree-holder will only be able to proceed against such blended income and cannot possibly get any right to proceed against the impartible estate itself.

The Sub-Judge has also relied on certain cases where it was held that an impartible *Zemindari* in the hands of the legal representative of the deceased former *Zemindar* should be treated as his assets for the purpose of realising the debts of that *Zemindar*. He has quoted *Zemindar of Kalhasti* v. *Achigadu* (1), and *Depuru Kulappa* v. *Umade Rajaha* (2), as authorities in favour of his view, but he has not noticed that these authorities are no longer of any value after the passing of the Impartible Estates Act, which is now conclusive on the question of the liability of an impartible estate as regards debts incurred by the previous holder of the estate.

In these circumstances, we must set aside the order of the Sub-Judge and declare that

(1) 30 M. 454; 17 M. L. J. 367.
(2) 8 Ind. Cas. 392; 8 M. L. T. 297; (1911) 1 M. W. N. 75.

the A schedule properties are not liable to be attached and that the attachment levied on schedule A properties should be set aside. The appellant will have his costs of this appeal, and, as regards costs in the lower Court, each party will bear his own costs as directed by the Sub-Judge.

V. N. V. *Appeal accepted.*
S. D.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NOS. 1430 AND 1431 OF 1922.

December 14, 1923.

Present:—Mr. Justice Pigott, Mr. Justice Lindsay and Mr. Justice Sulaiman.

M. MUHAMMAD JAN—PLAINTIFF—APPELLANT
versus
SHIAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 14—Limitation Act (IX of 1908) s. 4—Pre-emption decree—Payment of purchase-money, time fixed for—Court closed before expiry of period—Payment on re-opening of Court.

Where a pre-emption decree directs the payment of the purchase-money within a certain period, but the Court closes for the vacation before the expiry of that period, a payment made on the day on which the Court re-opens will amount to a compliance with the decree.

Case-law discussed.

Execution Second Appeal from the decree of the District Judge of Badaun, dated the 31st of July 1922.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—The facts out of which the two appeals before us arise are stated in the referring order of the 22nd June 1923. In substance they amount to this: by an appellate decree, the plaintiff in two pre-emption cases was given one month from the 27th of September 1921 within which to deposit certain money, if he desired to obtain the benefit of the decrees in his favour. The Civil Courts closed for the vacation in that year on the 30th of September and re-opened on the 4th of November. On that date the successful plaintiff made the deposit required by the decree. The Courts below have held that it was too late, more than thirty days having elapsed since the 27th of September 1921. There was authority of this Court for the view thus adopted. This is to be found in the case of *Hirday Narain* v. *Alam Singh* (1). The attention of the Courts below was not drawn to the fact that, since the decision above referred to a Bench of this Court, in the case of *Reoti Ram* v. *Sita Ram* (2), had arrived at a different conclusion. The matter has been referred to a Full Bench in order that these conflicting decisions may be re-considered. The position is so far an unfortunate one that in *Reoti Ram's case* (2), the attention of the Bench was not called to the decision in *Hirday Narain's case* (1), while, on the other hand, the decision in *Reoti Ram's case* (2) is founded upon an older decision of this Court which was not laid before the Bench which decided *Hirday Narain's case* (1). The older decision in question is the case of *Debi Din Rai* v. *Muhammad Ali* (3). We now find, moreover, that another Bench of this Court, in the case of *Bisheshar Nath* v. *Saul-ud-din* (4) had held a deposit made under circumstances precisely similar to those which we are now considering to have been made in time. The question for determination is whether the deposit made by the plaintiff Muhammad Jan was or was not within time under the terms of the decree. We have no desire to discuss any question as to the powers of the Court to extend that time; nor do we hold that the case falls within the provisions of section 10 of the General Clauses Act. As regards the decisions of this Court there is clearly a preponderance of authority in favour of the plaintiff-appellant. The current of authority is broken only by the decision in *Hirday Narain's case* (1). The

(1) 48 Ind. Cas. 353; 41 A. A. 471; 16 A. L. J. 892.
(2) 60 Ind. Cas. 894; 19 A. L. J. 49.
(3) 3 A. 850; A. W. N. (1881) 100; 2 Ind. Dec. (N. S.) 573.
(4) A. W. N. (1884) 217.

facts in that case were to this extent peculiar, that the deposit made by the plaintiff was not made actually on the first possible day after the reopening of the Courts, but one day later. It is true that a point was made in argument of the fact that, on the first available day, the Treasury where the deposit was required to be made was only open for one hour ; but we do not know how far this circumstance may have affected the decision of the Hon'ble Judges. There are two cases of other High Courts which are, in our opinion, in point. In the case of *Shooshi Bhushan Rudro* v. *Gobind Chandar Roy* (5) the Calcutta High Court, relying upon certain English cases, made the following observations :—

> "The broad principle there laid down is that, although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused, not by any act of their own, but by some act of the Court itself, such as the fact of the Court being closed, they are entitled to do the act on the first opening day."

They go on to remark that this principle had been affirmed in older cases of the same Court.

The same principle was laid down by another Bench of the same Court in the case of *Peary Mohan* v. *Ananda Charan* (6), in which again two older cases are referred to. We desire to refer also to the case of *Sambasiva Chari* v. *Ramasami Reddi* (7). The significance of that case lies in the fact that the Hon'ble Judges repelled contentions based upon the statutory provisions of the Indian Limitation Act and of the General Clauses Act ; but nevertheless held that there is a generally recognized principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity. It is quite true that this case, as well as *Shooshi Bhushan Rudro's case* (5), was laid before the Bench of this Court which decided *Hirday Narain's case*. (1) The learned Judges there remarked that these cases have nothing to do with question then being argued before the Court. Strictly speaking, this remark is correct, as the Hon'ble Judges were then dealing with a pre-emption decree prescribing a certain period for the doing of a certain act ; but it does seem to us that the general principle affirmed in the Calcutta and Madras cases is applicable and is sound in law. In view of these considerations and, taking account of the fact that the general current of authority in this Court has been opposed to the decision in *Hirday Narain's case* (1), we think that that case should now be overruled and the law affirmed as settled by two previous decisions and one subsequent one. In our opinion the deposit tendered by Muhammad Jan, the plaintiff, on the 4th of November 1921 was in time under the terms of the decree and should have been accepted. We, therefore, allow these appeals, set aside the order of the Court below and dismiss the application of the defendants to have the decree of the 27th of September 1921 executed as a decree in their favour. The appellant will have his costs throughout. It will be for the plaintiff Muhammad Jan to make such further application to the Trial Court as he may be advised, if he desires to obtain execution of the decree in his favour.

Z. K. *Appeals allowed.*

(5) 18 C. 231; 9 Ind. Dec. (N. S.) 154.
(6) 18 C. 631 at p. 634; 9 Ind. Dec. (N. S.) 421.
(7) 22 M. 179 ; 8 M. L. J. 265 ; 8 Ind. Dec. (N. S.) 271.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 60 OF 1923.

February 7, 1924.

Present.—Mr. Hallifax, A. J. C.

SALE MUHAMAD—DEFENDANT—APPELLANT

versus

RAMRATAN TIWARI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872) s. 2—Receipt—Want of consideration—Agreement—Validity.

A receipt is merely evidence of a fact and is not an agreement requiring consideration to make it a valid contract.

GUPTA NAND BHARTHI *v.* HARI SHANKAR

Appeal against the decree in Civil Suit No. 53 of 1921 by the 2nd Sub-Judge, Raipur, dated 20th April 1923.

Sir *B. K. Bose*, Messrs *V. Bose* and *P. N. Rudra*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—It appars that a decree at least in respect of the alleged loans of Rs. 1,000 and Rs. 700 should have been granted to the plaintiff as soon as the defendant put in his pleadings as he admitted his liability in respect of them both. He signed receipts for both these sums of money and there seems to have been much discussion and argument over the question of the invalidity of these receipts "for want of consideration". A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract.

[*After discussing the facts the learned A. J. C. concluded as follows* :—]

The appeal is dismissed and the defendant-appellant will pay all the costs of both parties in this Court. It may be added that no reason has been stated in the judgment of the lower Court for not allowing the plaintiff the full amount he had to pay on account of the cloth to the seller of it who obtained a decree against him, nor can I imagine any reason. It is hard, if not impossible, to decide any case properly unless the issues are carefully framed to cover only the points of difference between the parties and to cover each point once only. Half a dozen issues at the most would have done that here, but the learned Judge who decided the case was not satisfied with the thirteen framed by his predecessor but added ten more.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1479 OF 1923.

December 11, 1923.

Present :—Mr. Justice Sulaiman.

Mahant GUPTA NAND BHARTHI—DEFENDANT—APPELLANT

versus

HARI SHANKAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal, second—Construction of document, whether question of law or fact.

The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal.

Mathar Singh v. *Ranbaz Singh*, 61 Ind. Cas. 65 ; 19 A. L. J. 149 ; 3 U. P. L. R. (A) 27, distinguished.

The Midnapore Zemindari Co., Ltd. v. *Uma Charan Mandal*, 74 Ind. Cas. 482 ; 21 A. L. J. 723 ; (1923) A. I. R. (P. C.) 187 ; 4 P. L. T. 627 ; 33 M. L. T. 291 ; (1923) M. W. N. 832 ; 4 M. L. J. 663 ; 25 Bom. L. R. 1287 (P. C.), followed.

Second appeal against the decree of the Subordinate Judge of Bulandshahr, dated the 11th of August 1923.

Mr. *G. Agarwala*, for the Appellant.

JUDGMENT.— This second appeal arises out of a suit brought for possession of the site of a house by removal of the materials standing thereon. The main question in the case was one of fact whether the plaintiffs were or were not the owners of the land. Both the Courts below have decreed the claim holding that the plaintiffs' title is fully established. The lower Appellate Court has found as follows: "From the voluminous documentary evidence referred to in the judgment of the lower Court it was conclusively proved that plaintiff No. 1, who is respondent No. 1, was the purchaser of all the rights of the appellant in Sarai Goshain, a Mohalla in which the house in dispute was situated, and the, plaintiff No. 2 was the auction-purchaser of the

rights of the other *zemindar* Tikam Bharti in this house and, therefore, neither the appellant nor the other *zemindar* had any right left in themselves in respect of the site or the materials." It is contended on behalf of the defendant-appellant that the Court below has drawn wrong inference from the documentary evidence on the record. The Court of first instance had set forth the documentary evidence in detail and showed that the house in dispute was mentioned as item No. 17 in the sale certificate which was granted after an execution sale on the basis of a simple money decree in 1916. It also referred to a number of other documents showing that the entire title had passed to the plaintiffs and nothing had remained with the defendants. It is, however, contended on behalf of the appellant that, when a number of documents have to be construed, the question as to what proper inference can be drawn from them is one of law and not of fact and can, therefore, be gone into in second appeal. Reliance is also placed on the case of *Mathar Singh* v. *Ranbaz Singh* (1), and it is urged that in that case the learned Judges went into the whole of the evidence on the ground that the findings, which were apparently those of fact, were not based on evidence but upon evidence which had been misread or misunderstood. It may be possible to distinguish that case on the ground that the question of fact raised in that second appeal was one which had nowhere been put up as a plea in the written statement. That was a circumstance which very probably influenced the learned Judges in going through the evidence once again. However that may be, I am bound by the recent pronouncement of their Lordships of the Privy Council in the case of *The Midnapur Zemindary Co., Ltd.* v. *Uma Charan Mandal* (2) where it was laid down that, "where documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights." It cannot be suggested that the sale certificate referred to by the Court of first instance which expressly contains a recital that the house now in dispute was sold, has in any way been misconstrued. The learned Vakil for the appellant also is not able to show which of the particular documents referred to by the first Court has been wrongly interpreted. The question really is not one of misinterpretation of any document or documents of title but one of inference of fact from voluminous documentary evidence. I am, therefore, of opinion that the question, being one primarily of fact, cannot be challenged in second appeal. The appeal is without force and is hereby dismissed.

Z. K. *Appeal dismissed.*

(1) 61 Ind. Cas. 65; 19 A.L.J. 149; 3 U.P.L.R. (A.) 27.
(2) 74 Ind. Cas. 482; 21 A. L. J. 723; (1923) A. I. R. (P. C.) 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 4 M. L. J. 663; 25 Bom. L. R. 1287 (P.C).

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 261 OF 1922.

October 14, 1923.

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

SAVANNA VENKA ANARUNA VELLAYAPPA CHETTIAR —APPELLANT
versus
M. R. M. RAMANATHAN CHETTIAR—RESPONDENT.

Provincial Insolvency Act (*V of* 1920), *ss.* 4, 80—*Official Receiver, power of—Sale by Official Receiver—Objections—Procedure.*

An Official Receiver has no power to make an order in a claim petition. It is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act.

If the claimant wants to prevent a sale of the property as belonging to the insolvent, he should apply to the District Judge direct to take action under section 4 of the Act.

Appeal against the order of the District Court of Ramnad, at Madura, dated the 28th November 1921, and made in C. M. P. No. 832

SARAB SUKH DAS *v.* RAM PRASAD

of 1920, presented against the order of the Official Receiver, dated the 21st November 1920, and made in M. P. No. 126 of 1920 in I. P. No. 9 of 1919.

Messrs. *B. Sitarama Rao* and *S. R. Muthuswamy Aiyar*, for the Appellant.

Messrs. *M. Patanjali Sastri* and *C. S. Rama Rao Sahib*, for the Respondent.

JUDGMENT.—This appeal is from an insolvency proceeding before the District Judge of Madura. The Official Receiver seems to have made an attempt to sell certain properties to which the appellant before us put forward a claim that such properties belonged to him and not to the insolvent and should not be sold. These properties were included in a mortgage-decree obtained by the respondent against the insolvent. Strangely enough, the Official Receiver thought that he had power to dispose of the claim petition like that and, thinking that a *prima facie* title had been made out by the claimant, he passed an order releasing the properties from sale, holding that the properties belonged to the claimant. On this the mortgagee decree-holder, conceiving that he was somehow or other aggrieved by the order, put in an appeal to the District Judge. The District Judge thereupon came to the conclusion, and rightly in our opinion, that the secured creditor, the mortgagee decree-holder, was not in any way bound by any proceedings taken by the Official Receiver in the matter. But he thought, at the same time, that the effect of the order, if allowed to stand, would be to deprive the secured creditor of his right of sale which conclusion we are unable to follow. The secured creditor undoubtedly was not at all affected by the order of the Official Receiver.

On that, the District Judge proceeded to allow the appeal petition before him and set aside the order of the Official Receiver without deciding whether the property actually belonged to the claimant or to the insolvent. The form of the order which was drawn up proceeded further and it declared that the claim petition put in by the claimant do stand dismissed. The effect of that order, if left standing, must necessarily be that the property should be treated as the insolvent's and not as the claimant's, a position which the District Judge did not arrive at in his judgment.

We think that the whole of the proceeding is misconceived. In the first place, the Official Receiver had no power to make any order on a claim petition. It is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act, V of 1920. If the claimant wanted to prevent the sale of the properties as belonging to the insolvent, he should have applied to the District Judge direct to take action under section 4 of the Act. He did not do so. That being so, we must set aside all the proceedings in the lower Court and leave the parties *in status quo ante*. The claimant, if he finds that the Official Receiver either at his own instance or at the instance of any creditor, proposes to sell the properties which he claims to be his, may, if so advised, apply to the District Judge under section 4 of the Act for a proper order to be passed.

We, therefore, allow the appeal and set aside all the proceedings in the lower Court and direct each party to bear his own costs.

V. N. V. *Appeal allowed.*
S. D

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 15 OF 1920.

November 15, 1923.

Present :—Mr Justice Lindsay and Mr. Justice Kanhaiya Lal.

Lala SARAB SUKH DAS AND OTHERS —DEFENDANTS—APPELLANTS
versus
RAM PRASAD—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Purchases made in names of members—Presumption—Purchase made by stranger—Wakf—Dedication, proof of—Installation of idol or construction of temple, whether necessary.

Where there is a nucleus of joint family property and purchases are thereafter made in the names of different members of the family, then, in the absence of evidence to show that the purchases are made by the members out of their separate funds, they must be treated as joint family property.

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A purchase made in the name of a stranger, however, is *prima facie* a purchase made by him for his own use.

Under the Hindu Law the actual installation of idols or the construction of a temple is not absolutely necessary for validating a deed of *wakf* made for such a purpose. [p. 1021, col 2.]

Chatarbhuj v. *Chatarjit*, 8 Ind. Cas. 832; 33 All. 253; 8 A. L. J. 34; *Bupati Nath* v. *Ram Lal*, 8 Ind. Cas. 642; 37 Cal. 128; 10 C. L. J. 355; 14 C. W. N. 18, relied on.

The name given to a deity is only a sacred convention. The deity is supposed or believed to exist from eternity. The idol is virtually treated as a visible symbol of the deity in whose favour the dedication is made or by whom the purchase is to be effected; and the mere fact that the installation takes place afterwards does not affect the validity of the dedication or of the purpose for which the purchase is made. [p. 1022, col. 1.]

A certain village was purchased in the name of an idol and the income derived from the village was used for the purposes of worship of the idol and other charitable purposes. Idols bearing the name mentioned in the sale-deed were also purchased, but there was no formal installation of the idols and no temple was built for them;

Held, that there was a sufficient dedication of the village to the idol and the village had become *wakf* property.

First appeal against the decree of the Additional Subordinate Judge of Moradabad, dated the 21st November 1919.

Dr. *S. N. Sen* and Mr. *Panna Lal*, for the Appellants.

Messrs. *N. P. Asthana* and *Badri Narain*, for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was instituted by the plaintiff-respondent for the partition of a one-third share of certain property, comprising landed property, houses and moveables. The parties are descended from one Sewa Ram, who died about 40 or 45 years ago, leaving two sons, Bhagwan Das and Gobardhan Das. The plaintiff is the grandson of Bhagwan Das. His father, Dharam Das, died in 1904, while Bhagwan Das was alive. One of the defendants was Gobardhan Das who died during the pendency of the suit. The other defendants were the descendants of Bhagwan Das.

The first question for consideration in this appeal is, whether the property in dispute was joint family property, and whether there had been any partition in the family at or about the time alleged by the defendants.

The allegation of the plaintiff was that the property in dispute was joint family property and that the defendants were refusing to make a partition. The defendants pleaded that the villages, Ram Dandi and Ghar No. 5 mentioned in the schedule attached to the plaint, were *waqf* property, endowed for the purpose of a temple to be constructed in the latter and that, excepting house No 10, the rest of the property was their separate property. They further pleaded that Bhagwan Das had separated from Gobardhan Das about 40 years ago and that Dharam Das, the father of the plaintiff, had similarly separated from his father, Bhagwan Das, about 20 years later.

The Court below found that the family lived jointly till about 4 or 5 years before the institution of the suit, that there had been no partition, and that the entire property in dispute excepting the moveables, the existence of which was not proved, was property divisible between the parties.

The evidence produced by the defendants on the latter point is, as the learned Subordinate Judge points out, very unsatisfactory. On the other hand, several respectable witnesses have been examined on behalf of the plaintiff to prove that the family was joint. One of them, Mohan Lal, is an Honorary Magistrate who pays Rs. 2,000 as revenue and Rs. 1,800 as income-tax. He states that Bhagwan Das and his sons formed a joint family and had a joint business and he supports his statement by producing the entries in his account books which go to show that there were money dealings between him and the firm styled Bhagwan Das-Gobardhan Das which belonged to the parties. He also states that at times Ram Prasad, the plaintiff, and Makhan Lal and others used to come to get money from the firm and to re-pay the same. He further states that to his knowledge there was never a partition in the family and that when the sister of the plaintiff was married, the entire arrangement in connection with the marriage was made and the expenditure connected therewith met by Gobardhan Das and the other members of the family.

Another witness, Tika Ram, who pays Rs. 26 as income-tax states that Bhagwan Das and Gobardhan Das were joint, that the

plaintiff Ram Prasad used to get exponses from the family shop, which was managed by Gobardhan Das and that some of the defendants and their sons used to work in that shop.

Another witness, Ramji Mal, a physician, similarly deposes that Bhagwan Das and Gobardhan Das formed a joint Hindu family and that whenever he went on a professional visit, Gobardhan Das and Sarab Sukh Das paid his fee for his attendance.

The statements of these witnesses are corroborated by certain documentary evidence produced in the case. There is, for instance, a copy of a plaint in a suit filed by Gobardhan Das in 1907 for the recovery of money due by certain debtors of the firm. After the institution of that suit an application was made by Bhagwan Das and his two sons, who were then alive, and by the present plaintiff under the guardianship of Bhagwan Das, stating that they were living jointly with Gobardhan Das and that they should be added as co-plaintiffs. This application was allowed, and Bhagwan Das and his sons, Daulat Ram and Sarab Sukh Das, and his grandson, the present plaintiff, were brought on the record. This could not evidently have been done without the consent of the then plaintiff Gobardhan Das. Again, in 1916 the sister of the plaintiff was married and an application was made by Gobardhan Das for permission to take a procession through the streets and for the use of fire-works in connection therewith. In that application he described the sister of the plaintiff as "his daughter." It is not possible to attach much significance to the use of the words "his daughter" in that petition, but from the fact that the application was made by Gobardhan Das, there is reason to think that he was taking an active and leading part in the affair, or, in other words, such a part as would ordinarily be taken by the head or manager of a family in connection with the celebration of a marriage in it. Further, an extract from the Income-tax Register for 1916-1917 has been produced, showing that the present plaintiff and Sarab Sukh Das, Daulat Ram and Gobardhan Das were jointly assessed to income-tax with reference to the income derived from the Sugar-cane Press and houses held by the family.

There is also the evidence of Mohan Lal showing that the firm of Bhagwan Das, Gobardhan Das used to take monies from time to time from him.

There is, further, on the record a decree which was jointly obtained by Gobardhan Das, Sarab Sukh Das and Daulat Ram against a certain debtor in 1915. The plaintiff was not a party to that decree; but from the fact that the other members of the family were co-plaintiffs with Gobardhan Das there can be no room for doubt that the entire family continued to work jointly till at least 1916.

On behalf of the defendants reliance has been placed on a written statement filed by Sarab Sukh Das and others in 1919 in which they stated that Bhagwan Das and Gobardhan Das were proprietors of the firm styled Bhagwan Das and that they had no concern with the firm. But the object of their disclaiming any connection with that firm obviously was to disavow any responsibility for any liability incurred by the firm and much weight cannot, therefore, be attached to that statement. In connection with the same suit Gobardhan Das was examined and in the statement which he then made he said that Bhagwan Das was his *sharik* and brother. That statement is inconclusive and does not necessarily support the defence. On a consideration of the entire evidence we are of opinion that the Court below has come to a right conclusion in holding that the plaintiff was living jointly with the other members of the family including Gobardhan Das. In fact, the father of the plaintiff had died, while the plaintiff was still a minor. He was brought up by his grandfather. The family carried on a joint business in which he took some part in getting money from and making payments to other firms; and the statement of the defendants that a partition had taken place; that Dharam Das had separated 20 years ago from his father, and that Bhagwan Das had separated from Gobardhan Das, cannot be trusted.

As regards the property in dispute, some of the purchases were made in the name of one member of the family and others in the name of another member of the family, but, as the family was joint at the time the purchases were made, the presumption is, that they were made with joint family funds. No reliable evidence has been adduced on behalf of the defendants to establish that the purchases made in the names of the different members

of the family were made out of their separate earnings; and in the absence of any evidence, the entire property so purchased must be treated as joint family property.

The case of the village Ram Dandi, however, stands on a different footing It was purchased on the 30th June 1906 in the name of Sri Lachmi Narainji, an idol said to have been installed in a temple situated in one of the houses at Chandausi. The purchase was made for a sum of Rs. 5,000 and the greater portion of the consideration was applied to the payment of a debt due to Sarab Sukh Das and of certain other debts due to certain other persons by vendor. There is no evidence to show when the debts were paid ; but as the sale-deed stands in favour of, and in the name of Sri Thakurji, known as Sri Lachmi Narainji Maharaj, the presumption that any purchase made in the name of any member of the joint family would be deemed to have been made with joint family funds, would not be applicable. A purchase made in the name of a stranger is *prima facie* a purchase made by him for his own use. There is evidence to show that in 1895 three idols had been obtained through an official attached to the Rangaji temple of Brindaban and that the expenses of the purchase of those idols were met by the firm of Bhagwan Das-Gobardhan Das. The idols were made of copper and weighed two maunds sixteen seers. They were, according to the evidence of Mohan Lal, placed in a certain shop, from which they were removed about 18 or 19 years ago to house No. 3, where they still exist. The intention of the family evidently was to build a separate temple for the installation of those idols but no temple appears to have been built for the purpose. During the pendency of the suit Gobardhan Das executed a *tamlik-nama* by which he disposed of the greater portion of his property in favour of Sarab Sukh Das, and a deed of *waqf*, by which he dedicated one-fourth of the house, entered as No. 5 in the plaint, and a one-fourth share of the income of the village Kulaha ; the former for the construction of the temple there and the latter for the expenses of its upkeep. In the deed of *waqf* he stated that an oral dedication had already been made of the *gher* previously by him and his brother Bhagwan Das. But no evidence has been produced in support of that statement. The effect of the present suit was to create a separation in the family and thereby to give power to Gobardhan Das to dispose of his share in the family property in any way he thought proper. The *waqf* cannot, therefore, operate except as regards his share of *gher* No. 5 and of the village Kulaha. As regards the village Ram Dandi the defendants have produced certain account-books, beginning from the 26th September 1906 and ending with the 8th August 1918, wherein the income of the village and the expenses incurred in connection with the temple are detailed. The account-books purport to be in the handwriting of Sarab Sukh, who was not produced ; but the evidence of Mohan Lal proves that they were maintained in the ordinary course of business by Sarab Sukh who was in charge of the endowed property. The account-books show that the entire income derived from the village Ram Dandi was applied to the maintenence of the worship of the idols installed in the house and charitable relief. They further go to show that the village, Ram Dandi, had all along been treated as *waqf* property and that neither Bhagwan Das nor any of his descendants even objected to the use of the income for the purposes aforesaid. If the village Ram Dandi had had been joint family property, it is obvious that the income derived from that village would have been brought into the family hotch-pot and used for family purposes. That was not, however, the case. That village must, therefore, be treated as a *waqf* property purchased for the benefit of Sri Luchmi Narainji Maharaj, that is, the deity who was to be subsequently installed in a temple to be constructed for his use.

It is contended on behalf of the plaintiff that there could be no valid and effective *waqf* because no temple was actually built and no idols were set up. But, as has already been pointed out, the family had obtained idols to be set up bearing the name borne in the sale-deed, and the income which was derived from the village purchased in his name was used for the purposes of worship and other charitable purposes. In fact, the actual installation of idols or the construction of a temple is not absolutely necessary for validating a deed of *waqf* made for such a purpose. In *Chatarbhuj* v. *Chatarjit* (1)

(1) 8 Ind. Cas. 832 : 33 A. 253 ; 8 A. L. J. 34.

where by a deed of gift certain *zemindari* property was expressed to be given to an idol, which wasnot at the time of execution in existence, and possession of the property was made over to a certain person as *pujari*, it was held that the deed was valid and created a trust in favour of the idol. In *Bhupati Nath* v. *Ram Lal* (2) it was similarly held that the principle of Hindu law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void." The name given to a deity is only a sacred convention. The deity is supposed or believed to exist from eternity. The idol is virtually treated as a visible symbol of the deity in whose favour the dedication is made or by whom the purchase is to be effected; and the mere fact that the installation takes place afterwards, does not affect the validity of the dedication or of the purpose for which the purchase is made.

It only remains to consider how far the properties entered in the deed of *waqf* executed by Gobardhan Das on the 18th September 1918 were partible. Both the *gher* and the village Kulaha must be treated as joint family property because they were purchased in the name of some member of the family or another when the family was joint. The family puchased an old ancestral house and carried on certain sugar-cane pressing business. It possessed the nucleus round which the acquisitions could grow; and in the absence of any evidence to show that these purchases were made by any member or members of the family out of separate funds, they must necessarily be treated as joint family property. But the effect of the institution of the present suit for partition was to create a separation between Ram Prasad and the other members of the family, and Gobardhan Das had, therefore, a right under the Hindu Law, to dispose of his share of the property. The *waqf* is, therefore, valid so far as his half share of the said property is concerned.

In the plaint originally filed, the plaintiff had claimed a one-sixth share, but on the death of Gobardhan Das, he amended the plaint and claimed to own a one-third share in the entire property. The Court below has rightly awarded a one sixth share to him. The claim of the plaintiff ought, therefore, to be allowed in respect of the said one-sixth share except in regard to the village Ram Dandi and a half share of the village Kulaha and *gher* No. 5 comprised in the *waqf* of the 18th September 1918.

The appeal is allowed in so far that the decree for partition granted by the Court below will be confined to the property other than the village Ram Dandi and a half share of *gher* No. 5 and of the village Kulaha mentioned in the deed aforesaid. It will be open to the defendants when a partition is effected to remove the idols lying in house No. 3 to such place as may be constructed for their reception either in that portion of *gher* No. 5 which may be allotted to them or in such other place as they think proper. Subject to these reservations, the decree of the Court below will be confirmed. The plaintiff shall get 5|6ths of his costs and the defendants 1|6th of their costs throughout.

Z. K. *Appeal allowed in part.*

(2) 3 Ind. Cas. 644; 37 C. 128; 10 C. L. J. 355; 14 C. W. N. 18.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 867 OF 1922.

December 3, 1923.

Present:—Mr. Justice Kanhaiya Lal

SHAIKH MUDI—DEFENDANT—APPELLANT
versus
MOHIB ALI—PLAINTIFF—RESPONDENT.

Mortgage—Occupancy tenancy, joint—Mortgage by some co-tenants—Co-tenant, whether can repudiate entire mortgage

A mortgagor is estopped from denying the validity of the mortgage after having received the consideration thereof from the mortgagee.

Similarly, a joint occupancy tenant who desires to repudiate a mortgage of the tenancy made by his co-tenants, can get back possession of his own share in the tenancy, but he cannot repudiate the entire mortgage made by his co-tenants and get back possession

of their shares, without paying to the mortgagee the money realised from him by his co-tenants.

Bahoran Upadhya v. *Uttamgir*, 12 Ind. Cas. 112 ; 33 All. 779 ; 8 A. L. J. 931 ; *Ramzan* v. *Bhukhal Rai*, 47 Ind. Cas. 852 ; 16 A. L. J. 747, referred to.

Second appeal against the decree of the 1st Additional Judge of Gorakhpur, dated the 17th March 1922.

Mr. *Hamid Hasan*, for the Appellant.

The Respondent was not represented.

JUDGMENT.—The question for consideration in this appeal is whether in the case of a joint occupancy holding belonging to four brothers and mortgaged by some of them with possession in favour of another person, one of the brothers, who was not a party to the mortgage, can get back possession of the entire holding without paying the mortgage-money on the ground that such a mortgage was invalid. The Court of first instance gave a decree for joint possession with the mortgagees; but the lower Appellate Court decreed the entire suit. In *Bahoran Upadhya* v. *Uttamgir* (1), it was held that a mortgagor of an occupancy holding, who had put the mortgagee in possession, could not recover back possession upon the ground merely that the mortgage was void under the provisions of the N.-W. P. Tenancy Act (II of 1901) without repaying to the mortgagee the money which he had received from him. In *Ramzan* v. *Bhukhal Rai* (2), it was similarly held that though a usufructuary mortgage of an occupancy-holding was void under section 20 of the N.-W. P. Tenancy Act, the mortgagor could get back possession on his paying the mortgage-money. A mortgagor is estopped from denying the validity of the mortgage after having received the consideration thereof from the mortgagee. Similarly a joint occupancy-tenant who wants to repudiate a mortgage made by his co-tenant can get back possession of his share, but cannot repudiate the mortgage made by his co-sharers without paying the mortgage-money realised by the latter by virtue of the mortgage from the mortgagee. To allow him to do so would in effect amount indirectly to allowing his co-sharer to resile from the mortgage and getting back possession without re-paying the money taken by him from the mortgagee under the cloak of the plaintiff's joint right. The appeal is, therefore, allowed with costs here and in the lower Appellate Court and the decree of the lower Appellate Court amended in so far that the plaintiff will not be able to get possession of the three-fourths share of the mortgagors without the payment by him or the defendants Nos. 1 to 4 of the mortgage-money due to the defendants Nos. 5 to 6. In other respects the decree of the lower Appellate Court will stand confirmed.

Z. K. *Decree modified.*

(1) 12 Ind. Cas. 112 ; 33 A. 779 ; 8 A. L. J. 931.
(2) 47 Ind. Cas. 852 ; 16 A. L. J. 747.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 637 OF 1922.

December 4, 1923.

Present :—Mr. Justice Stuart and Mr. Justice Mukerji.

DILDAR—DEFENDANT—APPELLANT
versus
SHUKRULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Mortgagee failing to deliver possession of entire mortgaged property—Mesne profits, liability to pay.

On redemption a mortgagee is bound to hand over to the mortgagor the property of which he got possession in the capacity of mortgagee and in no other capacity. If he claims to have become a co-sharer in the property during the pendency of the mortgage, the proper procedure is for him to hand over to the mortgagor the whole quantity of the lands of which he obtained possession as mortgagee and then to settle with the mortgagor as to which portion should be handed back to him as representing his share.

If the mortgagee fails to deliver possession of the lands of which he obtained possession in the capacity of mortgagee he will be liable to pay mesne profits to the mortgagor.

Sarbjit Singh v. *Raj Kumar*, 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A 5; (1922) A. I. R. (A.) 162, distinguished.

Second appeal against the decree of the District Judge of Gorakhpur, dated the 6th of February 1922.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

Judgment.—The facts which have given rise to this second appeal are these : The appellant and some others, on whose behalf the appellant has appealed, obtained two mortgages of certain shares in a *patti* of 4 annas. Subsequently, it is not clear whether after the redemption of the mortgages or before the redemption, the mortgagees purchased a small share (6 p.) out of the *patti*. The mortgages were redeemed. After the mortgage the appellants obtained possession over certain plots of land. Presumably this possession was obtained as mortgagees and on behalf of the mortgagors. The dispute arose when the mortgage was redeemed. The mortgagees refused to give up the lands over which they were in possession as mortgagees. Their contention was that they had become co-sharers in the lands and they were entitled to keep possession as co-sharers.

The Courts below gave a decree for joint possession to the plaintiffs and also a decree for mesne profits. The plaintiffs have not appealed. The contentions of the appellant are (1) that there should have been no decree for joint possession, and (2) that there should have been no decree for mesne profits.

On the first point it seems to us clear that the mortgagees were bound to hand over the lands of which they got possession, in the capacity of mortgagees, and in no other capacity. When the share was redeemed the whole quantity of land should have been handed back to the mortgagors. After that act had been performed it was for the parties to settle between themselves, if possible, what lands out of these should be handed back to the mortgagees as representing a fair share of theirs. The mortgagees were not at all entitled to keep possession simply because they had become co-sharers in the *patti*. In this view the possession of the mortgagees over the lands which they have got in the capacity of mortgagees was unlawful. The decree for joint possession was, therefore, a very proper one.

On the second point the learned Counsel for the appellant has cited to us the case of *Sarbjit Singh* v. *Raj Kumar Roy* (1). In our opinion that case is quite distinguishable. It was a case in which certain admittedly joint lands were held by tenants and after the tenants left one of the co-sharers took possession of those lands. The defendants in the case were entitled to take possession of those lands as co-sharers in the village. In the present case, as we have already said, the mortgagees were bound to hand over the entire quantity of land they had taken possession of as mortgagees. In our opinion, the Courts below might have given a decree for possession and not only a decree for joint possession. The decree for mesne profits, therefore, was perfectly correct.

The appeal fails and is dismissed with costs which will include in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A. 5; (1922) A. I. R. (A.) 162.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 677 OF 1922.

December 5, 1923.

Present :—Mr. Justice Stuart and Mr. Justice Mukerji.

GANESHI LAL—PLAINTIFF—APPELLANT
versus
Babu NOBIN CHANDRA BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Guardian de facto, alienation by, of minor's property, validity of.

A guardian of a Muhammadan minor, who is not a guardian under the law, is a pure and simple outsider or *fazuli*, and cannot bind the property of the minor by any act of his, whether there be any necessity or benefit to the minor or not.

Imambandi v. *Mutsadi*, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 23 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), followed.

Second appeal against the decree of the Additional District Judge of Cawnpore, dated the 6th March 1922.

Dr. *K. N. Katju*, for the Appellant.
Mr. *S. C. Das*, for the Respondents.

GANESH LAL *v.* NOBIN CHANDRA BOSE

JUDGMENT.—The property claimed by the plaintiff-appellant is 5|6ths of a certain property once owned by one *Musammat* Chanda. She mortgaged the whole of it in 1914 and died a year later. She left her surviving two heirs her mother *Mt.* Nasiban and her son Siddiq. The son was a minor. The mother sold the entire property in 1915 to the respondent No. 1 in this appeal for a sum of Rs. 500. She received in cash a sum of Rs. 100 and left with the transferee the sum of Rs. 400 for the purpose of payment of the mortgage which had been executed by *Mt.* Chanda in 1914. Siddiq attained majority sometime in 1919 and in 1921 sold the property to the appellant. The appellant brought the suit out of which this appeal has arisen for recovery of 5|6ths of the property being the share of Siddiq in it.

The Court of first instance held that the appellant was entitled to recover the 5|6ths of the property but subject to payment of 5|6ths of the sum of Rs. 400 that went to pay off the mortgage created by *Mt.* Chanda.

The learned Additional District Judge reversed the decree and dismissed the suit *in toto*. He held that the suit was barred by time. He also recorded a finding to the effect that, in any case, the appellant could not succeed without paying 5|6ths of a sum Rs. 900, and not of a sum of Rs. 400 only.

Two points have been urged before us in this appeal. First, it has been contended that the act of the mother Nasiban could not bind the son Siddiq at all. It is urged that it is immaterial whether there was any necessity for the sale or not. The second point that has been urged is that the suit was not time-barred. Taking the second point first. It appears that the sale having been made in 1915 the suit was amply within time for the ejectment of the purchaser.

To take up the first. The point raised is really concluded by the judgment of the Privy Council in *Imambandi* v. *Mutsaddi* (1). As we read the judgment, their Lordships have authoritatively laid it down that a guardian of a Muhammedan minor who is not a guardian under the law is a pure and simple out-sider, or *fazuli* as he has been described, and he cannot bind the property of the minor by any act of his whether there be any necessity or benefit to the minor. In view of this Privy Council case it is not necessary to go into any of the rulings of this Court in which it may have been held that a *de facto* guardian of a Muhammedan minor could bind his property by a transaction by which the minor has been benefited.

A third question arises in this case. It appears that there was a decree against *Mt.* Chanda and several other persons for the sale of certain properties. It has been found as a fact by the Court below that the property now in question was one of the properties dealt with by the decree. We have not got any copy of the decree on the record. It appears from the judgment that, besides the property in question in this appeal, there were other properties involved. It is clear that the whole of the liability for the decretal amount cannot be laid on the property in question. At any rate, the respondent No. 1 was bound to contribute to the extent of his own liability. The Court below, therefore, was not justified in holding as a matter of law that the appellant was bound to pay 5|6ths of the sum of Rs. 900. The Court of first instance allowed 5|6ths of Rs. 400 or a sum of Rs. 333-5-4. This decree the appellant accepts.

The result is that we allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs which will include fees on the higher scale.

Stuart, J.—In view of the fact that the plaintiff agrees to pay Rs. 333-5-4 to Babu Nobin Chandra Bose the question does not arise whether if he had insisted he would not have been able to escape all liability. I note that we are allowing the amount without expressing any opinion as to whether he is liable to pay under the law. We are allowing it because he agrees to pay it.

I concur in allowing the appeal with costs including fees on the higher scale.

Z. K. *Appeal allowed.*

NARAINDAS *v.* KUNJILAL

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 165 OF 1923.

February 2, 1924.

Present:—Mr. Kotval, A. J. C.

NARAINDAS AND SHEODAS—PLAINTIFFS —APPLICANTS
versus.
KUNJILAL AND ANOTHER—DEFENDANTS —NON-APPLICANTS.

Contract Act (IX of 1872) s. 107—Re-sale—Notice, burden of proof.—General rule of law, applicability whether limited.

The giving of notice is a condition precedent to the lawful exercise of the power of re-sale given by section 107 of the Contract Act and it is for the person exercising the power under the section to plead and prove that the notice was given and the condition precedent fulfilled. It is not enough to say that the purchaser has suffered no loss on account of the re-sale, inasmuch as where the legislature enacts a general rule its operation cannot be governed by such considerations as whether looking to the reasons which led the legislature to enact it, it is necessary to apply the rule or not in particular cases. The rule is expressed in unambiguous language and applied in every case where the facts to which it is intended to apply exist.

Application for revision of the order of the Small Cause Court, Jubbulpore, dated the 5th April 1923.

Mr. *N. G. Bose, R. B.*, for the Applicants.

Mr. *A. V. Khare*, for the non-Applicant.

ORDER.—Although a case somewhat different from that in the plaint was put forward in the pleadings the application in this Court is argued on the bases of the claim as set forth in the plaint and ground 3 is not pressed.

It is admitted that the plaintiffs re-sold the goods in exercise of the power given by section 107, Contract Act, but it is pleaded that the fact that no notice to the defendants is proved is due to the defendants not having pleaded want of such notice. But as the giving of a notice was a condition precedent to the lawful exercise of the power it was for the plaintiffs to plead and prove that the notice had been given and the condition precedent fulfilled. The plaintiffs are, therefore, not entitled to a remand for the purpose of proving the notice.

It is next urged that, although the rule under section 107 requires notice, the absence of a notice does not affect the plaintiffs' claim. It is said that the object of the rule in requiring notice is that no unnecessary loss may be caused to the puchaser and that he may have an opportunity of taking the goods and paying up or of purchasing them at the re-sale. In the present case it is said there is no question of loss to the purchaser as it is not alleged that the rate at which the goods were re-sold was not a fair rate. Where the Legislature enacts a general rule its operation cannot be governed by such considerations as whether looking to the reasons which led the Legislature to enact it, it is necessary to apply the rule or not in particular cases. If it be held that a rule need not be applied if the mischief it sought to prevent is not likely to happen in a particular case, the applicability of the rule would depend upon the result of a preliminary investigation as to the likelihood of the mischief. Where the rule is expressed in unambiguous language it must be applied in every case where the facts which it is intended to apply exist. The application fails and is dismissed with costs.

S. D. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 612 OF 1922.

December 10, 1923.

Present:—Mr. Justice Mukerji.

BIJAI BAHADUR—PLAINTIFF—APPELLANT
versus
PARMESHWARI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Decrees, two, in one suit—Appeal, single, whether competent—Agra Tenancy Act (II of 1901), s. 79, applicability of—Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Mortgage paid off by stranger—Suit to recover mortgaged property—Limitation.

BIJAI BAHADUR v. PARMESHWARI RAM

Where separate appeals preferred by two sets of defendants were accepted, and the plaintiff filed only one second appeal against the appellate decree but impleaded both sets of defendants as respondents to the appeal;

Held, that the second appeal was maintainable and that the failure to prefer two separate appeals was only a technical defect which could be overlooked, especially in view of the fact that both sets of defendants had been impleaded as respondents.

Gansham Singh v. *Bhola Singh*, 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A.) 490; 45 A. 506, referred to.

Section 79 of the Agra Tenancy Act applies only to a case where there is more or less forcible ejectment, it does apply when there is an ejectment by mutual consent. A suit by the heirs of a mortgagor to recover the mortgaged property from a stranger who has paid off the mortgagee is governed by Article 144 and not by Article 148 of Schedule I to the Limitation Act.

Second appeal from the decree of the District Judge of Ghazipur, dated the 31st of January 1923.

Dr. *M. L. Agarwala*, for the Appellant.

Messrs. *Mangal Prasad Bhargava*, *U. S. Bajpai* and *S. K. Dar*, for the Respondents.

JUDGMENT.—In this appeal Mr. Bajpai has taken a preliminary objection, namely, that the appeal is not maintainable. The point raised is rather difficult. I have, however, given it my best consideration.

The facts are these: The appellant's predecessor-in-title brought the suit out of which this appeal has arisen. It was a suit for redemption to which eleven persons were made parties. It was distinctly stated in the plaint that the suit was really directed against defendants Nos. 1 to 5 and if the other defendants whe had been made parties as a mere matter of form did not object, the plaintiff was not going to hold them liable either for costs of the suit or for damages. The suit succeeded in the Court of first instance and redemption was decreed on payment of a certain amount of money Defendant No. 8 who was the original mortgagee filed a written statement but he nowhere said in it that the suit was liable to be dismissed *in toto* on any ground whatsoever. All that he asked for was that he should be allowed a certain amount of money in the case of redemption. From the decree passed in favour of the plaintiff there were two appeals before the first Appellate Court, one was appeal No. 220 of 1921. This was instituted by the defendants Nos. 1 to 5. The other appeal No. 228 of 1921 was filed by the defendant No. 8, Bhagirath Ram, who died pending the appeal. Defendants 1 to 5 had urged in their written statement that the suit was incompetent and should be dismissed. They pleaded limitation and raised other objections. In their grounds of appeal they repeated the plea of limitation. This plea succeeded in the Court of first instance. In the appeal filed by Bhagirath Ram he urged that he should have his money, but in the last ground of appeal he asked that the suit should be dismissed.

The Court of first appeal wrote a combined judgment allowing the appeal lodged by defendants Nos. 1 to 5. While concluding this judgment it said as follows: "Civil Appeal No. 228 of 1921 was instituted by the representatives of Bhagirath Ram who claimed half the consideration-money and he also asked that the appeal should be dismissed."

The appeal No. 228 was also allowed and the suit was ordered to be dismissed. The present appeal is against the decree passed in appeal No. 220 of 1921 which had been brought by the defendants Nos. 1 to 5 only. But in this Court Bhagirath's heirs, namely, Bujhawan Ram, Lakhan Ram and Nand Kishor, have been impleaded.

Now, it is urged on behalf of the respondents that as no appeal has been lodged against the decree made in appeal No. 228 of 1921 this appeal is not maintainable.

On behalf of the appellant the case of *Ghansham Singh* v. *Bhola Singh* (1), recently decided by five learned Judges of this Court, has been cited and it has been urged that practically there is one decree and the mere fact that the formality of filing an appeal against the decree in appeal No. 228 of 1921 has not been gone through should not prejudice the present case. I think I ought to accept this argument of the learned Counsel for the appellant. I have already stated that the heirs of the defendant No. 8, Bhagirath Ram, are parties to the present appeal. It is not the case that an appeal has been lodged

(1) 74 Ind. Cas. 411; 21 A. L. J. 465, (1923) A. I. R. (A.) 490; 45 A. 506.

against only defendants Nos. 1 to 5 who alone were said to be in possession and were found to be in possession by the Court of first instance. If a separate appeal had been filed against the decree in appeal No. 228 of 1921 the same question would have arisen as would arise in the present appeal I have already mentioned that the defendant No. 8 never urged in his written statment that the suit should fail. In his grounds of appeal, too, he never urged the plea of limitation. Under the circumstances, I think we ought to look to what should operate substantial justice and should overlook the technical side of the question (if any).

I do not think it necessary to discuss the Full Bench case, but I may point out that what was decided there was that a Court has to look to the substance of a thing rather than to the form. In my opinion, as the heirs of Bhagirath Ram are parties to this appeal they cannot in any way be prejudiced by the fact that no appeal was filed against the decree which they got in their own appeal. The appeal may, therefore, be argued on the merits.

JUDGMENT.—The facts which have given rise to this appeal are shortly these: One Harcharan Singh was the proprietor of the disputed property which he lost, as a result of the execution of a decree against him, at an auction-sale held on 20th of May 1897. About a month later, on the 17th June 1897, he made the mortgage in question. By this mortgage he mortgoged with one Bhagirath Ram a small plot of land for the sum of Rs. 24. The auction-purchasers who are now represented by defendants Nos. 1 to 5 instituted two suits for redemption of certain mortgages executed by Harcharan Singh in the years 1886 and 1897. The suits for redemption did not include the mortgage now in question. The suits were referred to arbitrators for decision and they decided that the auction-purchasers should pay half of the amounts of the two mortgages of 1886 and 1887 and also half of the amount of the mortgage of 17th June 1897. The result was that, after the redemption, the auction-purchasers took possession of the mortgaged properties sometime in 1905. Harcharan Singh put in an objection in the Execution Department. His objection was rejected on 17th June 1905. The suit out of which this appeal has arisen was instituted by the son of Harcharan Singh for the redemption of the mortgage dated the 17th June 1897 as against the defendants Nos. 1 to 5, the auction-purchasers. In the plaint he said that the original mortgagee Bhagirath Ram and others were merely *pro forma* defendants.

The suit was resisted *inter alia* on the ground of limitation. This plea succeeded in the first Court of appeal. This is the only question for determination in this Court, namely, whether the Court below was right.

On behalf of the respondents it has been urged that either section 79 of the Tenancy Act applies or Article 144 of the Limitation Act applies, and in either case the suit is time-barred.

It is urged that the arrangement, through the arbitration, that was come to, between the auction-purchasers and Bhagirath, amounted to an ouster of Bhagirath from the land and the ouster of Bhagirath amounted to the ouster of Harcharan Singh who had become an ex-proprietary tenant of the mortgaged plot, he having lost, a month before, his title as *zemindar*. This argument does not appeal to me and for this reason, that section 79 appears to apply to a case where there is more or less forcible ejectment and does not apply where there is an 'ejectment' by mutual consent.

On the second point I think the respondents' contention should succeed. As I have already mentioned, the redemption suits did not relate to the mortgage in question. That, however, by itself, is not very important. In agreeing to pay half the money due on the mortgage of 17th June 1897 the auction-purchasers really purported to assume the rights of Harcharan Singh as an ex-proprietary tenant. They had no right of redemption. They usurped, as it were, that right. It cannot be said that by the redemption effected by means of the award, they became transferees or assignees of the mortgagee's rights. They claimed adversely to Harcharan Singh and in their own right. The redemption by the auction-purchasers was in defiance of all title as an ex-proprietary tenant that may have remained in Harcharan Singh. In this view Article 148, Schedule I of the Limitation Act would not apply. The suit, therefore, although framed as one of redemption, is really

a suit for recovery of property against persons who had no right to hold that property with an offer to compensate them for such monies as they may have parted with.

I think that the decree of the Court below was right and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1447 OF 1920.

January 16, 1924.

Present :—Mr. Justice Moti Sagar.

KHANU—PLAINTIFF—APPELLANT
versus
RAJA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887) s. 158 (xvii)—Jurisdiction of Civil and Revenue Courts—Suit to recover excess area alloted in partition, nature of—Question of title.

A suit to recover possession of a certain area of land on the allegation that the area in dispute had been alloted to the defendants at a partition of *shamilat* land in excess of the share to which they were entitled in accordance with the mode of partition agreed to by the parties and adopted by the revenue authorities, raises a pure question of title and is not excluded from the jurisdiction of the Civil Courts by clause xvii of section 158 of the Punjab Land Revenue Act.

Anwar v. *Allat Yar*, 16 Ind. Cas. 967 ; 10 P. L. R. 1913 ; 275 P. W. R. 1912 ; 28 P. R. 1913, followed.

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 22nd March 1920, reversing that of the Munsif, 1st class, Bhera, District Shahpur, dated the 23rd August 1919, and dismissing the plaintiffs' suit with costs.

Mr. *Nank Chand*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The parties to the suits out of which these two appeals have arisen belong to village Kohlian in the Bhera *Tahsil* of the Shahpur District. The village was admittedly divided into two *tarafs*, *chahrda* and *lehnda*. The former was again sub-divided into two *pattis*, namely, Duliani and Phuliani, Prior to 1907 the *shamilat* land of these two *pattis* was joint. On the 21st June 1907, one Sardara of Phuliani *patti* applied for partition of the joint *shamilat*. It was agreed between the parties to these proceedings that the partition would be effected on the basis of the revenue paid by each co-sharer as assessed in the Settlement then current. It appears that the revenue assessed on *patti* Duliani amounted to Rs. 303-15-0 and the *patti* was accordingly entitled to 281 *bighas* only of the *shamilat* land. The plaintiff's allegation is that when the partition proceedings were completed this *patti* was allotted 61 *bighas* more than what they were entitled to. These 61 *bighas* are alleged to have been taken out of the share of some of the proprietors of *patti* Phuliani. The Duliani *patti* was thus awarded 342 *bighas* to which they were clearly not entitled under the agreement arrived at between the parties. This allotment gave rise to two suits, one for possession of 1 *bigha* 2 *kanals*, and the other for possession of 17 *bighas*, 1 *kanal*, out of 61 *bighas* which were alleged to be in possession of the defendants in excess of their proper share. The Trial Court decreed both the suits, but the lower Appellate Court on appeal has held that the suits really related to the mode of partition, and, therefore, excluded from the jurisdication of Civil Courts under section 158 of the Land Revenue Act. The suits having been dismissed the plaintiffs have now come up in second appeal to this Court, and the sole question for determination is whether the Civil Courts have jurisdiction to entertain these suits.

It has been argued by Mr. Nanak Chand on behalf of the appellants that there is a question of title involved in these cases, and that, therefore, section 158 of the Land Revenue Act has no application. This contention is, in my opinion, well founded and must prevail. The plaintiffs came into Court with a clear allegation that the defendants were not entitled to the 61 *bighas* which had been allotted to them in excess of their proper share, and that the plaintiffs were the owners thereof in accordance with the agreement which had been arrived at between the parties prior to the partition. No objection was made by the plaintiffs to the mode of

partition, but, on the contrary, it was the right of the defendants to take possession of the land in suit that was disputed. In my opinion, the question, raised was purely one of title, and the jurisdiction of the Civil Courts was not barred under clause (xvii) of section 158 of the Punjab Land Revenue Act.

In *Anwar* v. *Allah Yar* (1), the plaintiffs, who were parties to certain partition proceedngs, brought a suit in the Civil Courts for a declaration that the defendants were not entitled to a certain portion of the *shamilat* land which had upon partition been allotted to them by the Revenue Officer. The defendants alleged that they had acquired the lands in suit by purchase. It was held that the question involved was one of title and that the Civil Courts had jurisdiction to entertain the suit. This case appears to me to be very much in point, and I hold that the jurisdiction of the Civil Courts to entertain the claim is not barred.

I accept both appeals and, setting aside the order of the Court below, remand the cases for decision on the merits. Parties to bear their own costs in this Court.

Z. K. *Appeal accepted.*

(1) 16 Ind. Cas 967 ; 28 P. R. 1913 ; 10 P. L. R. 1913 ; 275 P. W. R. 1912.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 587 OF 1923.

December 18, 1923.

Present :—Mr. Justice Ryves and Mr. Justice Mukerji.

BOHRA TARA CHAND AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
MURTAZA HUSAIN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 4—Mortgage-suit—Preliminary decree passed before coming into force of Code—Final decree passed after Code—Execution of decree—Application made more than twelve years after date of decree, whether barred.

A preliminary decree in a mortgage-suit was passed before the coming into force of the Civil Procedure Code of 1908, but the final decree was passed after that Code came into force. The last application for execution of the decree was made after the expiry of twelve years from the date of the final decree ;

Held, that the execution of the decree was governed by the Civil Procedure Code of 1908 and the applicatibn for execution was, therefore, barred by time.

Kousilia v. *Ishri Singh*, 6 Ind. Cas. 188 ; 32 All. 199 ; 7 A. L. J. 420, distinguished.

Execution Second Appeal against the decision of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Agra, dated the 24th November 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This is a decree-holder's appeal. The suit in which the decree was passed, was based on a mortgage. The preliminary decree was passed on the 4th of May 1908. As on this date the new Code of Civil Procedure had not come into force the decree was passed under section 88 of the Transfer of Property Act. The final decree was obtained by the decree-holders on the 19th of August 1909, when the new Act had come into force. The last application for execution was presented after the expiry of 12 years from 19th August 1909. The question, therefore, arises whether this last application would be governed by the old Code of Civil Procedure or by Act V of 1908. If the old Code governed the case, he 12 years' limitation would not apply because the decree in the case is a mortgage-decree. If the new Code applies the application would be barred by time.

The learned Counsel for the appellants relies on the case reported in *Kousilla* v. *Ishri Singh* (1). But in that case both the decrees under sections 88 and 89 of the Transfer of Property Act had been passed before the new Code of Civil Procedure came into force. In the case before us the only decree that is executable was passed under the new Code of Civil Procedure and, therefore, the rules of procedure laid down in that Code should apply.

The decree of the Court below seems to be right and the appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 6 Ind. Cas. 188 ; 32 A. 199 ; 7 A. L. J. 420.

RAMSWARUP *v.* RAGHUNANDAN

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 193 OF 1923.

December 10, 1923.

Present:—Mr. Baker, A. J. C.

Pandit RAMSWARUP—PLAINTIFF—APPLICANT

versus

RAGHUNANDAN—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908) s. 51 (1) O. XL, r. 1, O. XLIII, r. 1 (s)—Receiver, appointment of—Objection, dismissal of—Objector not party to suit—Appeal, whether lies—Execution of decree—Judgment-debtor dead—Receiver, whether can be appointed.

An order dismissing an objection to the appointment of a Receiver of property, the objector not being a party to the suit, falls under O. XL, r. 1 of the Civil Procedure Code, and is appealable at the instance of the objector under O. XLIII, r. 1 (s) of the Code.

The appointment of a Receiver is a form of execution under section 51 (1) of the Civil Procedure Code.

Execution of a decree, whether by appointment of a Receiver or otherwise, cannot proceed against a judgment-debtor who is dead and whose representatives are not on the record;

Revision against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 40 of 1923, dated the 30th April 1923.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *M. Gupta*, for the Non-Applicant, Defendant.

Order.—The facts of this case are peculiar, and the point they raise is difficult. It is necessary to go minutely into the facts in order to understand the case.

The present applicants filed two suits in the Court of the Sub-Judge, Hoshangabad, against four persons, the defendants being (1) The Secretary of State, (2) Raghunandah, the present non-applicant, (3) Madhusudandas and (4) Dayal. The suits were tried together. The facts were that defendants Nos. 3 and 4 jointly borrowed Rs. 1,170 from the plaintiffs, defendants Nos. 1 and 2 being joined as they gave out that Madhusudandas was dead, and they were in possession of his property, this being apparently because the Police took possession of some of his property, and defendant No. 2 Raghunandan who was the *malguzar* of the village took possession of his absolute occupancy land. The plaintiffs asked for a decree against defendants Nos. 3 and 4, but if defendant No. 3 was dead, for a decree against defendants Nos. 1 and 2, they being in possession of Madhusudandas's property. Defendants 1 and 2 stated that they did not know whether Madhusudandas was alive or dead.

On the authority of *Srinath Das* v. *Probodh Chunder Das* (1), it was held that the suit would lie. A preliminary issue was framed, and the Court decided on 12th April 1923 that Madhusudandas was alive, and a decree was passed against defendants Nos. 3 and 4, defendants Nos. 1 and 2 being discharged from the suit.

In execution of this decree, an application was presented the same day by the plaintiffs for the attachment of Madhusudandas's absolute occupancy land. We are not concerned with defendant No. 4, Dayal, in this case. This land was ordered to be attachad, and an application was made for the appointment of a Receiver, as the judgment-debtor had disappeared, and the *malguzar*, the present non-applicant, had taken possession. On 21st April 1923, the Court appointed a Receiver, and there was no appeal from this order. But two objections were put in by the non-applicant, one on 23rd April 1923 and the other on 26th April 1923, for the cancellation of the order appointing a Receiver. The first objection proceeded on the mistaken ground that the land was occupancy, which is not the case, it being absolute occupancy land. The second objection proceeded on the ground that Madhusudandas died before the institution of the suit, and so his suit was a nullity. The Court passed an order on 30th April 1923. It held that it was no longer open to Raghunandan Prasad to contend that the decree was obtained against the dead defendant and is, therefore, void, and the second point as to the abandonment of the land was held to fail, because the provisions of the Tenancy Act do not refer to absolute occupancy holding. The application was, therefore, dismissed but in accordance with the wishes of

(1) 6 Ind. Cas. 244; 11 C. L. J. 580.

the decree-holder, Raghunandan Prasad himself was appointed Receiver instead of the person already appointed.

Against this order the *malguzar* appealed, and the District Judge, Hoshangabad, set aside the order on the ground that execution could not proceed against a dead man, and ordered that the lower Court must enquire whether Madhusudandas is dead, and, if so, the decree-holder must proceed against his heirs or representatives. He, therefore, set aside the order appointing a Receiver and directed that an issue should be framed whether Madhusudandas is dead, and, if so, to direct the respondent decree-holder to correct his application for execution against Madhusudandas's heirs or representatives, and conduct execution proceedings in accordance with the law. The present application is presented for revision against this decree.

It is first contended that the *malguzar* not being a party to this suit cannot object to or appeal against the appointment of a Receiver, and, therefore, the District Judge's order is without jurisdiction, and in support of this contention a case of the Patna High Court, *Inderdeo* v. *Gouri Shankar* (2), is relied on. In that case 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 certain grounds. The objection was overruled. The objector appealed to the High Court and also filed an application for revision, and it held that the objector, not having been a party to the suit, had no right of appeal. His application for revision was, however, considered.

This case appears to be in conflict with the ruling in *Hudson* v. *Morgan*, (3) in which it was held that where in a mortgage-suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit, such an order was appealable. That case is under the old Code. The provisions of the present Code are, however, the same. The order appointing a Reciever was made under O. XL, r. 1, and is appealable under O. XLIII, r. 1, clause (s).

(2) 45 Ind. Cas. 177 ; (1918) Pat. 138 ; 4 P. L. W. 414.

The case of *Hudson* v. *Morgan* (3), has been followed by the Patna High Court in *Agabeg* v. *Musammat Sundari* (4), which was decided only a week later than the case in 45 Indian Cases, referred to above. This case is of use because it might be contended that though an appeal will lie by a person whose property is affected by an order appointing a Receiver, the appeal made by the *malguzar* in present case was not an appeal against the order of appointment of a receiver, but against the order dismissing his objection to the appointment ; and it has, as a matter of fact, been contended by the applicants in this case that the objection taken by the *malguzar* to the appointment was under O. XXI, r. 58, and, therefore, no appeal would lie, but a suit under O. XXI, r. 63. This contention must be overruled, because the rules under O. XXI refer expressly to objections to the appointment of a Receiver, which is provided for by a special Order, O. XL of the Civil Procedure Code. And the Patna case I have just quoted, *Agabeg* v. *Sundari* (4) is a clear authority for holding that an order dismissing an objection to the appointment of a Receiver of property, the objector not being a party, falls under O. XL, r. 1 of the Civil Procedure Code, and is appealable. I hold, therefore, that an appeal will lie. It is quite true that there was a finding in the suit to which the *malguzar* was a party that Madhusudandas was alive at the time of the institution of the suit and that question cannot be re-opened. But taking that at its highest, it only amounts to a finding that Madhusudandas was alive at the date of the decree, which is dated 20th April 1923, and the decree, is, therefore, not a nullity.

It is now contended that Madhusudandas is dead and admittedly he has not been heard of for years and is not in the village. Execution cannot proceed against a judgment-debtor who is dead and whose representatives are not on the record, and it must be determined whether he is alive or dead before further proceedings can be taken. The appointment of a Receiver is a form of execution under section 51, clause (1) of the Code of Civil Procedure. Before

(3) 1 Ind. Cas. 356 ; 36 C. 713 ; 13 C. W. N. 654 ; 9 C. L. J. 563.

(4) 48 Ind. Cas. 133 ; 3 P. L. J. 573.

any steps in execution, either by the appointment of a Receiver or otherwise, can be taken, the heirs of Madhusudandas, if he is dead, must be brought on record, whoever his heirs may be.

In these circumstances, the order of the lower Appellate Court must be upheld and the application for revision dismissed with costs.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 506 OF 1922.
December 3, 1923.

Present:—Mr. Justice Stuart and Mr. Justice Mukherji.

KALYAN RAI—PLAINTIFF—APPELLANT

versus

JAGANNATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (3)—Statement by executant of pro-note as to consideration, admissibility of.

A statement by the executant of a promissory-note, who is dead, that a particular sum was due to him as the consideration for the promissory-note, is admissible in evidence under section 32 (3) of the Evidence Act to prove the real consideration for the promissory-note.

Second appeal against the decree of the District Judge of Pilibhit, dated the 30th January 1922.

Mr. *Mukhtar Ahmad*, for Mr. *Iqbad Ahmad*, for the Appellant.

Messrs. *Durga Prasad* and *S. C. Das*, for the Respondents.

JUDGMENT.—The question raised in this second appeal is whether the lower Appellate Court was justified in coming to the conclusion that only a part of the consideration of the promissory note, which was the basis of the suit, out of which this appeal arises, passed. The Court of first instance had relied on the presumption of the law that a promissory-note is executed for a consideration. The learned District Judge controverted this presumption on the fact that, as a matter of fact, at least a part of the consideration was not paid on the date the promissory-note was executed. He also admitted into evidence a certain statement of the executants of this promissory-note. It was contained in the sale-deed executed by them By this sale-deed the executants left a part of the sale consideration for payment of the very promissory-note now in question. They said that only a sum of Rs. 700 was due to them on account of the promissory-note. The learned Judge thought that this statement was admissible under section 32 (2) of the Evidence Act. Without specifically deciding whether the statement was admissible under clause II or not we are clearly of opinion that the statement is admissible under section 32 (3). The evidence, therefore, that was admitted and the presumption that was raised by the Court below was not unjustified. The finding is clearly one of fact only and we do not think we are entitled to go behind it.

The result is that the appeal fails and is hereby dismissed with costs on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1668 OF 1920.

January 3, 1924.

Present : —Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

RAJA RAM—PLAINTIFF—APPELLANT

versus

GAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, suit for—Muafi *land assessed to revenue—Revenue paid by mortgagee, whether can be added to mortgage-money—Interest, mortgagee whether entitled to.*

Where in the case of a mortgage of *muafi* land, the land is assessed to revenue during the continuance

of the mortgage, and the mortgagee is compelled to pay the revenue, he is entitled to add the amount so paid to the mortgage-money and claim it from the mortgagor at the time of redemption. He is not, however, entitled to claim interest on the amount unless the terms of the mortgage give him that right.

Second appeal from the decree of the District Judge, Ludhiana, dated the 27th April 1920, modifying that of the Subordinate Judge, 1st Class, Ludhiana, dated the 3rd November 1918, and granting the plaintiff a declaration to the effect that his mortgage shall be liable to redemption on payment to him by the defendants of Rs. 250 only.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Deo Raj Sawhney*, for Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—This second appeal has arisen under the following circumstances: The land in suit belonged to one Mahan Singh, *Granthi-Jagirdar*. It was *muafi* in 1820. Mahan Singh made a gift of the land in favour of Brahm Narain and three other persons who resided in the *Dharmsala* Khanpur. Brahm Narain having died his *chela* Gobind Das succeeded to the land in 1848. Gobind Das then, on the 15th of November 1869, mortgaged the land to Duni Chand, the father of the plaintiff in this suit. The mortgage was with possession, and the mortgagee was to take the income in lieu of interest on the amount of Rs. 250, the mortgage-money. In 1873 the *muafi* was resumed and the land was assessed to revenue. In 1887 and later in 1899 the proprietors in the village brought suits to recover possession of the land from the mortgagee on the ground that Gobind Das had died and that the property had reverted to the proprietors of the village. Those suits were dismissed as it was not proved that Gobind Das had died. On the 6th of June 1918 the land in dispute was mutated in favour of the *Dharmsala* under the management of Hardit Singh and Dasondhi in consequence of a report to the effect that Gobind Das had died. Subsequently, on the 20th of June 1918, the above two persons filed an application in the Court of the Revenue Assistant, Ludhiana District, for the redemption of the mortgage under section 4 of Act II of 1913. On the 9th of July 1918 they succeeded in getting an order for redemption from the Revenue Court on payment of Rs. 250, the mortgage-money. Thereupon the present suit was instituted by the plaintiff, the son of the original mortgagee, for a declaration under section 12 of the Act. In the plaint it was stated that the defendants had no right to redeem the land because (*a*) Gobind Das, the original owner of the land, was still alive; and (*b*) the land in dispute was the private property of the said Gobind Das and the *Dharmsala* or the two *lambardars* had no concern therewith, nor was there any *Dharmsala* in existence. In the alternative, it was also alleged that even if Gobind Das had died sonless the *Dharmsala* would have no right to get the land. It was further alleged in the plaint that even if the *Dharmsala* or the two *lambardars* were entitled to redeem the land, they could only do so on payment of the mortgage-money as well as the land revenue which the plaintiff had been obliged to pay in consequence of the resumption of the *muafi* and the assessment of the land to revenue. The total amount claimed by the plaintiff was Rs. 3,400 which included interest on the revenue paid by the plaintiff at the rate of 12 *per cent. per annum* for 50 years.

On these pleadings two issues of fact arose, namely, (1) whether Gobind Das had died; and (2) whether the land was the private property of Gobind Das or it belonged to the *Dharmsala*. Upon both these questions of fact the decision of the Trial Court was against the plaintiff. That Court, however, held that the plaintiff was entitled to claim the amount of revenue which he had been obliged to pay and that he was entitled to recover it with interest. The Trial Court, therefore, allowed the amount of Rs. 562-8-0 on account of the land revenue and Rs. 1,117-12-9 on account of interest upon the revenue. It granted a declaration that the land could be redeemed on payment of Rs. 1,930-4-9.

Both parties were dissatisfied with the decision of the trial Court and both of them preferred appeals. The lower Appellate Court, has modified the decree of the Trial Court, and has held that the land was redeemable on payment of Rs. 250, the mortgage-money only, as decided by the Revenue Court. The decision of the Trial Court on the issues of fact

as well as on the issue of law was challenged in the lower Appellate Court. That Court, however, agreed with the Trial Court in finding that Gobind Das had died. It also found that the mortgaged property belonged to the *Dharmsala* and was not the private property of the mortgagor Gobind Das, and that, therefore, Hardit Singh and Dasondhi, *lambardars*, who were the *de facto* managers of the *Dharmsala*, were entitled to redeem. On the question of liability to pay revenue on the land the Court came to the conclusion that, as the mortgagee had realised much more than would justly be due to him, the land had rightly been allowed to be redeemed on payment of Rs. 250 only.

The plaintiff has come up in second appeal. Mr. Badri Das on behalf of the appellant has questioned the findings of fact recorded by the lower Appellate Court as to the nature of the property in question, and as to the death of Gobind Das, mortgagor. In our opinion, the findings being findings of fact cannot be questioned in second appeal. As to the liability to pay the land revenue together with interest, the learned Vakil has cited a large number of authorities, and has contended that the present case comes within the purview of those rulings in which it has been held that where revenue on the mortgaged property has been enhanced and the mortgagee has been obliged to pay it, he is entitled to add the amount to the mortgage-money and claim it from the mortgagor. The trend of the authorities is in favour of the argument put forward by Mr. Badri Das. Here the land originally mortgaged was *muafi* land. Subsequently, in 1873, it was assessed to revenue. In principle there can be no distinction between the case of an enhancement of revenue and that of a fresh assessment of revenue. Therefore, the plaintiff was clearly entitled to the revenue which he was obliged to pay. In our opinion, however, he was not entitled to any interest. Reliance has been placed upon the provisions of section 72 of the Transfer of Property Act. That Act, however, does not apply to this province. The terms of the mortgage-deed do not provide for any interest to be paid on sums spent by the mortgagee for the various purposes mentioned in section 72 of the Transfer of Property Act. We, therefore, do not think that it would be just to allow interest upon the amount of the revenue paid by the plaintiff. In coming to this conclusion we have taken into consideration the fact that, according to the admission of the plaintiff himself, the *chakota* of the land had been gradually increasing until it had risen to Rs. 125 *per annum*.

The result is that we accept the appeal so far as to hold that, in addition to Rs. 250, the mortgage-money, the plaintiff will also be entitled to Rs. 562-8-0 representing the amount of revenue paid by him from time to time. The total amount on payment of which redemption is to take place is, therefore, Rs. 812 8-0. The decree will be modified accordingly. We make no order as to costs.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 665 OF 1922.

December 5, 1923.

Present:—Mr. Justice Stuart and Mr. Justice Mukerji.

KARIM BAKHSH *alias* KARAM BAKHSH —PLAINTIFF—APPELLANT

versus

WAHAJUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

U.P. Land Revenue Act (III of 1901), s. 233 K applicability of—Evidence Act (I of 1872), s 115—Estoppel—Partition—Co-sharer, permitting another person to remain recorded as co-sharer and participate in partition proceedings—Representation.

Per Stuart, J.—Section 233 K of the U. P. Land Revenue Act ordinarily operates only as against those recorded co-sharers who have been parties to the partition proceedings.

A Muhammadan tenant-in-common cannot be held to be represented in partition proceedings by another Muhammadan tenant-in-common merely because their interests are identical.

Where, however, a co-sharer permits another person to continue recorded as a co-sharer in respect of property which belongs to the former and to participate in partition proceedings as a co-sharer, he is estopped from subsequently objecting to the proceedings on the ground that he was not a party to them or had no notice of them.

Per Mukerji, J.—The rule of estoppel by substantial representation is based on broad principles. The rule applies with great force in the case of a Hindu

family because of the constitution of it, but it would apply in other cases also provided the facts are sufficient for its support.

Courts are to dispense justice, and rules of procedure should not be allowed to defeat the ends of justice.

Second appeal from the decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, at Allahabad, dated the 8th February 1922.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the Appellant.

Mr. *Iqbal Ahmed*, for the Respondents.

JUDGMENTS.

Stuart, J. :—This appeal is mainly on two points. The first is, whether certain partition proceedings in a Revenue Court were vitiated by the omission to issue fresh proclamation of the proceedings, and the second is whether even if those proceedings were regular the plaintiff-appellant is prevented from obtaining a relief under the provisions of section 233 of Local Act III of 1901. The facts in respect of the first point are these : A certain Wahaj-ud-din applied to the revenue authorities for partition of his share in a village in the Allahabad district. He put in this application in 1909. In the course of the proceedings two brothers, Meera Bakhsh and Aulia Bakhsh, who are recorded co-sharers of a two-pie share took certain objections to the partition which involved a question of proprietary title. These objections were decided against them and that decision became final. These objections were decided against them before March 1916. In March 1916 Wahaj-ud-din withdrew his application for partition and if this withdrawal had been accepted the whole of the partition proceedings would ordinarily have come to an end and there would have been no partition. The withdrawal was accepted as far as Wahaj-ud-din was concerned but almost directly another co-sharer Abdul Jalil who had been a party to the partition proceedings demanded that the partition should be allowed to go on and his request was acceded to. The partition was accordingly completed and finally sanctioned on the 10th of October 1917. The first point which we have to decide is, whether the acceptance of Wahaj-ud-din's withdrawal automatically brought proceedings to an end and necessitated the commencement of new proceedings with the issue of fresh notices and a complete cancellation of the previous proceedings. I am of opinion that, on the merits, there was no cessation of the proceedings and that the order of the presiding officer on Abdul Jalil's petition amounted in effect to a cancellation of the sanction to withdraw. The appeal, therefore, cannot succeed upon the first point.

The second point is more important and more difficulty. The present plaintiff Karim Bakhsh is a younger brother of Aulia Bakhsh and Meera Bakhsh. He was a posthumous child being born after the death of his father Maula Bakhsh. Maula Bakhsh owned two-pie share in *mauza* Seondha. At his death this was recorded jointly in the names of his two existing sons Aulia Bakhsh and Meera Bakhsh. I am not in a position to say whether the entry was made before or after the birth of Karim Bakhsh. Karim Bakhsh was born about 1888 and had attained his majority before the partition proceedings commenced. His name was not recorded as that of a co-sharer at the time that the partition proceedings commenced and it was not so recorded till the 16th of August 1915 when Aulia Baksh died. Then the name of the plaintiff-appellant was recorded in place of Aulia Baksh in the revenue papers but he was not brought on as a party to the partition proceedings and he was never a party to the partition proceedings. The question which he wishes to re-open in the suit out of which this appeal arises is the very question of proprietary title which was decided against his brothers Aulia Bakhsh and Meera Bakhsh sometime in 1911. His case is that as he was not a party to the partition proceedings section 233 K has no application and that under the law as it is understood in this Court he has a perfect right to raise the matter now. Section 233 K can ordinarily only operate as against those recorded co-sharers who have been parties to the partition proceedings The Courts below repelled the plaintiff-appellant's plea on the ground that, although his name did not appear, he was sufficiently represented by his order brothers. I doubt the soundness of this proposition. I do not see how a Muhammadan tenant-in common can be held to be represented by another Muhammadan tenant in-com-

mon merely because their interests are identical. But I would agree with the Courts below in refusing the plaintiff-appellant any relief for a different reason. We have a clear and binding finding as to the facts and on these facts it appears that the plaintiff-appellant had attained majority before the partition proceedings ever commenced and that he deliberately premitted his brothers Aulia Bakhsh and Meera Bakhsh to remain recorded as co-sharers in respect of the property which really belonged to him and that he permitted them to represent his interests in that property and to assert claims of proprietary title on their own behalf which were really assertions of proprietary title on his behalf. I do not consider that this representation was a good representation in law but I do not consider the plaintiff-appellant's conduct in refusing to disclose his title and refraining from having his name recorded as a co-sharer and thus giving notice to the parties and the presiding officer as to his position, estops him from seeking any relief in the present proceedings. I consider that this is a clear case of estoppel by conduct and for that reason I would dismiss this appeal.

Mukerji, J.—I quite agree with my learned brother that the appeal should be dismissed, but I wish to add a few words. I would rest the decree of this Court more on the ground of representation than on the ground of estoppel. I quite agree that the principle of estoppel applies to the facts of the case but I should think that, in the peculiar circumstances of this case, the question of representation does come in although the appellant is a Muhammadan. The rule of estoppel by substantial representation is based on broad principles. The rule applies with great force in the case of a Hindu family simply because of the constitution of it, but in other cases only if the facts are sufficient for its support. The object of this rule is this. The Court is to dispense justice, and the rules of procedure should not be allowed to defeat the ends of justice. It is for this reason that in cases where it is found that a minor was substantially represented in a previous litigation he is not allowed to have set aside the decree, on the simple ground of want of representation. It has been held that he must show that he has been substantially prejudiced by the decree.

In the circumstances of this case, the appellant was living with his brothers. The brothers were carrying on all the business of the family. In fact, it was they who brought him up. It has been found, as a matter of fact, that he was all along aware of all the litigations that were going on in the family. It has been found in the case that, although he was adult at the date when the partition commenced, he never asked for being recorded as a co-sharer with his brothers. It was only on the death of his elder brother Aulia Bakhsh that his name was recorded. Even then his name was recorded not under his independent right but as an heir to Aulia Bakhsh. If, therefore, his brothers raised the same contention about the partition of the *abadi* of Yusufganj as the appellant is now raising and if that contention was found against his brothers, is it conducive to the interests of justice that Karim Bakhsh should be allowed to re-open the question which was settled against his brothers and for all practical purposes against him? I think that he should not be allowed to re-open the partition. I also would dismiss this appeal.

By the Court:—The order of the Court is that the appeal is dismissed with costs which will include fees on the higher scale.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 173 OF 1921.

December 5, 1923.

Present:—Sir Grimwood Mears, Kt., K. C., Chief Justice, and Mr. Justice Piggott

HIRA LAL—PLAINTIFF—APPELLANT

versus

KHAIRATI LAL—DEFENDANT—RESPONDENT.

Specific performance—Contract of sale—Price referred to valuer—Over-valuation— Mistake — Court, whether can interfere.

Where a contract for the sale of immoveable property refers the price to a valuer for him to ascertain between the parties, this fact does not of itself pre-

clude the Court from inquiring into the adequacy of the consideration, and the indequacy of the consideration would be strengthened as a defence to a suit for specific performance if any circumstances arise which throw a doubt on the accuracy with which the valuation is made. If the under-valuation or over-valuation is such as to convince the Court that the valuer has acted under fraud or mistake, the contract would be incapable of enforcement in equity.

First appeal from the decree of the Subordinate Judge of Aligarh, dated the 6th of January 1921.

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

Dr. *K. N. Katju* and Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Aligarh. The action was one brought by Hira Lal for specific performance of an agreement, Khairati Lal being the defendant. The plaintiff and defendant each had a certain share in a house in *mohalla* Dhusaran in Aligarh. They had frequent quarrels and those quarrels brought them to the Criminal Courts, and it appears that when the Deputy Collector was investigating or about to investigate one of those criminal complaints it was suggested that, as these parties could not live pleasantly in close proximity to each other, it would be a very good thing if one sold his share of the house to the other and removed himself to a distance. That view seemed in the circumstances to both of them to be a wise thing to do, and on the 4th of September 1919 when the parties were before a Magistrate of the second class they agreed that one Sohan Lal, a pleader, should act in preparing an estimate of the price of the share in the house owned and possessed by Hira Lal. Eight days later, on the 12th of September, there was a formal agreement which gave Sohan Lal the power to determine what was the value of the house and for what amount the share should be sold, and it was agreed that Khairati Lal would purchase the share that Hira Lal possessed in the house for the amount that Babu Sohan Lal might determine to be. There was nothing whatever said about the method of procedure that Sohan Lal should adopt except that he was to determine the value of the house after inspecting it. That was all he had to do. He did inspect the house, of that there is no doubt, and on the 29th of September he valued the share of Hira Lal in the house at Rs. 5,500. That amount came as a considerable shock to Khairati Lal, and on the 8th of October he in fact offered to sell his share at a price which would show a considerably less value than Rs. 5,500 as Hira Lal's share in the house. Again, in the written statement in paragraph 19 he offered to sell his share in the house for Rs. 1,500 and put his share twice as much as Hira Lal's. On that basis, therefore, he was expressing his willingness to part with his share in the house at a price very very far below the estimated value put upon Hira Lal's share by Sohan Lal. When the case came to trial somehow or other Sohan Lal was got into the box and he gave evidence. When he gave evidence it became perfectly clear that he had acted in a thoroughly careless manner. He appeared to have no idea whatever of the proper way of discharging the duty which he had undertaken and we are greatly astonished that a pleader of mature age and persumably some legal experience should have conducted himself in the way that he did. On his own admission he did not ask the advice of anybody as to the rates and prices which were prevailing in the *mohalla*. We do not say that it was necessary for him to do that, because he might, in his own experience already, have got a fair general idea. It would, however, have been a prudent thing for him to do this and it might have saved him from giving an estimate which we regard as completely extravagant. We now know the basis of that estimate, and he says that having had the rooms counted he prepared an estimate of the price by guess. What in fact he did is clear from an answer he made to the Court. He took what he believed to be the price of materials and the price of labour prevailing in the year 1919, and he worked out a figure of what he believed would have cost if somebody started to build on that site a portion of the house such as he was called upon to value. He was aware that he was dealing with a house at least 40 years old as regards, at all events, the principal structure, and it never occurred to him at all that he was proceeding upon a compeletely unfair basis. What he ought to have done would have been to have asked himself what was the value of the house after allowing for the fact that it

was a house 40 years of age. The proper question for him to put to himself was what would a willing purchaser be likely to give to a seller according to the original structure of the house its present condition and location. When questions directed to show that his value was over-estimated were put to him he dropped down to a sum of Rs. 3,000 as being the value of the house as it stands to-day. There is no doubt that Mr. Ali Ausat took a strong view with regard to Mr. Sohan Lal's incompetence and carelessness. We take the same view and we consider that he is deserving of censure and reprobation.

Now comes the appellant who says that he is entitled to a decree for specific performance, that is to say, that this Court in the exercise of its discretion must decree that Khairati Lal shall pay Rs. 5,500 for a property manifestly worth not more than Rs 3,000. We decline to do it, and it so happens that this type of case has been considered in some of the English decisions. In the sixth edition of Fry on Specific Performance, p. 215, the law is summarised in this way: "Where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration, and this inadequacy of consideration would, of course, be strengthened as a defence if any circumstances arose which threw a doubt on the accuracy with which the valuation was made. The effect of an undervaluing by the valuers is a question which has, however, been but little discussed in our Courts: it has been debated with the usual diversity of opinion by the writers on Civil law. It is conceived that, if the under-value were such as to convince the Court that the valuers had acted under fraud or mistake, the contract would be incapable of enforcement in Equity: otherwise, if the under-value did not so convince the Court that the valuers had acted under fraud or mistake, the contract would be capable of enforcement in Equity." We are of opinion here that the valuer arrived at his finding by applying a wholly mistaken standard. We, therefore, approve the decision of the Subordinate Judge and dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 9 OF 1902.

August 30, 1923.

Present:—Mr. Raymond, A. J. C. and Mr. Madgowkar, A. J. C.

DANDUMAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
DWARKAMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 47, 151—Partition decree—Execution of decree—Recovery of land in excess of share—Restoration—Amendment of decree—Jurisdiction.

A Court has jurisdiction in execution under sections 47 and 151 of the Civil Procedure Code to amend its final decree for partition and order restoration of land recovered by a party in excess of that awarded by the decree and a separate suit is not necessary for the purpose.

Dhan Kunwar v. *Mahtabsing*, 22 A. 79, A. W. N (1899) 181; 9 Ind. Dec. (N. S.) 1083, followed. *Abdul Karim* v. *Ismail Nissa Bibi*, 34 Ind. Cas. 231; 38 A. 330; 14 A. L. J. 401; *Shivbai* v. *Yesoo*, 48 Ind. Cas. 130; 43 B. 235, 20 Bom. L. R. 925. *Moru Narsu* v. *Hassan Valad Fatch Khan*, 48 Ind. Cas. 135; 43 B 240; 20 Bom. L. R 929. *Sultan Rao* v *Anandrao Jagandorao*, 55 Ind. Cas. 967; 44 B. 97; 22 Bom. L. R. 238, relied upon.

Appeal from the judgment and decree of the First Class Sub-Judge, Shikarpur, dated the 6th February 1922.

Mr. *Kodumal Lekhraj*, for the Appellant.

Mr. *Fatechand Assudamal*, for the Respondents.

JUDGMENT.

Mr. Raymond, A. J. C.—The difficulty in this case seem to have arisen in this way. A Commissioner had been appointed to effect a partition of the lands belonging both to the plaintiff and the defendants in equal halves. There were two Survey Numbers 43 and 44 on which stood two shops. A *Sanad* of these Survey Numbers showed an area of 440 feet and the Commissioner apparently in the sketch prepared by him drew a line dividing the land equally as he imagined between the plaintiff and the defendants. However, according to the plaintiff, the area which has come to the

possession of the defendants is 289 feet 6 inches whereas the plaintiff acquires 223 feet 6 inches. This, no doubt, shows that the measurement shown in the *Sanad* was not correct.

Plaintiff asked for amendment of the decree and the lower Court has appointed or proposed to appoint an Overseer to measure the whole property, that is, both the Survey Numbers 43 and 44, to ascertain whether the plaintiff's allegation is correct The defendants-appellants urge that the decree cannot be amended in execution proceedings but that the plaintiff should file a suit. It appears to me that this contention is untenable for the question between the parties is one that relates to the execution of the decree between the parties to the suit and a separate suit does not lie. In Mulla's Civil Procedure Code, at page 122, 3rd Edition, it is observed that if a decree-holder takes in execution land which is not at all covered by the decree, or land which is in excess of the decree, the proper course for the judgment-debtor is to proceed by an application under section 47, Civil Procedure Code, for the recovery of the land in the one case, and the excess in the other and not by a separate suit. In *Dhan Kunwar* v. *Mahtab Singh* (1), it was held that, " where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, that it was competent to the judgment-debtors by application under section 244 of the Code of Civil Procedure to recover such surplus from decree holders." And at page 81 of the same report the Chief Justice refers to a possible case where after the execution sale it appeared that the decree awarded less to the decree-holder than he was entitled to according to the judgment and pointed out that in such a case the decree-holder, notwithstanding the sale would be justified in applying for the amendment of the decree so as to entitle him to recover in execution the full amount decided in the judgment to be due to him and that such application should be made under section 244 corresponding with section 47 of the present Code.

(1) 22 A. 79; A. W. N. (1899) 181; 9 Ind. Dec. (N. S.) 1083.

The application, therefore, rightly comes under section 47 of the Civil Procedure Code, read with section 151, Civil Procedure Code, which refers to the inherent powers of the Court to be exercised in doing substantial justice between the parties.

I, therefore, concur in the order of my learned brother, dismissing with appeal with costs.

Mr. Madgowkar, A. J. C. -A preliminary decree for partition was passed and a Commissioner was appointed and upon his measurements and plan the final decree ensued. The plaintiff-respondent applied under sections 47, 151 and 152, Civil Procedure Code, to the Court to re-measure the portions allotted to the parties on the ground apparently that the Commissioner's total measurement was too small by about 66 feet and that the defendants-appellants had been wrongly placed in possession of this excess. The lower Court decided that it had jurisdiction in execution to enter into this question. The defendants appeal.

The argument for the appellants is that the Court having made a final partition was *functus officio* and could not in execution correct its own decree. The language of section 47, however, is broad and clear enough to cover the present question. Nor is it apparent what advantage to the parties would ensue if, as is contended for the appellants, the question now raised could be decided not in execution but by a fresh suit. The present question clearly arises between the parties to the suit and relates to the execution, discharge or satisfaction of the decree and it, therefore, must be determined by the Court executing the decree and not by a separate suit under section 47 of the Code of Civil Procedure. As instances of a similar character, in addition to the authorities quoted by the learned Sub-Judge, I may refer to the case of *Abdul Karim* v. *Islamin Nissa Bibi* (2) and the judgment of Hayward, *J*, in *Shivbai* v. *Yesoo* (3), Scott, C. J., in *Moru Narsu* v. *Hassan Valad Fatteh Khan* (4) and

(2) 31 Ind. Cas. 231 ; 38 A. 339 ; 14 A. L. J. 401.
(3) 48 Ind. Cas. 130 ; 43 B. 235 ; 20 Bom. L. R. 925.
(4) 48 Ind. Cas. 135 ; 43 B. 240 ; 20 Bom. L. R 929.

RANI *v.* AIDAL SINGH

Ganpatrao Sultanrao v. *Anandrao Jagandorao* (5), that money recovered in excess in execution can be recovered back in execution and not in a separate suit. It is not clear why land if recovered in excess in partition cannot be recovered back in execution and the error corrected.

Both under section 47 as well as under section 151 the Court has clearly jurisdiction. The appeal, therefore, fails and must be dismissed with costs.

P. B. A. *Appeal dismissed.*

(5) 55 Ind. Cas. 967 ; 44 B. 97, 22 Bom. L. R. 238.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 869 OF 1922.

December 17, 1923.

Present :—Mr. Justice Mukerji.

RANI—DEFENDANT—APPELLANT
versus
AIDAL SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901) ss. 4, 79, Sch. IV, Art 30—Ejectment by land-holder—Ejectment by one of several co-sharers—Suit to recover holding—Limitation.

When a tenant is unlawfully ejected by one of several co-sharers in the *patti*, who together would be entitled to recover rent from him, and, therefore, jointly constitute the landholder, he cannot be deemed to have been ejected by his land-holder within the meaning of section 79 of the Agra Tenancy Act, or for the purposes of Article 30 of Schedule IV to the Act.

Second appeal against the decree of the First Additional District Judge of Aligrah, dated the 21st March 1922.

Mr. *G. Agarwala*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of the following circumstances. The respondents, who are four in number, instituted the suit out of which this appeal has arisen for the ejectment of the appellant's predecessor-in-interest (husband) from certain plots. The allegation was that the respondents were the occupancy tenants and the original defendant was their sub-tenant. The defendant pleaded that he was a co-sharer in the village and he was holding the land as his *Khud Kasht*. He denied the respondent's right to eject him as a sub-tenant. He also pleaded limitation.

The suit was thrown out by the Court of first instance, but on appeal the learned District Judge remanded an issue to the Munsif. That issue was: "Are the present appellants occupancy tenants in the land in dispute or is it *Khud Kasht* of the present respondents?" The learned Munsif held that the plaintiffs, the appellants before the first Appellate Court, were occupancy tenants. He also held that there was no relation of landlord and tenant between the parties and that the respondent (the original defendant) was a co-sharer in the *patti* in which the lands were situated and he held the land without the consent of the plaintiffs. He also held that as there was a *lambardar* in the *patti* the defendant could not be regarded as land-holder.

On receipt of the finding, the lower Appellate Court decreed the suit. It did not come to any conclusion in what capacity the defendant was in possession nor did it come to any conclusion how long did the defendants possession extend.

These points not having been determined by the Court below, with the help of the learned Counsel for the parties, I went through the evidence and come to the following conclusion. I find that the defendant was one of the co-sharers in the *patti* and that he had been in possession of the lands for a period between 6 and 10 years without the consent of the plaintiffs.

On these findings it has been argued by the learned Counsel for the appellant (the original defendant's successor-in-title) that the suit should have been thrown out as being barred by limitation under section 79 of the Tenancy Act and serial No. 30 of the 4th schedule of the Tenancy Act, the period of limitation is laid down as six months.

RIAZ-UD-DIN v. SHUJA-UD-DIN

It has been argued by the learned Counsel for the respondents that the appellant cannot be called the "landholder." She is only one of the several co-sharers who are acting through a *lambardar*, one Reshan Singh. The question is, how far this contention of the respondent is correct.

No authority bearing on the point has been cited to me. If we look to the definition of the word 'land-holder' to be found in section 4 of the Tenancy Act we see that the land-holder is the person to whom rent is payable. Where there are more than one person entitled to receive rent, the land-holder would be the whole body of men and not one single member. The word 'person' should be read as having been used to include 'persons'. Applying this definition, it follows that when a tenant is unlawfully ejected, say, by one of a body of 150 co-sharers in the *patti*, who together would be entitled to recover the rent, the tenant cannot be deemed to have been ejected by his land-holder. Referring to section 194 of the Tenancy Act we find that where there are two or more co-sharers entitled to any right, that right must be exercised conjointly unless they have an appointed agent. Such an appointed agent would be the *lambardar*. For the application of the rule of six months' limitation and of section 79 of the Tenancy Act it seems to me it would be necessary for the whole body of co-sharers to act (to eject the tenant) or the *lambardar* to do so on behalf of the whole body of co-sharers. This would follow from the natural meaning of the several sections. If we look to the spirit of the rule we also see that this is based on sound sense. As I have said, by way of example, if there be 150 co-sharers (a matter which is not unusual in Districts like Azamgarh, Gorakhpur and Basti) and one of the co-sharers happens to take it into his head to eject a tenant it would be very hard on the latter. He may sue within six months one of the 150 co-sharers and when he has received the fruit of his litigation, he may be dispossessed by another of the 150 of the co-sharers.

My finding of law, therefore, is that the ejectment of the respondents by the appellant's predecessor was not an ejectment to which section 79 of the Tenancy Act or the short period of limitation would apply.

That being the case, there seems to be no bar to the success of the plaintiffs-respondents. It is true that they brought the suit in a Court which had jurisdiction only to eject tenants. But no question of jurisdiction having been taken, and as it has been found that the title subsists in the respondents, there is no reason why they should not succeed. I have already stated that the case went in appeal to the District Judge who was the Appellate Court both for the Revenue and Civil Courts. The issue that was remanded by him for trial, was remanded to the Civil Court. It follows that the decree of the Court below was right.

The appeal fails and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1809 OF 1923.

January 30, 1924.

Present:—Mr. Justice Le Rossignol.

RIAZ-UD-DIN—DEFENDANT—APPELLANT

versus

SHUJA-UD-DIN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) sch. II, paras. 14, 15—Arbitration without intervention of Court—Award—Arithmetical error—Amendment—Remission to arbitrator for re-consideration—Power of Court.

A private award cannot be amended by the Court on the ground that the arbitrator has made an arithmetical mistake in arriving at the sum due by one party to the other, nor has the Court power to remit such an award to the arbitrator for re-consideration.

Shyam Lal v. *Parshottam Das*, 58 I. C. 585; 18 A. L. J. 241; 2 U. P. L. R. (A.) 101; 42 A. 277, relied on; *Hutchinson* v. *Shepperton*, (1849) 13 Q. B. 955; 13 Jur. 1908; 116 E. R. 1528, distinguished.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Delhi, dated the 13th June 1923, passing a decree in

accordance with the award filed by the arbitrator in favour of the plaintiff.

Application under paragraph 20 of Schedule II, Civil Procedure Code, for filing of a private award.

Mr. *Mela Ram* and Lala *Tirath Ram*, for the Appellant.

Mr. *M. Obedulla*, for the Respondent.

JUDGMENT.—The question in this appeal is whether a private award can be amended by the Court on the ground that the arbitrator had made an arithmetical mistake in arriving at the sums due by one party to another. The Court below has held that in such a case it is not competent to interfere and must pass a decree in harmony with the award. The matter has been discussed in *Shyam Lal* v. *Parshottam Daso.* (1), in which it was held that in the case of a private award a Court has no power to correct an arithmetical error, not to remit such an award for re-consideration.

For the appellant reference has been made to *Hutchinson* v. *Shepperton* (2) and two other English rullings which are based upon broad lines of equity. In this country, however, the question must be decided upon a consideration of the Statute Law which is contained in paragraphs 14 and 15 of the Second Schedule of the Civil Procedure Code. In the case of a private award the Court has not been invested with the power of modification or correction such as it possesses under paragraph 12, in the case of an award made on reference to arbitration under the orders of the Court. Under paragraph 14, it may remit the award when it is illegal on the face of it, but I agree with the Court below that a mere arithmetical error does not amount to an illegality. It is uged on behalf of the appellant that the real intention of the arbitrator is not represented by his final conclusions and that his real conclusion must be gauged by the processes by which he arrived at those conclusions. There seems to me little doubt that if the parties had argued the point before the arbitrator he might have amended his final conclusions but even this is not certain, he was not bound to give his detailed reasons for the award and all that we have to consider are the terms of the conclusions at which he arrived, regardless of any error that may have crept into his calculations.

As the law stands at present, I cannot hold that the Court below could have adopted any course other than that which it has followed and I dismiss the appeal, but direct the parties to bear their own costs.

Z. K. *Appeal dismissed.*

(1) 58 Ind. Cas. 555 ; 18 A. L. J. 241 ; 2 U. P. L. R. (A.) 104 ; 42 A. 277.

(2) (1849) 13 Q. B 995 ; 13 jur. 1098 ; 116 E. R. 1528.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 812 OF 1922.

December 11, 1923.

Present :—Mr. Justice Mukerji.

BISHUNATH OJHA—PLAINTIFF—APPELLANT

versus

SHEOPRAGASH OJHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (*XVI of* 1908), s. 17 (1) (*a*)—*Compromise declaring right to immoveable property—Registration, whether necessary—Agreement reduced to writing—Oral evidence, whether admissible.*

Where an agreement is not required by law to be in writing or to be registered it is not not necessary to prove the agreement by the production of a written document.

Where, however, the terms of an agreement have been reduced into writing, the writing alone is the evidence of the agreement and no oral evidence can be adduced to prove the agreement.

A petition of compromise filed in mutation proceedings which purports to declare the rights of the parties to immoveable property of the value of more than Rs. 100 falls within the purview of section 17 (1) (*a*) of the Registration Act and requires registration.

Jagrani v. *Bisheshar Dube*, 14 A. L. J. 449; *Baldeo Singh* v. *Udal Singh*, 18 A. L. J. 877 ; *Balamatul-zamina* v. *Masha Allah Khan*, 16 A. L. J. 98, referred to

BISHUNATH OJHA *v.* SHEOPRAGASH OJAH

Second appeal against the decree of the District Judge of Ghazipur, dated the 20th April 1922.

Dr. *M. L. Agarwala*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The question for determination in this Second Appeal is whether a certain petition filed in the Revenue Court on 22nd December 1914 in a mutation proceeding is admissible in evidence, and, if so, whether it gives the appellant the property which he claims.

The question has to be decided with reference to the peculiar facts of this case, having regard, of course, to the principles laid down in various cases by this High Court.

It appears that on the death of *Musammat* Udha, the widow of one Monohar Ojha, certain persons, including the appellant, claimed title. Applications were made in the Revenue Court. It does not appear clearly on what ground the present appellant claimed. The compromise in question was filed. This compromise will be examined later on. It will be sufficient here to mention that by this compromise the parties to it asked the Revenue Court to record the names of themselves in certain shares. An order was made in accordance with the compromise. But it appears from the statement of facts made in the plaint that this order was set aside by a Court of appeal on the ground that the persons actually in possession were the Maharaja of Dumraon and another. Some of the defendants in this suit instituted a suit in the Civil Court for the ejectment of the Maharaja of Dumraon and others with respect to the property which belonged to *Musammat* Udha. That suit succeeded and on foot of the decree mutation orders were passed in favour of the contesting defendants. This fact constituted the cause of action of the plaintiff-appellant and he brought the suit for maintenance of possession.

It has been found by the Court of first instance that the plaintiff never got possession. The plaintiff based his claim on two grounds. He contended that he was an adopted son of one Dhanai Ojha and as such was reversioner to the property. On this point the decision of the Courts below is against him. It has been found that Dhanai Ojha never adopted him. The second point that was taken by him was that as the result of the compromise arrived at in the mutuation proceedings he was entitled to the share now claimed by him. The Courts below negatived this ground of the claim They held that the document by itself did not create any title for want of registration.

The Courts below have relied on the Full Bench case of *Jagrani* v. *Bisheshar Dube* (1). The learned Counsel for the appellant has sought to distinguish this case and has referred me to two cases decided subsequently, namely, the case of *Baldeo Singh* v. *Udal Singh* (2) and *Salamatul-Zamina* v. *Masha Alla Khan*, (3).

In my opinion this case must be decided on the peculiar facts involved in it. The principles of law are perfectly clear. Where an agreement is not required by law to be in writing or to be registered it is not necessary to prove the agreement by the production of a written document. Now the question in this case is whether the petition of compromise filed in the Revenue Court is admissible to prove the plaintiff's title. I have already said that, it has been found that the appellant has no title to the property independently of the compromise. This claim based on adoption by Dhanai Ojha has been negatived. But that fact alone does not show that there was not a *bona fide* contest in the mutation proceedings. But the question is, "the plaintiff having no initial title at all, what is that which gives him the title ?" It is said that it is the agreement among the parties in the mutation proceedings by which they settled their dispute that the appellant's claim was recognised. Reading the petition of compromise I find the following sentence in it :—

"*Haq o hissa har sulah kunindagam hasb-i-zail qarar paya.*"

Assuming that there was a *bona fide* dispute as to the property the terms of the settlement were reduced into writing and the petition of compromise purported to *declare* the rights of the several executants. As the terms of the compromise were reduced into writing, the

(1) 35 Ind. Cas. 701 ; 14 A. L. J. 449 ; 38 A. 366 (F. B.).
(2) 58 Ind. Cas. 732; 18 A. L. J. 877 ; 2 U. P. L. R. (A) 202.
(3) 43 Ind. Cas. 645 ; 16 A. L. J. 98 ; 40 A. 187.

writing alone is the evidence and no oral evidence can be adduced to prove the agreement. The writing being there and the property involved being worth more than Rs. 100 the provisions of section 17 of the Registration Act would apply and the document cannot be of any value to the appellant without registration. In fact, the petition of compromise is *the title-deed* of the appellant. He has no title independently of this document. In this view I think the decision of the Courts below was perfectly right. I dismiss the appeal with costs including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 32 OF 1923.

February 22, 1924.

Present :—Messrs. Baker, J. C. and Prideaux, A. J. C.

SAWAI SINGAI BALCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAWAI SINGAI LACHMAN PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint Family—Partition, whether must be equal—Arbitration—Reference made by father—Award, whether binding on minor sons.

There is no absolute rule of Hindu Law that a partition must be equal, although, generally speaking, it is so. A member of a joint Hindu family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest. [p. 1048, col. 1.]

Amritrao v. *Makundrao*, 53 Ind. Cas. 866 ; 13 L. W. 112 ; 15 N. L. R. 165 (P. C.), followed.

A father in a joint Hindu family as manager fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family. It is competent to him to refer to arbitration the partition of the joint family property, and an award made on such a reference, if valid in other respects, will be binding on the sons, whether adults or minors. [p. 1048, col. 2.]

Jagan Nath v. *Mannu Lal*, 16 A. 231 ; A. W. N. (1894) 60 , 8 Ind. Dec. (N. S.) 150 ; *Balaje Narayan Gokhale* v. *Nana*, 27 B. 287 ; 5 Bom. L. R. 95, relied on.

Appeal against the decree of the Subordinate Judge, Saugor, dated 17th January 1923, in Civil Suit No. 63 of 1921.

Messrs. *M. Gupta* and *N. G. Bose*, *B. B.*, for the Appellants.

Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The plaintiffs sued for partition of the family property, alleging that part of the joint property had been partitioned among the parties on 22nd August 1920 by six *panchas*, but that no immoveable property was divided. The defendants alleged that the whole joint property had been divided on various dates ; that immoveable property had been partitioned by an agreement on the same date as that alleged by the plaintiffs but conducted by different arbitrators, and that the parties are in possession of their respective shares in accordance with the partition. The Additional District Judge, Saugor, found that the entire joint property had already been partitioned and dismissed the plaintiffs' suit ; hence the present appeal.

The evidence has been discussed at length by the learned Additional District Judge. The principal point in this case is as to the genuineness of Exhibits D-13 and D-14, which are respectively the reference to the arbitration by the parties and the award of the arbitrators, dated 22nd August 1920. These documents are alleged by the plaintiffs to be forgeries. The oral evidence, as pointed out by the lower Court, is conflicting. The whole of the evidence has been read out in Court and the witnesses on both sides have made certain statements to which exception can be taken, but we do not think that it is necessary to go in detail through the oral evidence. The principal factor in arriving at a determination in this case must be the conduct of the parties, which is a matter of very great importance.

The partition of the immoveable property is alleged to be unequal since the defendants have been given a larger share in three villages than the plaintiffs. The genealogy is given at the beginning of the lower Court's judgment and need not be repeated. It has been argued by the learned Advocate for the respondents that in the case of a large property, such as is in issue in the present case, worth more than a lakh, it cannot be definitely said that the partition is unequal, merely because the defendants have got a larger share in the immoveable property. It would be necessary to go in detail through all the other items of property, cash, ornaments, cattle and grain, etc., valuing each item, in order to be able to decide whether the partition was unequal or not. In our view of the case, however, this question does not arise, because, if it can be shown that the plaintiffs submitted the question of partition to arbitration by Exhibit D-13 and accepted an award of the arbitration by Exhibit D-14, the partition, whether equal or not, is binding upon them. Exhibit D-14, which is signed by the arbitrators and which is denied by the plaintiffs, was apparently signed originally by the representatives of the three branches, plaintiff No. 1 Panchamal, plaintiff No. 5 Nathuram and defendant No. 1 Lachhman Prasad, and their signatures have been struck out. The reason assigned for this by the appellants is that the defendants, knowing that when the document was presented for registration the Registrar would require the attendance of the executing parties, scored out these signatures in order to prevent the plaintiffs being called, as they knew they would at once repudiate the document.

It may be observed that if Exhibit D-14 is a forgery, it was not necessary for the defendants to forge the signatures of the plaintiffs on an award, as the defendants must have known that the plaintiffs at the first opportunity would repudiate the document. The explanation put forward by the defendants for scoring out the signatures is that, while an award does not require registration, the effect of the signatures of the plaintiffs on the document would be to convert it into an instrument of partition which would require a very large stamp, in view of the value of the property. The suggestion made by the defendants that the names were scored out at the instance of the Sub-Registrar has been denied by the Sub-Registrar himself, and seems very improbable that he would interfere in any away with the nature of the document presented for registration.

The defendants' case is that the award was entered into with the consent of all the parties and that after disputes arose it was found necessary to have it registered, and it was only after that that the plaintiffs attacked it as a forgery. It seems probable that circumstances arose which compelled the registration of the document. The date of Exhibit D-14 is 22nd August 1920 it was presented for registration on 11th December 1920 and the plaintiff No. 1 says that he got knowledge of it on 15th December 1920.

In this connection the conduct of the plaintiffs is of very great importance. The document was impounded for want of stamp and sent to the Collector. Plaintiff No. 1 alleges that he presented a petition to the Sub-Registrar, saying that it was a forgery. The Sub-Registrar is unable to state whether any such application was made, without reference to the application itself, and no copy of such an application has been put in on the record, although presumably the original application must be in the possession of the registration authorities. Proceedings were then taken by the Deputy Commissioner to recover the deficit stamp and notices were issued to the parties. Plaintiff No. 1 who is the principal plaintiff in the case, plaintiff No. 5 being a young man, alleged to be of weak intellect, did not contest the award as a forgery. It is true that plaintiff No. 5 Nathuram (Ex. D-25), stated before the Collector on 30th March 1921: "The document ment is an award made by the *Panch* but it was not done in my presence." But, apart from that, we find no protest on the part of the plaintiffs that the award was a forgery. Plaintiff No. 1 made no allegation that it was forged, though his interests were seriously affected by it. Naturally, when plaintiffs were called upon to make good the deficiency of the stamp, they would have said that the award is a forgery, made without their knowledge, that they did not sign it, and that, therefore, they were not responsible for payment of any deficient stamp-duty on it, nor did it affect any property.

Ultimately, stamp-duty and penalty were levied on the award which was thus made legal. Before this, an application made for mutation of names in accordance with the award. The plaintiffs did not appear before the *Tahsildar*, although notices were issued. They appealed to the Deputy Commissioner against the *Tahsildar's* order regarding mutation, not on the ground that the award was a forgery but that it was unregistered and that there was no proper proclamation. This is shown by Exhibit D-2, which is the order of the Deputy Commissioner in appeal, dated 18th March 1921. The appeal is by Panchamlal, plaintiff No. 1, against the order of the *Tahsildar*, Rehli, granting mutation in favour of defendant No. 2. The first ground of appeal was that there was no proper proclamation, and the only other ground was that the mutation granted was based on an unregistered document, that is, the award (Exh. D-14), which is now being challenged as a forgery.

It is perfectly clear that if this document was a forgery, both the plaintiffs Nos. 1 and 5, whose interests were adversely affected by it, would have lost no time in bringing this fact to the notice of the Revenue authorities. One would have expected also that they would have instituted civil or criminal proceedings against the defendants with a view to have the document set aside, but, on the contrary, we find that in the appeal against the order in the mutation proceedings the question of the document being forged is not even mentioned, and what is still more curious is that from the statement of plaintiff No. 1 Panchamlal it appears that even after this, further moveable property was divided between the plaintiffs and the defendants in March and May 1921. It is difficult to suppose that if the plaintiffs were aware that their co-sharers defendants had brought into existence the forged award, by which they were unjustly deprived of their fair share of the property, they would consent to divide any more property with them until the award was set aside.

Great importance attaches to this conduct of the plaintiffs, and in our opinion it is entirely against the theory that this award was got up behind their back, without their consent, and is a forgery as they now contend.

It is to be observed that the plaintiffs admit that a *Panch* was called to effect a partition on the 22nd August, the same date as alleged by the defendants, but the *Panch* is different. The partition which they set up was only a partial partition. It is not supported by any document, whereas the partition set up by the defendants is supported by Exhibits D-13 and D-14, and it has been shown that the names of the sharers have been mutated in accordance with Exhibit D-14 and that the plaintiffs did not attack that award on the ground of its being a forgery. It has also been admitted by the plaintiff No. 1 (P. W. 1) that the buffaloes were divided in *Kuar*, and the bullocks in *Baisakh* following, that is, subsequent to the date of the alleged forged award which came to the notice of the plaintiff No. 1 in the preceding December.

In these circumstances, the story of the defendants appears much more probable. The *Panchas* named in the plaint as having been present at the partition set up by the plaintiffs are four only, Harchand, Bholanath, Berbuda Prasad and Mulchand. Subsequently, in his evidence the plaintiff No. 1 added two more, namely Bilku and Ahmirchand. Out of these six, only Mulchand was examined as P. W. 2 and Harchand as P. W. 9 ; the other four are not examined. Mulchand is the plaintiffs' *Karinda* and was prosecuted by the defendants for criminal breach of trust. Harchand is son-in-law of plaintiff 1. He was married to the sister of defendant 1, but she died long ago. On the other hand, the defendants have examined all *Panchas* named by them in their statement, with the exception of Parmanand, and also the witnesses who attested the award. In this connection, we may remark that the attempt on the part of the appellants to show that the letter "ग" *i.e.* (Gavhi, witness), before the names of these witnesses has been changed to "द", *i.e.* (Daskat, signed by), is unsuccessful. There is no such change. All that has happend is that the writer had made a mark (11=) before the signature of each witness ; in some instances the signatures coincided with this mark and in others did not. Even if such a change had been made, the fact that uneducated arbitrators described themselves as witnesses would have little significance.

It is extremely improbable that if the defendants wanted to forge an award, they would go the length of forging the signatures of the plaintiffs on it and then scratch them out again. The conduct of the parties as referred to in the earlier portion of this judgment leaves no doubt in our minds that D-14 is not a forgery, and, therefore, it is inherently improbable that D-13, which is a submission to arbitration, is a forgery either. If, therefore, these documents are genuine, as we believe they are, the question of the inequality of the partition does not arise. By Exhibit D-13 the plaintiffs gave power to the arbitrators to divide the property, as they liked, in order to avoid litigation. It is not contended that there was any inequality of partition except as regards the land, although it is true that the defendants have got a larger share of the land. This is immaterial in view of the acceptance by the plaintiffs of the award of arbitrators, as shown by their subsequent conduct. An objection was taken to it merely on the score of registration and they have not expressly declared it to be a forgery, so the award would be binding on them.

Plaintiff 5, Nathuram, has admitted signing Exhibit D-17, which refers to his acceptance of the award, but says his signature was obtained by force by defendant 1.

It has been contended on behalf of the appellants that, assuming the award is genuine, the plaintiffs had no power to bind their minor sons and heirs by a reference to arbitration. It is contended that, under the Hindu Law, the partition must be equal. It has been held by the Privy Council in *Amritrao* v. *Mukundrao* (1), that a member of a joint Hindu family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest. There is no absolute rule that the partition must be equal although, generally speaking, it is so.

With regard to the power of the father to bind his sons by a consent to an unequal partition, authority will be found in *Jagan Nath* v. *Manu Lal* (2), where it was held that it is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, will be binding on the sons. In *Balaji Narayan Gokhale* v. *Nana* (3), it was held that a manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference of a dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Minors in the family are bound by the reference and, consequently, by the award made upon it. The law is that as a father in a joint Hindu family as manager fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family, it is competent for him to refer any dispute with reference to any matter, in which the family is interested, to arbitration. There is no evidence of fraud or collusion here, and unless the whole property is re-valued, it cannot definitely be stated how for the partition is unequal.

It has been contended on behalf of the respondents that the inequality only amounts to an extra share of Rs. 5,000 in three villages, whereas it has been contended on behalf of the appelants that there is a gross inequality in the *sir* and *khudkasht* lands. But, in view of the evidence derived from the conduct of the parties in accepting the award, the question of inequality does not arise.

The appeal consequently fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 53 Ind. Cas. 866 ; 15 N. L. R. 165 ; 13 L. W. 112 (P.C.)

(2) 16 A. 231 ; A. W. N. (1899) 60 ; 8 Ind. Dec. (N. S.) 150.

(3) 27 B. 287 ; 5 Bom. L. R. 95.

KHATOON BIBI v. NAZIR

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1524 OF 1923.

December 19, 1923.

Present :—Mr. Justice Mukerji.

Musammat KHATOON BIBI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAZIR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 11, whether exhaustive—Res judicata—*Husband and wife, question of divorce decided between*—*Question, whether can be reagitated by wife's father.*

The rules of procedure are framed for aiding justice and should not be so interpreted as to operate against the course of justice.

Section 11 of the Civil Procedure Code is not exhaustive as to the principles of *res judicata*.

Where it has once been decided between a husband and wife that there has been no divorce of the wife by the husband, the question cannot be re-agitated at the instance of the wife's father in a subsequent suit by the husband for restitution of conjugal rights to which the former happens to be a party.

S. Ramamoorthi Dhara v. *Secretary of State for India in Council*, 19 Ind. Cas. 656; 36 M 141; 24 M. L. J. 469, *Naha Kishore Tilokdas* v. *Paro Bema* 74 Ind Cas. 283; 50 C. 23; (1923) A. I. R. (Cal.) 198, relied on.

Second appeal against the decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Allahabad, dated the 27th August 1923.

Mr. *U. S. Bajpai*, for the Appellants.

JUDGMENT.—The facts of this case which have give rise to this appeal are these: The plaintiff, Nazir, is the husband, the appellant, *Musammat* Khatoon Bibi, is said to be his wife. Muhammad Ismail, appellant No. 2, is father of *Mt.* Khatoon Bibi. In a previous suit between the husband and wife it was held that there was no divorce. Nazir instituted this suit, out of which this appeal arises, for the restitution of conjugal rights against his wife. The father-in-law, Ismail, was made a party to the suit on the ground that the father-in-law was putting obstructions in the way of the wife's going to live with the plaintiff. The lower Court found that the question of divorce was *res judicata* and did not permit the father-in-law, Ismail, to adduce evidence in proof of his allegation that there was in fact a divorce. Ismail raised a further plea that there was no cause of action against him. On that plea the learned Judge of the lower Appellate Court has pointed out that it was clear from his statement that he was not prepared to allow his daughter to go and live with her husband and there was, therefore, a cause of action against him.

In this appeal it is urged that the lower Courts were wrong in shutting out evidence. It is also urged that there is no cause of action against Ismail. The last of the grounds taken in appeal, namely, the 4th ground, has not been pressed before me.

As regards the question of divorce, I think the lower Courts were perfectly right. The question of the status between the alleged husband and wife has been once decided as between themselves. It would be simply monstrous to allow the father to prove that there was, as a matter of fact, a divorce. It is true that section 11, Civil Procedure Code has no application when the question is raised by Ismail. But that section is not exhaustive. In the case of *S. Ramamurti Dhora* v. *The Secretary of State for India in Council* (1), it was held that where there was a dispute between to rival claimants for a property and the suit was decreed in favour of one it was not open to a third party to contend that the property did not belong to the successful party. In this connection see also *Naha Kishore Tillokdas* v. *Paro Bema* (2). The principle on which these decisions were given applies to this case. If the Courts were to allow Ismail to prove successfully that there was a divorce, the result would be that, while the wife would be compelled to go and live with her husband, the decree, would be nullified by the father being allowed to keep back the wife. The rules of procedure are framed for aiding justice and they should not be so interpreted as to operate against the course of justice.

(1) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 469.
(2) 74 Ind. Cas. 283; 50 C. 23; (1922) A. I. R. (C.) 198.

In my opinion, therefore, there is nothing in the first and second grounds of appeal.

The next point is whether the Court below was wrong in holding that the statement of the appellant himself showed that there was a good cause of action against him. I think that the Court below was justified in saying that it was clear from the attitude and pleadings of Ismail in the conduct of the case that the plaintiff was right in saying that Ismail was unwilling to allow his daughter to go and live with the plaintiff.

The appeal fails and is hereby dismissed under O. XLI, r. 11, Civil Procedure Code.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 124 OF 1923.

February 26, 1924.

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

GAYA PRASAD AND ANOTHER — APPLICANTS

versus

FIRM MUTHU LAL BUDHA LAL— OPPOSITE PARTY.

Arbitration—Submission, leave to revoke, when to be given.

In giving leave to revoke a submission, the Court shall be satisfied that a substantial miscarrige of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle underlying the exercise of the power to revoke, is that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by.

Civil Revision against the order of the District Judge of Cawnpore, dated the 13th of August 1923.

Dr. *M. L. Agarwala* and Mr. *P. N. Sapru*, for the Applicants.

Messrs. *Sailanath Mukerji* and *N. P. Asthana*, for the Opposite party.

JUDGMENT.—We think that the learned Judge went a little too far in cancelling the order of the 15th of July 1922. We think we understand what his intention was, but it has left the matter in somewhat of a muddle, because if the order of the 15th of July is cancelled, the application ceases to exist, and the notice to the parties and the arbitrators is no longer effective. On the other hand, the parties before us are agreed that the application has not been disposed of and is still pending. All we can do, therefore, is —while suggesting that the arbitrators shall not go on with their arbitration while the application to revoke the submission is pending—to cancel the order of Mr. Holme of the 13th of August 1923, and to send the matter back in order that the application for revocation be heard and determined at a very early date. If the District Court of Cawnpore possesses a copy of the last Edition of Russel on Arbitration, namely, the 10th Edition, 1919, edited by Mr. Hudson, it will find in a very small compass in sub-section (4) of section 1 of part I, all the principles set out which ought to govern the decision of an application for leave to revoke. For the convenience of the Court, in case this book is not available, we may mention that it has always been, under the corresponding section in England, held by English Courts that in giving leave to revoke a submission, the Court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle

underlying the exercise of the power to revoke is, that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that, unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by.

We set aside the order of the 13th of August 1923, and direct the record to be returned to the lower Court for disposal without delay. The costs will be costs in the application and will include in this Court fees on the higher scale.

S. D. *Revision allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 64 OF 1921.

December 18, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

S. S. RAMUDU AYYAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

N. K. RAMAYYAR AND BROTHERS, BY THEIR MANAGING PARTNERS N. K. N. RAMAYYAR—DEFENDANTS—RESPONDENTS.

Contract Act (*IX of* 1872), *s.* 118—*Contract for sale of goods—Warranty of quality, breach of—Failure to reject within reasonable time—Remedy—Compensation for damage.*

The plaintiff agreed to sell goods to the defendant at Rs. 16-2-0 a bundle describing them as those he had purchased from R. N. & Co., who were buying the same from certain Mills at Rs. 14 a bundle. Some of the goods delivered by the plaintiff in pursuance of the contract were purchased by R. N. & Co. from the Mills at Rs. 9-12-0 but were of the same quality and description as those purchased at Rs. 14. The defendants received the goods at their godown and three months thereafter rejected the goods. In a suit by the plaintiff to recover the purchase-money ;

Held, (1) that the contract being in respect of bales sold at Rs. 14 and the goods delivered being these sold at Rs. 9-8-0, there was a breach of the condition of the contract.

Sivarama Iyer v. *Subba Iyer & Sons*, 70 Ind. Cas. 346 ; 15 L. W. N. 9 ; (1922) A. I. R. (M.) 28, follow d.

(2) but that the defendants having accepted the goods and not having rejected them within a "reasonable time" they were entitled under section 118 of the Contract Act only to claim compensation for damages caused by the breach of warranty of title.

(3) that, however, as the goods delivered were in texture and quantity the same as the goods contracted for, the damage caused was *nil* and the plaintiff was, therefore, entitled in full to the purchase money claimed.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 70 of 1919.

Mr. *A. Krishnaswamy Ayyar*, for the Appellants.

Mr. *C. Krishnamachariar*, for the Respondents.

JUDGMENT.—In this case plaintiffs entered into a contract to sell 60 bales of yarn of various counts to defendants. Ex. A, dated 21st August 1918, is the first written record of the contract and in respect of the count of 50's with which we are mainly concerned, it was agreed that 30 bales should be supplied at Rs. 16-12-0 per bundle of 5 lbs. On 23rd August 1918 plaintiffs wrote another letter (Ex. C.) stating that the bales sold were those purchased from Rayalu Aiyar Nagasami Iyer & Co., which the latter were buying from the Mills at Rs. 14 per bundle. These two letters were accepted by defendants in Ex. B, and we may take the three documents together as embodying the terms of the contract. Plaintiffs delivered 28 bales, including 7 bales of count No. 50, between 9th September 1918 and 14th October 1918. The first 3 bales of 50's were paid for in full after deducting the advance paid in respect of them. All the bales were left in defendants's godown and no objection was taken until 19th December 1918 (Ex. H). It then transpired that Rayalu Iyer Nagasami Iyer & Co., had purchased 50's from the Madura Mill at Rs. 9-8-0 per bundle as well as at Rs. 14 per bundle, and some of the former bales were supplied to defendants. It is admitted that the goods in all the bales were of the same quality and description, except that some were

sold by the Mills at Rs. 14 per bundle and some at Rs. 9 8-0 per bundle. As the contract was in respect of bales sold at the former price, and goods of the latter price were delivered, on the authority of *Sivarama Iyer* v. *Subbiyer & Sons* (1), this amounted to a breach of a condition of the contract and we may take it as such. On this footing the Subordinate Judge has held that plaintiffs broke the contract and has refused to decree their suit for the balance of purchase-money due in respect of these six bales. In appeal it is contended that, in spite of the breach of condition, the defendants accepted the goods and cannot, therefore, plead breach of contract, but are confined to their remedy under section 118 of the Contract Act, that is, the damages sustained owing to the breach of warranty. It is then contended for respondents that they were entitled to a reasonable time within which to reject the goods and that their rejection 3 or 4 months after delivery was within a reasonable time. In section 118 the words are, "time reasonably sufficient for examining and trying" and it is not suggested that, during the three months after delivery, defendants made any attempt to examine or try the goods, nor did they make any enquiries as to their origin Undoubtedly, 3 months is an excessive period for mere examination or trial, but it is argued that, inasmuch as defendants were not in a position to find out the breach of warranty by mere examination the reasonable time must be extented so as to cover the time that actually elapsed before its discovery. This, however, is not what the section provides, and when delivery is accepted, money paid, and the goods stored in the buyer's premises, it is not unnatural that the seller should consider that they have been accepted and he is entitled to protection equally with the purchaser. We must, therefore, hold that the time was not reasonable. (*Vide* Original Side Appeal No. 13 of 1921) in this Court and *Kissendoyal* v. *Askaran*, (2). In this view we hold that defendants accepted the 6 bales of 50's which form the subject-matter of this appeal and can only claim compensation for the damage caused by the breach of warranty which is admittedly *nil*, for the goods delivered were in texture and quantity the same as the goods contracted for. Plaintiffs are, therefore, entitled to the balance of purchase-money claimed by them. The Subordinate Judge has awarded them Rs. 14-2-0 per bundle, the price realized on re-sale, but the contract price is Rs. 16-2-0 and plaintiffs are entitled to an additional Rs. 2 per bundle, that is, Rs. 960 The Subordinate Judge has also allowed defendants to set off the advance paid by them in respect of the 32 bales, which were admittedly not delivered, but they do not form the subject-matter of this suit. The right to the money paid in advance will depend upon a number of considerations in reference to the contract as a whole and these questions have not been put in issue. With regard to this sum, therefore, defendants will be referred to a separate suit. The decree is modified by awarding plaintiffs Rs. 35,190 plus Rs. 960 minus Rs. 19,360, that is, Rs. 16,790 with interest at 9 per cent. from 2ud April 1919 to date of plaint and subsequent interest on the aggregate at 6 per cent; and parties will pay and receive proportionate costs. Respondents will pay appellants' costs in appeal.

V. N. V. *Appeal accepted.*

(1) 70 Ind Cas. 346 ; 15 L. W. 9 ; (1922) A. I. R. (M.) 98.

(2) 31 Ind. Cas. 290 ; 23 C. L. J. 115.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 577 OF 1922.

February 19, 1924.

Present :—Mr. Baker, J. C.

ABDUL AZIZ KHAN AND ANOTHER—APPELLANTS—PLAINTIFFS

versus

THE MUNICIPAL COMMITTEE, KHANDWA—DEFENDANT—RESPONDENT.

C. P. Municipal Act (XVI of 1903) s. 31—Contract, what is—Auction-sale, whether contract—Writing, whether necessary.

ABDUL AZIZ KHAN *v.* THE MUNICIPAL COMMITTEE, KHANDWA

Contracts made by a public body must be strictly in conformity with the mode of making such contracts as prescribed by Statute.

Young v. *Corporation of Leamington*, (1882); 51 W. J. Q. B. 292 ; 8 Q. B. D. 579 ; 46 L. T. 55530 L. R. 500, 46 J. P. 516; affirmed in (1883) 52 L. J. Q. B. 713; 8 App. Cas. 517, 49 L T. 1; 31 W. R. 925 ; 47 J. P. 660, relied on.

The word "contract," as used in section 31 of the C. P. Municipal Act, must be taken in its ordinary sense.

A sale by auction by a Municipality is a contract within the meaning of section 31 of the C P Municipal Act and in order to be binding on the Municipality must be in writing.

Payne v. *Care*, (1789) 1 R. R. 679, 3 T. R. 148; 1006 E. R. 502; *Johnston* v. *Boyes*, (1899), 2 Ch. 73 , 68 L J. Ch. 425; 80 L. T. 488 ; 47 W. R. 517 ; *Warlow* v. *Harrison*, (1858) 29 L. J. Q. B. 15 ; 1 El. & El. 295 ; 6 Jur. (N. S.) 66; 8 W. R. 95; 120 E. R. 920, relied on

Section 31 of the C. P. Municipal Act does not lay down that a contract should be in any particular form, except that it should be in writing.

Appeal against the decree of the District Judge, Khandwa, in Civil Appeal No. 67 of 1922 dated 18th August 1922.

Mr. *M. Gupta*, for the Appellants.

Mr. *S. B. Gokhale*, for the Respondent.

ORDER.—This appeal has been argued on a single point of law, and until that is decided the remaining questions in it cannot be considered.

The facts are that the defendants, the Municipal Committee, Khandwa, sold by public auction the grass growing round the Moghat tank under certain conditions which were duly published, but subsequently, they required the plaintiffs to enter into an agreement which was contrary to the conditions of sale, certain coupes being excluded and certain impossible conditions being imposed, and on the plaintiffs objecting the coupes were sold by the Municipality to another person. The plaintiffs, therefore, sued the defendants for damages.

The first Court, the Subordinate Judge, Khandwa, awarded the plaintiffs Rs. 2,692-8-0. On appeal the District Judge of Nimar reduced the damages to Rs. 1,442-8-0. The plaintiffs make a second appeal against this decision and the defendants put in cross objections.

The appeal and the cross-objections relate to certain items of damages, but at the hearing a preliminary objection was taken by the respondents that under section 31 of the Central Provinces Municipal Act of 1903 the suit would not lie because there was no contract in writing with the plaintiffs as required by the Act. Section 31 of the Act lays down (1) "Every contract made by or on behalf of a Committee whereof the value or amount exceeds fifty rupees shall be in writting. (2) Every such contract shall be signed by the president or vice-president and a secretary.... (3) If a contract to which this section applies is entered into otherwise than in conformity therewith it shall not be binding on the Committee." The question, therefore, arises as to whether a sale by auction held by the Municipal Committee is a contract within the meaning of section 31 of the Act.

It is of course settled law that it is absolutely necessary that the contracts made by a public body should be strictly in conformity with the mode of making such contracts, as prescribed by Statute. There are numerous decisions on this point, the leading case being the well-known English case, *Young & Co.* v. *The Corporation of Leamington* (1).

It is contended on behalf of the appellants that the case does not fall under section 31 of the Municipal Act, as the sale is not a contract. Because if the sale is complete, the stage of contract is passed. The question of the confirmation of the sale does not arise, as both the lower Courts found that there was an absolute confirmation of the sale by the Municipality. Subsequently, however, the Municipality sought to impose new conditions which it had obviously no power to do.

There can be no doubt whatever that the sale by auction is a contract. This has been repeatedly held in many cases. It was laid down in the case of *Payne* v. *Cave* (2), that a

(1) (1882) 51 L. J. Q. B. 292 ; 8 Q. B. D. 579 ; 46 L. J. 555 ; 30 W. R. 500 ; 46 J. P. 516—Affirmed in (1883) 52 L. J. Q. B. 713 ; 8 App. Cas. 517 ; 49 L. J. 1 ; 31 W. R. 925 , 47 J. P. 660.

(2) (1789) L. R. R. 679 , 3 T. R. 148 , 100 E. R. 502.

binding at an auction, instead of being a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that this assent is signified by knocking down the hammer, and that, till then, either party may retract. In *Johnston* v. *Boyes* (3), following *Warlow* v. *Harrison* (4), it was held that when the conditions of sale provide that the highest bidder shall be the purchaser, the person who makes the highest bid has a right of action against the seller on his refusing to act in accordance with the conditions.

The word "contract" as used in sections 30 and 31 of the C. P. Municipal Act must be taken in its ordinary meaning. Contract is defined in section 2 of the Indian Contract Act as an agreement enforceable by law, and an agreement is constituted by a promise or a set of promises forming the consideration for each other.

The Municipality offered the grass for sale by auction, thereby promising to sell it to the highest bidder, the plaintiffs accepted the offer by biding at the auction, and on confirmation of the sale there was a complete contract, subject to such conditions as were accepted by the plaintiffs. There cannot be the smallest doubt that on confirmation of the sale by the Municipality there was contract between themselves and the plaintiffs, and, as required by section 31 of the C. P. Municipal Act, such a contract must be in writing, signed by the President or Vice-President and a Secretary. By Exhibit D-1 the Municipality announced the conditions of sale under a notice signed by the Secretary. The only one of these conditions, which is material at the present stage, is No. III, which refers to the return of the deposit to the purchaser in case of the non-confirmation of the sale for any reasons. It will thus appear that the contract was not to be completed until the confirmation of the sale. The sale was duly held and the plaintiffs were the highest bidders.

(3) (1899) 2 Ch. 73; 68 L. J. Ch. 425: 80 L T. 188; 47 W. R. 517.

(4) (1858) 29 L. J. Q. B. 15; 1 E. L. E. C. 295, 6 J. U. R. (N. S.) 66; 8 W. R. 95, 720 E. R. 920.

Exhibit D 2 is a memorandum of the auction-sale held on 26th July 1920. It mentions all the bids and states that the conditions of sale are herewith attached; one copy of the conditions is also given to the high est bidder, Abdul Aziz (plaintiff). Exhibit D-2 is signed by the Vice-President, Secretary and two members of the Municipality, and alo by the plaintiffs, but it cannot be regarded as a completed contract because it required confirmation by the Committee as provided for in the conditions of sale. Exhibits P.4 and D-9 are the same Exhibit, being copies of the resolution of the Muncipality, dated 7th October 1920, which states as follows; "Read papers showing sale of grass coupes in the catchment area of the Moghat tank together with the Sub-Committee's report thereon. Resolved that the sale be confirmaed as per recommendation of the Sub-Committee. Resolved further that the contractors Munshi Aziz Khan and G. A. Dalal be asked to execute an agreement as per conditions recommended by the Sub-Committee which were proclaimed at the time of auction."

On confirmation by the Municipality the contract came into existence. That contract was based on the auction-sale and is evidenced by the Memorandum, Exhibit D-2, which is signed by the Vice-President and Secretary, as also by the plaintiff. I do not see any reason why this should not be considered as a sufficient compliance with the Statute which does not lay down that the contract should be in any particular from, except that it should be in writing, signed by the President or Vice-President and a Secretary. Exhibit D-3 conforms to these conditions and I find that it is a sufficient compliance with the Statute. The plaintiffs as the highest bidders have a right of action on Exhibit D-2, read along with the conditions of sale.

I have deferred this Judgment pending the receipt of the original proceedings of the Municipality. These are in the handwriting of the President and are not signed by the Secretary. But this is immaterial as the resolution confirming the sale relates back to Exhibit D-2.

The question of different conditions alleged to be proclaimed at the time of sale does not

arise at this stage. The appeal should be set down for hearing on the merits.

G. R. D.
Z. K.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 940 OF 1921.

January 11, 1924.

Present :—Mr. Justice Spencer, Acting Chief Justice.

MOHAMMAD ESUF ROWTHER—DEFENDANT—APPELLANT

versus

SULTAN ABDUL KADIR AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit to recover whole property dismissed—Suit to recover portion, whether barred—Res judicata between co-defendants, requisites of.

Where a suit to recover possession of the whole of a certain property is dismissed, a subsequent suit to recover a portion of that property based on the same title will be barred by *res judicata*.

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

A finding will not operate as *res judicata* between co-defendants unless there was an active contest between them on the point and the decision of the question was necessary in order to dispose of the plaintiff's suit.

Sankaramahalingam Chetty v. *Muthulakshmi*, 48 Ind. Cas. 860 ; 33 M. L. J. 740, followed.

Second appeal against the decree of the Court of the 2nd Additional Subordinate Judge, Tanjore, in A. S. No. 99 of 1920, preferred against the decree of the Court of the District Munsif of Negapatam, in O. S. No. 502 of 1918.

Messrs. *K. V. Krishnaswamy Aiyar* and *N. Swaminatha Iyer*, for the Appellant.

Mr. *A. Krishnaswamy Aiyar*, for the Respondents.

JUDGMENT.—This is a suit to recover possession of certain lands. The parties are Muhammadans. It is necessary to make this clear at the outset, because in dealing with the parties' contentions in the Courts below, there has been some confusion of mind caused by reference to self-acquired property and even to *Stridhanam* (see paragraph 27 of the District Munsif's judgment in O. S. No. 38 of 1915.)

The plaintiffs are the widow and children of Sheik Muhammad Rowther, son of Muhammad Bava Rowther. Sheik Muhammad Rowther had one brother, who is the first defendant, and four sisters. There has been previous litigation on the subject of the suit property. Sheikh Muhammad Rowther brought a suit, O. S. No. 15 of 1905, to recover the same lands from first defendant on a plea of trespass in which he alleged that the properties were in plaintiff's possession but that it was necessary to have them delivered to him through Court to avoid any further dispute. The defendant took oath in that case and the plaintiff's suit was dismissed. Another suit, O. S. No, 38 of 1915, was brought by the daughters of Isabibi Ammal, one of the sisters of Sheik Muhammad and the 1st defendant. That suit was dismissed on a finding that the property was the exclusive property of Sheik Muhammad.

Both the Courts below have held that the result of the second suit was to negative the right of the sisters to any share of the property and to enhance the shares of Sheik Muhammad and the first defendant. The plaintiffs have been given a preliminary decree for partition of the suit properties into two equal shares. I am of opinion that both the judgments are wrong. This suit does not purport to be a suit for partition of property between co-owners. The cause of action is

stated to be the claim of the first defendant in O. S. No. 38 of 1915 to absolute right in the suit property, and the relief asked for is that the plaintiffs' 6-8ths' share should be made over to them. It is not alleged that the plaintiffs have obtained possession of the property at any date subsequent to the 10th of November 1905 when the first suit (O. S. No. 1905) for possession of this property was dismissed and that the have since been dispossessed. As regards 'the plaintiffs' title to sole possession of the property, the decision in O. S. No. 15 of 1905 is *res judicata* as between them and the defendant Muhammad Esuf. The mere assertion of title in O. S. No. 38 of 1915 by a co-defendant will not give rise to any cause of action if the property was at that time in the defendant's possession. The present suit, if it be regarded as a suit to obtain possession against a trespasser, is barred by reason of the prior suit, O. S No. 15 of 1905 upon the same title, vide *Naina Muhammad Rowther* v. *Abdul Rahiman Rowther* (1) If it be alleged that in the prior litigation the plaintiff asked for too much and, therefore, his suit was dismissed and that his representatives are now at least entitled to 6-8ths or some other smaller share of the property, then they are equally barred, because Sheik Muhammad should have pleaded in that suit that, if he was not entitled to a decree for the whole property, he should at least be given a decree for his 6-8ths' share. That principle is clearly established by the decision just quoted.

It is argued that the effect of the judgment in O. S. No. 15 of 1905 was destroyed by the judgment in the subsequent suit, O. S. No. 38 of 1915, in which it was held that the property was the exclusive property of Sheik Muhammad. That is not so. The judgment in O. S. No. 38 of 1915, disposed of a claim made by the daughters of one of Sheik Muhammad's sisters to their share of this property upon partition. The finding that it was the exclusive property of Sheik Muhammad will not operate as *res judicata* between co-defendants, as there was no active contest between them on this point and the decision of the question was not necessary in order to dispose of the suit of those plaintiffs : vide *Sankaramahalingam Chetty* v. *Muthulakshmi* (2). If the present suit is to be treated as a suit for partition of Sheik Muhammad's share, then it is necessary that the plaint should be amended by properly stating the cause of action as the plaintiffs' demand for a partition to be made by their co-owner and his refusal. It will also be necessary to make all the members of the family parties to the suit. One of the sisters of Isa Bivi, Jeleika Bivi, is stated to be dead. The other two sisters Hamida Bivi and Muhammad Bivi, are parties in the connected suit for recovery of the house, O. S. No. 511 of 1918, but they have not been made parties to the present suit ; nor has any one been put on the record as the legal representative of the deceased sister. The only order that I can make on the present second appeal is that, upon the plaintiffs paying all the costs of the defendants up to date within one month, they will be allowed to amend their plaint so as to claim the relief of partition of their share making all the children of Muhammad Bava or other legal representatives parties to the suit, within one month of this order, and upon their so doing, the suit will be remanded for re-trial, permitting the defendants to file fresh written statements to meet the plaintiffs' new claim for partition; and upon the plaintiffs' failure to do so, their suit will stand dismissed with costs in this Court and in the Courts below reversing the decisions of the District Munsif and the Subordinate Judge. This order also disposes of the memorandum of objections which is dismissed.

Z. K.

(1) 72 Ind. Cas. 207 16 M. 135, (1922) M. W. N. 845 ; 17 L. W. 188 ; 32 M. L. T. 82 (1923) A. I. R. (M) 257.

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GENERAL INDEX.

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For the purpose of ascertaining the factum of relinquishment there is no difference between the incidents which govern a *Paikan* tenure, and a *raiyati* holding under the Bengal Tenancy Act C KASIRAM KAIBORTA *v.* BOGA KAIBORTA 503

————, what amounts to. *See* BENGAL TENANCY ACT, s. 25 497

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—— 1865—X. *See* SUCCESSION ACT.
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—— 1872—IX. *See* CONTRACT ACT.
—— 1877 —I. *See* SPECIFIC RELIEF ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT
—— 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—V. *See* EASEMENTS ACT.
—— 1882—VI. *See* COMPANIES ACT.
—— 1886—II. *See* INCOME TAX ACT.
—— 1887—VII. *See* SUITS VALUATION ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.

Acts General contd.

Act 1894 I *See* LAND ACQUISITION ACT.
1897 X *See* GENERAL CLAUSES ACT.
—— 1899 II. *See* STAMP ACT
—— 1899 IX. *See* ARBITRATION ACT.
1907 III *See* PROVINCIAL INSOLVENCY ACT.
—— 1908 V *See* CIVIL PROCEDURE CODE.
—— 1908 IX. *See* LIMITATION ACT
—— 1908 XVI. *See* REGISTRATION ACT.
—— 1917 VIII *See* SUPER TAX ACT.
1918 VII. *See* INCOME TAX ACT.
—— 1920 V *See* PROVINCIAL INSOLVENCY ACT
1920 XIV. *See* CHARITABLE AND RELIGIOUS TRUSTS ACT
—— 1922 XI. *See* INCOME TAX ACT.

Acts Bengal.

Act 1859—XI *See* BENGAL LAND REVENUE SALES ACT.
1876 VII. *See* LAND REGISTRATION ACT.
—— 1885—VIII *See* BENGAL TENANCY ACT
—— 1887—XII. *See* BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT.
—— 1897—V. *See* BENGAL ESTATES PARTITION ACT.
—— 1908 VI. *See* CHOTA NAGPUR TENANCY ACT
—— 1911 XVIII. *See* CALCUTTA IMPROVEMENT APPEALS ACT.
—— 1920 III *See* CALCUTTA RENT ACT

Acts Bihar & Orissa.

Act 1914 XIV. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT.

Acts—Bombay.

Act 1879 XVII *See* DEKKHAN AGRICULTURISTS' RELIEF ACT
—— 1896 XX. *See* SIND ENCUMBERED ESTATES ACT
—— 1901—III. *See* BOMBAY DISTRICT MUNICIPAL ACT.

Acts C. P.

Act 1898 XI. *See* C. P. TENANCY ACT.
1903 XVI *See* C. P. MUNICIPAL ACT.
—— 1920—I. *See* C. P. TENANCY ACT.

Acts—Madras.

Act 1881—V. *See* MADRAS LOCAL BOARDS ACT.
—— 1904—II. *See* MADRAS IMPARTIBLE ESTATES ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1920—XIV. *See* MADRAS LOCAL BOARDS ACT.

Acts—Punjab.

Act 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1913- I. *See* PUNJAB PRE-EMPTION ACT.
—— 1913 -II. *See* PUNJAB REDEMPTION OF MORTGAGES ACT.
—— 1918—VI. *See* PUNJAB COURTS ACT.
—— 1920—II. *See* PUNJAB CUSTOM (POWER TO CONTEST) ACT.

Acts—U. P.

Act 1876—XVIII. *See* OUDH LAWS ACT.
—— 1886—XXII. *See* OUDH RENT ACT
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.

Regulations.

Reg. 1793 I. *See* BENGAL PERMANENT SETTLEMENT REGULATION.
—— 1793- VII. *See* BENGAL REGULATION.
—— 1799- VIII. *See* BENGAL REGULATION.
—— 1806 XVII. *See* BENGAL REGULATION.

Statutes.

1915—(5 & 6 GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.

Admission, *effect of—Status, question of.*

An admission operates merely to shift the *onus* and raises only a rebutable presumption. **N** JUMILAL *v.* HALKI **981**

——— *in pleadings, construction of—Conditional admission*

It is permissible for a Tribunal to accept part and reject the rest of any witness's testimony. But an admission in a pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all

If a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission. **N** KRISHNABAI *v.* DHONDO RAMCHANDRA, 20 N. L. R. 63 **542**

—— —— *of thumb impression on blank paper—Execution Burden of proof*

An admission must be taken as a whole and not piecemeal.

A defendant's admission that he had put his thumb impression on a blank paper is not an admission of execution of any document and, therefore, does not shift the burden of proving the document. **N** DEVIDAS *v.* MAMOOJI, 20 N. L. R. 7; (1924) A. I. R (N.) 103 **104**

Adverse possession—Co-sharers—Transferee from co-sharers, suit by, to recover possession. *See* LIMITATION ACT, SCH. I, ART. 144 **159**

——— ——— *Benami* transaction—Fraudulent purpose—Property, whether can be recovered. *See* BENAMI TRANSACTION **359**

——— ——— *Co-owners—Transferee from one co-owner—Possession when adverse to other co-owners—Samudayam tenure—Karaiyedu tenure.*

The possession of one owner is not ordinarily adverse to the other co-owners. Not only possession by one co-owner but also an exclusion of the others or a denial of their title to their knowledge is essential to render such possession adverse. The same principle is applicable to the case of a transferee from one of several co-owners. Where he prescribes as a co-sharer, he must prove exclusion or denial of title as against the other co-sharers. But in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee with an independent or invalid title or none.

Nature and incidents of *Samudayam* and *Karaiyedu* tenure in Tanjore District explained. **M** VENKATARAMA IYER *v.* SUBRAMANIA SASTRY, 20 L. W. 122 **37**

——— ——— ——— *Co-sharers. Overt act.*

The possession of one co-sharer is ordinarily the possession of all co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone. This adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession. **L** HIRA SINGH *v.* PUNJAB SINGH **113**

——— ——— *Invalid title, effect of.*

Possession for twelve years or any other period prescribed by the law on an invalid title cannot perfect anything but that title. **N** DINA SINGH *v.* JAMAL SINGH **446**

——— ——— ——— *Lawful and unlawful possession—Adverse possession between co-sharers—Ouster—Assertion of hostile title.*

An admitted or proved title subsists all through until complete adverse possession is established.

Possession is either lawful or unlawful and, in the absence of evidence, it must be assumed to be the former.

Possession is lawful when it is in virtue of a legal title.

Between two co-tenants, each has a title to the whole and also to his undivided moiety and each is said to be seized *per myet per tout, i. e.*, each co-tenant has the entire possession as well of every parcel as of the whole.

Nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to bring out the success of the plea of adverse possession.

The fact that a party has not been in the enjoyment of the rents and profits of the property in suit does not establish a title by adverse possession in the co-tenant who has enjoyed such profits.

In order to establish adverse possession as between co-sharers there must be evidence of an open assertion of hostile title by one of them to the knowledge of the other. **O** INDERPAL SINGH

Adverse possession—concld.

v. THAKUR DIN SINGH, 10 O. L. J. 646; (1924) A. I. R. (O.) 266; 27 O. C. 77 **895**

——— *Muhammadan Law—Succession—Co-heirs, possession of, whether adverse—Exclusive enjoyment of profits.*

The possession of some co-heirs of a deceased Muhammadan over the undivided estate of the deceased is the possession of all the co-heirs who are co-sharers in the estate.

The mere fact that the co-heirs who are not in possession have not been in the enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the co-heirs who have been in possession and have enjoyed such profits. **O** ABDUL SHAKUR KHAN *v.* MUHAMMAD ALI KHAN **282**

Agra Tenancy Act (II of 1901), ss. 4, 79, Sch. IV, Art. 30—*Ejectment by land-holder—Ejectment by one of several co-sharers—Suit to recover holding—Limitation.*

When a tenant is unlawfully ejected by one of several co-sharers in the *patti*, who together would be entitled to recover rent from him, and, therefore, jointly constitute the land-holder, he cannot be deemed to have been ejected by his land-holder within the meaning of section 79 of the Agra Tenancy Act, or for the purposes of Art. 30 of Schedule IV to the Act. **A** RANI *v.* AIDAL SINGH, 22 A. L. J. 113; (1924) A. I. R. (A.) 131 **1041**

——— **ss. 20, 31**—*Occupancy holding - Mortgage created by tenant—Death of tenant—Resumption by landlord—Mortgagee, position of.*

Where on the death of an occupancy tenant without heirs, the landlords become entitled to resume the occupancy holding they can only do so subject to the rights created by the deceased tenant which the landlords failed to challenge within the period allowed by law. So that, if the holding is in possession of a mortgagee from the tenant, whose mortgage was not challenged by the landlords within one year of its creation, the landlords cannot resume possession of the holding without paying off the mortgagee. On the other hand, the mortgagee cannot set up a title by adverse possession against the landlords. **A** RAJRANGISINGH *v.* SHEO BARAT **531**

——— **s. 21**—*Occupancy holding—Mortgage-Sub-lease by mortgagee—Mortgagee, whether entitled to recover rent from sub-lessee.*

Plaintiff, who was the mortgagee of an occupancy holding, sub-let it to the defendant. In a suit by the plaintiff to recover rent from the defendant the latter pleaded that he was a tenant of the original occupancy tenant and had paid the rent to him :

Held, (1) that the mortgage in favour of the plaintiff was illegal being in contravention of the provisions of the Agra Tenancy Act, and conferred no title on the plaintiff ;

(2) that the defendant having paid the rent to the original occupancy tenant the latter must be deemed to have resumed the holding ;

(3) that, therefore, the plaintiff was not entitled to recover any rent from the defendant. **A** ATA HUSAIN *v.* RAMMAN LAL **539**

——— **s. 79**, *applicability of—Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Mortgage paid off by stranger—Suit to recover mortgaged property—Limitation*

Section 79 of the Agra Tenancy Act applies only to a case where there is more or less forcible ejectment; it does apply when there is an ejectment by mutual consent. A suit by the heirs of a mortgagor to recover the mortgaged property from a stranger who has paid off the mortgagee is governed by Art. 141 and not by Art. 148 of Schedule I to the Limitation Act. **A** BIJAI BAHADUR *v.* PARMESHWARI RAM **1026**

——— **s. 165**—Suit against Ruling Chief as co-sharer—Property in suit outside State territory—Suit, whether maintainable without consent of Government. *See* CIVIL PROCEDURE CODE, s. 83 **559**

——— **s. 167**—*Jurisdiction of Civil and Revenue Courts—Suit between rival claimants to occupancy holding, whether cognisable by Civil Court—Matter decided finally by Revenue Court—Jurisdiction of Civil Court, whether barred.*

A suit between rival claimants to an occupancy holding is triable exclusively by a Civil Court and is not covered by section 167 of the Agra Tenancy Act.

Once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court.

When a matter has not been finally decided in a Revenue Court, for instance where an appeal is pending against the decision of an Assistant Collector, and the same question arises in a suit filed in a Civil Court over which the latter Court has jurisdiction, it is not precluded from deciding the question merely by reason of the fact that it has already been decided by a Revenue Court of first instance. **A** SURJAN SINGH *v.* UMARI SINGH **1008**

——— **s. 167**—*Jurisdiction of Civil and Revenue Courts—Decree by Revenue Court—Declaratory suit in Civil Court, maintainability of.*

The Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under section 167 of the Agra Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form.

Defendant obtained an *ex parte* decree in the Revenue Court for arrears of rent against the plaintiffs on the allegation that the latter were his sub-tenants. While the *ex parte* decree was still in force plaintiffs sued the defendant in the Civil Court for a declaration that they were joint occupancy tenants with him :

Held, that the object of the suit being to obtain from the Civil Court a reversal of the Revenue Court decree for arrears of rent, the suit was not maintainable. **A** GOVIND *v.* AMMAR **628**

Allahabad High Court Rules, Ch. III, r. 3—*Appeal—Evidence, absence of—Certificate not filed—Ground, whether can be argued.*

Rule 3 of Chapter III of the Allahabad High Court Rules is imperative, and unless the certificate required by the rule is present, the ground referred to in the rule cannot be argued in spite of the fact that the appeal has been admitted to a hearing. **A** PANDIT ISH NARAIN UPADHIA *v.* RAMESHAR LOHAR, 22 A. L. J. 244; (1924) A. I. R. (A.) 433 **164**

Amendment Discretion. *See* CIVIL PROCEDURE CODE, O. VI, R. 17 **234**

———— , when allowed - Plaintiff, whether can set up fresh claim—Description of defendant, correction of. *See* CIVIL PROCEDURE CODE, O. VI, R. 17 **905**

Amendment of plaint, *power of Court to grant.*

The Court has jurisdiction to allow an amendment when special circumstances exist even though the effect of the amendment will be to take away from a defendant, a legal right which has accrued to him by lapse of time. **S** FIRM OF JESSARAM BHAGWANDAS *v.* RATANCHAND FATEHCHAND **846**

Antecedent debt, what is—Barred debt, whether can be antecedent—Debt incurred on security of family property, whether antecedent. *See* HINDU LAW—JOINT FAMILY **911**

Appeal (Civil)—Alternative view, whether can be put forward. *See* TRANSFER OF PROPERTY ACT, CH. II **633**

———— *Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties.*

A plaintiff professing to appeal under O. XLI, r. 4 of the Civil Procedure Code, is not entitled to proceed with his appeal without making the other plaintiffs parties thereto as respondents **A.** BALKARAN LAL *v.* MALIK NAMDAR **637**

- — — — *Appellate Court, failure of, to mention particular document in judgment, effect of*

The mere fact that a lower Appellate Court has not mentioned a particular document in its judgment, does not justify an inference that it did not take the document into consideration. **N** SARASWATIBAI *v.* YADORAO **887**

- — — ———— *Appellate Court, whether can take cognisance of fact which occurred during pendency of appeal.*

An Appellate Court can take cognisance of a fact which has occurred since the order appealed against was passed and which materially affects the rights of the parties to the appeal. **C** SUKHDEODAS REKHABDAS *v.* TRIKUMDAS CALLIANJI **881**

———— — Decree against partner in personal capacity—Decree against partnership Order directing rateable distribution Appeal, whether lies. *See* CIVIL PROCEDURE CODE, S. 47 **731**

———— *Decree passed against some defendants—Review-decree against other defendants—Former decree, whether affected—Decree against which appeal should be filed.*

A suit was decreed against some defendants and was dismissed as against others. One of the former preferred an appeal against the decree. During the pendency of the appeal, the decree

Appeal (Civil)—concld.

was modified on review at the instance of the plaintiff and the suit was decreed against the remaining defendants also. The appellant was not a party to the review proceedings and the judgment and the decree, so far as they related to him, were not affected by the review:

Held, that the only decree against which the appellant could appeal was the first decree which was passed against him and that he was not bound to appeal against the decree passed on review as he was not a party to or in any way concerned with that decree. **C** SATYA RANJAN NAG *v.* HABITICH CHANDRA PAL **525**

- — — — — Decrees, two, in one suit—Appeal, single, whether competent. *See* CIVIL PROCEDURE CODE, O. XLI, R. 1 **1026**

———— *Findings of fact—Evidence—Findings of fact—Interference by Appellate Court—Trial Judge's verdict, whether should be lightly disregarded*

On appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But, generally speaking, it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of the conflicting witnesses. Nor should his pronouncement with respect of their credibility be put aside on mere calculations of probabilities by the Court of Appeal. There is no restriction on the discretion of the Appellate Courts in the consideration of the evidence but where the issue is simple and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded. **S** FIRM OF JOSSOMAL VALIRAM *v.* CHELLARAM BHOJRAJ **534**

———— *New point, whether can be taken.*

Although a point of law may be taken in appeal for the first time, it is subject to the rule that the evidence on the record should be complete and no further evidence should be necessary to substantiate the point. **Pat** NAGISHWAR BUX RAI *v.* BISSESWAR DAYAL SINGH, 2 P. L. R. 58; 3 Pat. 236; (1924) A. I. R. (Pat.) 446; 5 P. L. T. 576 **889**

———— — Order refusing to remove Receiver—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, O. XL, R. 1 **625**

- ———— , whether can be preferred without decree. *See* CIVIL PROCEDURE CODE, O. XLI, R. 1 **996**

- — — — — , withdrawal of, effect of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 22 **677**

Appeal (Second)—*Appellate Court—Question of fact.*

A Court of second appeal is precluded from considering the admission of execution made before the Registration Officer, as such question is a question of fact to be decided by a Court of fact and not to be disposed of in the second appeal as a matter of law. **N** BALIRAM *v.* KAMALJA **330**

Appeal (Second)—concld.

——— *Construction of document, whether question of law or fact.*
The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal. A GUPTA NAND BHARTHI *v.* HARI SHANKAR 1016

——— Finding based on inadmissible evidence—Procedure. *See* CIVIL PROCEDURE CODE, s. 103 219

——— Grounds *See* CIVIL PROCEDURE CODE, s. 100 63

——— "Necessaries" under section 68 Contract Act—Mixed question of law and fact *See* CONTRACT ACT, s 68 380

——— *Questions of fact and law Construction of document Finding of fact*
The expression "construction" as applied to a document includes two things, first, the meaning of the words, and, secondly, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases, but the effect of the words is a question of law.
There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding L SHANKAR DAS *v.* MANSA RAM 36

——— ——— *Questions of law, whether can be raised for first time.*
Questions dealing with the admissibility and the legal effect of evidence, will not, as a general rule, be entertained in second appeal in the High Court, if they have not been taken at least at the stage of first appeal in the Court below A SAT NARAIN PRASAD *v.* RAM AUTAR, 22 A. L. J. 153 221

——— ——— Question of limitation, when can be raised. *See* LIMITATION ACT, s 3 960

——— ——— Question of title Question of adverse possession Mixed question of law. *See* Practice 895

——— ——— Suit for money based on hypothecation bond, nature of—Amount claimed under Rs. 500—Appeal, second, whether lies. *See* CIVIL PROCEDURE CODE, s. 102 652

Arbitration *Appointment of arbitrator* Uberrima fides, *necessity of Arbitrator related to one party, effect of* Ex parte *award, when can be set aside.*

In case of an arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual, as regards his selection and fitness for the post ought

Arbitration—contd.

to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.
The fact that the arbitrator is related to one of the parties as his first paternal cousin does afford a real likelihood of an operation of prejudice on his part and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. In such a case as the above it is not necessary, in seeking to have the award set aside, to prove actual bias or partiality on the part of the arbitrator or that the existence of the relationship had any operation on his mind
An award passed *ex parte* will be set aside only if the absent party can convince the Court that he had sufficient cause for his non-appearance. S TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM *v.* FIRM OF MAYADAS DOWLATRAM 521

——— *Award—Error of law, when vitiates award.*
An error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it But where a specific question of law is specifically referred by parties to arbitrators and the latter arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred, an erroneous decision of law may be attacked, provided such error appears on the face of the award itself or any document so closely connected as to form part of it. S MADHORAM *v.* MITSUI BUSSAN KAISHA 230

——— *Award, publication of, mode of Arbitrators, duty of Stamp, failure to affix, effect of*
It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published.
As soon as the arbitrators have made a complete award, the award is regarded as made and published.
The law casts upon an arbitrator no obligation to stamp an award and an award is complete though it is unstamped and, therefore, inadmissible in evidence
In the absence of an express stipulation as to the mode of the delivery of the award, the duty of the arbitrators is to have the award ready for delivery to the parties at their request and to acquaint them with the fact within a reasonable time. N ANANTRAM *v.* MURLIDHAR 194

——— Larger sum awarded than mentioned in plaint—Court's power to modify such award—Officer of Court appointed arbitrator Powers of and award by such arbitrator—Award, finality of. *See* CIVIL PROCEDURE CODE, SCH. II, PARA. 12 60

——— *Submission, leave to revoke, when to be given.*
In giving leave to revoke a submission, the Court shall be satisfied that a substantial miscarriage of justice will take place in the event of

Arbitration concld.

its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle underlying the exercise of the power to revoke, is that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. **A** GAYA PRASAD *v.* FIRM MURLI LAL-BUDHA LAL **1050**

——— without intervention of Court - Award - Arithmetical error- Amendment Remission to arbitrator for reconsideration—Power of Court. *See* CIVIL PROCEDURE CODE, SCH II, PARA 14 **1042**

Arbitration Act (IX of 1899), s. 12 *Time for filing award, extension of.*

In extending time for making an award under section 12 of the Indian Arbitration Act, the Court must take into consideration all the circumstances of the case and decide if the arbitrator should be granted such indulgence. **S** TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM *v.* FIRM OF MAYADAS DOWLATRAM **521**

Army Regulations, Vol. II, Appendix IV, para. 35 (c) *Regulations, whether have force of law - Sale of house without sanction of Commanding Officer, validity of Cantonment tenure, land held on Licence.*

The collection of rules known as the Army Regulations cannot be treated as rules having the force of law, they are departmental rules issued with a view to the regulation of administrative business in the Army Department.

The condition laid down in para. 35 (c) of Appendix (IV) of Volume II of the Army Regulations cannot, therefore, operate as *per se* to invalidate a transfer which is good under the law.

A person, however, who has taken a grant of Cantonment land or accepted a transfer of a house in a Cantonment subject to the limitation imposed by this condition is bound by the condition.

A person who holds land merely upon Cantonment tenure has no status other than that of a licensee. **A** RAGHUBAR DAYAL *v.* SECRETARY OF STATE, 22 A. L. J. 354; 46 A. 427, (1924) A. I. R. (A.) 415 **642**

Assignment, *what is.*

Assignment is a transfer of an estate or interest in property, and no particular words are necessary to effect an assignment, provided the intention to transfer is clear from the language used.

The words "I have sold the document" are sufficient to effect a complete assignment of the debt represented by the document. **L** NANAK CHAND-KISHORI LAL *v.* RAM SARUP-GUJAR MAL **163**

"At merchants' risk," meaning of. *See* SHIP **972**

Award, executing Court, whether can modify term of. *See* CONSTRUCTION OF DOCUMENT **80**

———, registration of, whether compulsory. *See* REGISTRATION ACT, S. 17 **134**

Banker and Customer—*Bankers' lien, nature of--Moneys handed to Bank for specific purpose —Right of Bank to set off such monies against another account--Civil Procedure Code (Act V of 1908), O. VIII, r. 6.*

Bankers have a general lien on securities deposited with them as Bankers by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with the lien, they can set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons but they cannot successfully claim a lien on securities delivered to them for a specific purpose inconsistent with the existence of the lien claimed. **S** ROCHALDAS GIDOOMAL & Co. *v.* THE MERCANTILE BANK OF INDIA **596**

Benami transaction—*Fraudulent purpose - Property, whether can be recovered Adverse possession—Constructive trust.*

A party guilty of entering into a fraudulent contract is entitled to recover the property conveyed to the other party under such a contract provided the fraudulent purpose of the contract has not been executed.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected; then, and then alone, does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

Plaintiffs' father conveyed certain property to the defendant in order to defraud his creditors. Subsequently, the property was attached by a creditor of the transferor in execution of a decree obtained by him against the latter, but it was released on the objection of the defendant. Several years later, plaintiffs sued to recover the property from the defendant on the ground that the transfer by their father in favour of the defendant was fictitious:

Held, that the property having been transferred to the defendant to effect a fraudulent purpose, and the contemplated fraud having been carried out plaintiffs could not recover the property from the defendant. Where property is ostensibly transferred by one person in favour of another under an arrangement that the latter shall hold possession of the property for the benefit of the former, the arrangement gives rise to a constructive trust and the transferee is bound to hold the property in trust for the transferor and not for any benefit of his own.

In such a case no question of adverse possession by the transferee can arise until he does some overt act to the knowledge of the transferor indicating an unequivocal intention to hold the property for his own benefit. **O** RAUNAQ ALI *v.* NAZIR HUSAIN, 11 O. L. J. 92 **359**

Benamidar — Benamidar's *admission of ownership—Effect on real owner—Alienation by* benamidar, *validity of.*

An admission by a *benamidar* that some third person is the beneficial owner cannot have the effect of conveying to such person either the beneficial or the legal interest in the properties and an alienation by the *benamidar* of the legal interest is invalid and cannot effect the title of the real owner more especially if the alienee is aware of the *benami* title of the vendor. **M** VISWANATHA v. VENGAMA, 19 L. W. 567 **52**

———— —Right to execute decree. *See* CIVIL PROCEDURE CODE, O XXI, R. 16 **372**

Bengal Estates Partition Act (V of 1897), s. 7, *scope of—Partition, private—Large area left undivided—Collectorate partition, whether barred.*

Section 7 of the Bengal Estates Partition Act contemplates a complete partition of the lands of the estate by private arrangement, that is to say, the division by private arrangement must have been substantially of the whole estate.

Where a large area of land is left *ijmal* at a private partition, the private partition will not be a bar to a Collectorate partition. **Pat** QAMAR HUSAIN v. ABAS ALI, 3 Pat 614 **653**

———— **ss. 15, 16, 94, 95** *Partition. Separate accounts of revenue, whether cease.*

Sections 94 and 95 of the Bengal Estates Partition Act imply that separate accounts of revenue kept before a partition can have no further existence after a partition of the estate. If any further protection is required after the partition by way of separate account, a separate account must be freshly opened. **Pat** BANARSI PRASAD v. MOHI-UD-DIN AHMED, 3 Pat. 581 **723**

Bengal Land Revenue Sales Act (XI of 1859), s. 33, *applicability of.*

In order that section 33 of the Bengal Land Revenue Sales Act may come into operation there must have been a sale for arrears of revenue. Where an estate is sold at a time when there are no arrears of revenue, the sale is not a sale for such arrears, and section 33 will have no application to such a case. **C** BILASI CHANDRA ROY v. RAJENDRA CHANDRA DAS ROY, 51 C. 776 **661**

———— **ss. 33, 34,** *applicability of Arrears, absence of—Sale by Collector—Suit to recover possession—Execution—Limitation.*

Section 34 of the Bengal Revenue Sales Act applies only where a sale held under the Act is annulled by a final decree by a Civil Court. In other words, where a suit is brought under the provisions of section 33 of the Act, and a Civil Court annuls the sale on any of the grounds mentioned in the section, an execution petition must be presented within six months after the date of the decree, but when the suit is not one under the provisions of section 33 of the Act, section 34 of the Act has no operation whatever.

There is a clear distinction between a case where a sale is annulled and a case where the Court authoritatively recognises that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to the plaintiff. Where the sale is authorized, but there is a direct violation of the Statutory provision in conducting the sale, the suit must be one for annulment of the sale, and the Court has complete power to set aside the sale, provided the requirements of section 33 are complied with. But where the sale is not authorized, there is in law no sale, and, there being nothing to annul, all that the Civil Court does is to recognise that there is no sale and to pass a decree for possession in favour of the plaintiff.

Where an estate is not in arrears there is no authority in the Collector to put up the estate for sale, and a Civil Court has complete power to recognise authoritatively that there was no power in the Collector to put up the property to sale and to hold that there was in fact no sale at all. To such a case section 34 of the Bengal Revenue Sales Act has no application. **Pat** MUHAMMAD IDRIS v. LACHMAN DAS, (1924) Pat. 25; 5 P. L. T. 368 (1924) A. I. R. (Pat.) 504 **303**

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 8—Additional District Judge, jurisdiction of, extent of—Probate cases transferred to Additional Judge—Jurisdiction to revoke Probate granted by District Judge. *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 3 **701**

Bengal Permanent Settlement Regulation (I of 1793), Art. VI, effect of Exemption from all future taxes, whether granted Exemption, whether revoked by Income Tax Act. *See* INCOME TAX ACT, 1922, ss. 2, 4, 58 **783**

Bengal Regulation (VII of 1793), s. 15 Return filed by *zemindar*, with Collector, admissibility of certified copy—Presumption Admission, value of. *See* EVIDENCE ACT, s. 21 (1) **719**

Bengal Regulation (VIII of 1799), s. 48—Return filed by *zemindar*, with Collector, admissibility of—Certified copy—Presumption Admission, value of. *See* EVIDENCE ACT, s. 21 (1) **719**

Bengal Regulation (XVII of 1806)—*District Judge, whether acts judicially—Revision.*

The functions to be exercised under Bengal Regulation XVII of 1806 are ministerial and not judicial, but a District Judge assumes judicial functions when he proceeds to determine whether he has or has not the jurisdiction to issue a notice under the Regulation and his order is, therefore, open to revision. But where the aggrieved party has a right of suit, the High Court will not interfere with the order in revision **L** NAND KISHORE v. SARDAR NARAIN SINGH, 6 L. L. J. 137; (1922) A. I. R. (L.) 471 **350**

Bengal Tenancy Act (VIII of 1885), ss. 25, 87—*Landlord and tenant—Non-transferable occupancy holding—Abandonment, relinquishment, repudiation, what amounts to—Sale of holding in execution of decree—Tenant residing in homestead and cultivating land under transferee—Ejectment—Transferee, position of.*

A non-transferable occupancy holding was sold in execution of a money-decree and a mortgage-decree against the tenants, but the latter took a tenancy under the transferee and continued to reside on their homestead land and to cultivate several plots comprised in the holding. In a suit by the landlord for ejectment of the transferee;

Bengal Tenancy Act—contd.

Held, that there was no abandonment, relinquishment or repudiation of the holding by the tenants, and the landlord was not, therefore, entitled to evict either the tenants or their transferee.

Per Rankin, J.—A mere denial by an occupancy tenant of the landlord's title or of the relationship of landlord and tenant is not, by itself, a ground for eviction of the tenant, but if in a previous suit the tenant successfully denied the landlord's title, then, on the principle of estoppel by record, an eviction may take place.

A landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not, as against his tenant, the right to end the tenancy, cannot maintain ejectment against a third person merely because that third person has no title in himself.

A transferee of a non-transferable occupancy holding can claim no right as against the landlord but unless the landlord has a right to present possession, he cannot maintain ejectment against the tenant or his transferee. The only remedy which the landlord has against the transferee in such a case is to ask for a declaration that the transferee has not got the tenancy right in the landlord's property.

Semble: There can be no abandonment of an occupancy holding apart from the provisions contained in section 87 of the Bengal Tenancy Act.

Per Mukerji, J. The terms "abandonment" "relinquishment" and "repudiation" are terms distinct and not interchangeable; though proof of one may be some evidence, though not conclusive, yet relevant for, establishing facts and circumstances, which might go to constitute another.

Section 87 of the Bengal Tenancy Act, though it does not purport to define abandonment, plainly indicates what it is. The material elements are (*i*), that the *raiyat* should abandon his residence, and that he should do so voluntarily, without notice to his landlord, and without arranging for payment of his rent as it falls due, and (*ii*) that he should cease to cultivate the holding either by himself or by some other person.

Mere non-payment of rent is not evidence of abandonment or relinquishment, though non-payment of rent, coupled with non-occupation of land or other facts and circumstances, is evidence of an intention to abandon the holding or may amount to relinquishment.

The whole law of re-entry is based upon the principle that, so long as the tenancy is not terminated by abandonment, relinquishment or repudiation, the tenancy interposes and operates as a barrier and the landlord cannot re-enter. **C** RAMMESH CHANDRA MITRA v. DAIBA CHARAN DAS, 28 C. W. N. 602; 39 C. L. J. 356 **497**

——— **s. 48,** *applicability of—Mortgage by occupancy tenant—*Kabuliyat *in favour of mortgagee - Mortgagor, whether under-*raiyat.

An occupancy tenant executed a *zarpeshgi* deed in respect of a portion of his occupancy holding for a period of nine years in consideration of an advance in cash in favour of the plaintiff. The latter was to enter into possession and take the profits arising out of the cultivation of the land in lieu of interest on the loan. In the event of the principal sum not being paid off at the end of the term, the *zarpeshgidar* was to remain in possession upon the condition stipulated in the deed until re-payment of the principal in *Jeth* of any succeeding year. The property was also hypothecated to secure re-payment of the principal sum advanced if the *zarpeshgidar* should be dispossessed. Two days later the mortgagor executed a *kabuliyat* in favour of the mortgagee whereby he took the mortgaged land on lease for the term of the mortgage at a certain rent:

Held, (1) that the *zarpeshgi* was a mortgage and not a lease;

(2) that the *zarpeshgidar* did not become a *raiyat* under the mortgagor;

(3) that, consequently, the mortgagor did not become an under-*raiyat* under the mortgagee;

(4) that, therefore, section 18 of the Bengal Tenancy Act was not applicable to the case and the mortgagor was bound to pay the rent stipulated for in the *kabuliyat*. **Pat** TILAKDHARI SINGH v. CHATURGUN BIND, (1924) Pat. 4; 3 (Pat.) 266 **923**

——— **ss. 50, 102, 103B, 115** *-Record of Rights -Presumption of correctness, extent of Presumption of fixity of rent, applicability of Particulars under s. 102 not actually recorded.*

The presumption contained in section 103 B of the Bengal Tenancy Act applies only to the actual entries in the Record of Rights as finally published and to nothing else. The presumption does not extend to the orders of the Settlement Officers on which the entries are based.

When certain persons are entered in the Record of Rights as tenure-holders, no presumption arises as to whether they are or are not permanent tenure-holders or tenure-holders at fixed rates.

The presumption arising under section 50 of the Bengal Tenancy Act only ceases to apply by reason of section 115 of the Act when the particulars required by the order of the Local Government directing the Survey and Record of Rights to be prepared have been in fact recorded. **Pat** KAMALUDDIN AHMAD v. RAMANAND SINGH, (1924) Pat. 1; 3 Pat. 120; (1924) A. I. R. (Pat) 443 **605**

——— **s. 50 (2)**—*Fixity of rent - Presumption—Sub-division of tenure, effect of.*

The sub-division of a tenure does not operate as a breach of the continuity of the tenure. If the different parts into which the tenure is divided are held at a proportionate rent and the aggregate rent equals the original rents, the tenure-holders are still entitled to the benefit of the presumption arising under section 50 (2) of the Bengal Tenancy Act. **C** GOUR KRISHNA SARKAR v. NILMADHAB SAHA **744**

——— **s. 50 (2)**—*Presumption of fixity of rent, rebuttal of—Holdings, different—Burden of proof.*

Where a landlord succeeds in showing that certain holdings as recorded in the Record of Rights

in respect of which the presumption laid down in section 590 (2) of the Bengal Tenancy Act is claimed, were not in existence in the condition in which they were recorded in the Record of Rights in certain years, the *onus* is shifted on the tenants to prove that their present holdings are made up of other holdings which have also borne a uniform rental. **Pat** NAND LAL CHAUBE *v.* MAHARAJA KESHO PRASAD SINGH, (1923) Pat. 339; (1924) A. I. R. (Pat.) 245 **593**

——— **s. 60**—*Proprietor* ijaradar—*Entire estate—Rent payable to two proprietors—Rent payable to third person—Object of section.*

Section 60 of the Bengal Tenancy Act deals with cases where rent is due to the proprietor of an estate. An *ijaradar* is not a proprietor, his case, therefore, is not covered by the section.

Although a proprietor may be the owner of an estate or a part of an estate, section 60 merely speaks of "*proprietor of that estate*," which indicates an entire estate. Therefore, none of the several persons, who are individually registered as proprietors of the fractional share of an estate, is proprietor of the estate.

The case where rent is payable to two or more proprietors, the extent of whose interest is required to be registered under the second part of section 78 of the Land Registration Act, is not dealt with by section 60 of the Bengal Tenancy Act.

The words "that the rent is due to a third person," in the concluding portion of section 60 of the Bengal Tenancy Act, refer to a third person whose name is not registered at all.

The object of section 60 of the Bengal Tenancy Act is to afford indemnity to tenants who pay rent to the person whose name is registered under the Act, and to debar them from pleading in defence to a claim for rent by such person that the rent is due to a third person; but the section has not provided for cases where the names of all the part proprietors have been registered under the Land Registration Act.

Section 60 of the Bengal Tenancy Act is not concerned with questions of title. **C** PRODOH CHANDRA *v.* HARISH CHANDRA, 27 C. W. N. 888; (1924) A. I. R. (C.) 121 **7**

——— **s. 70**—*Division of crops—Final order—Suit for rent—Jurisdiction of Civil Courts.*

In a proceeding under section 70 of the Bengal Tenancy Act, the Sub-Divisional Officer passed the following order: "Parties heard. The *khasra* seems fair and is accepted. The landlord's share, if not accepted, may be sold and proceeds deposited in the Treasury." There was a subsequent order to the effect, "Sale-proceeds deposited into the Treasury. Case disposed of:"

Held, (1) that both orders must be read together as a whole, and, taken together, they amounted to a final order under section 70 of the Bengal Tenancy Act, enforceable as a decree;

(2) that a Civil Court, therefore, had no jurisdiction to pass a decree for rent in respect of the period dealt with by the orders of the Sub-Divisional Officer. **Pat** RAY BINODE BIHARI BOSE *v.* TOKHI SINGH, (1924) Pat 211 **465**

——— **s. 103 B (3), Ch. X**—*Record of Rights, entry relating to local custom—Presumption—Burden of proof—Custom entitling* raiyats *to abatement of rent on inundation, whether unreasonable or vague.*

An entry in the Record of Rights of a *mauzah* that if inundation takes place the *raiyats* are to get a rateable or proportionate deduction of rent from their landlords, is an entry of a local custom, and is not outside the purview of Chapter X of the Bengal Tenancy Act. The presumption of correctness laid down in section 103 B (3) of the Act, therefore, applies to the entry, the effect of the presumption being that the burden of proving the custom recited in the entry is taken from off the shoulders of the tenants, and the landlord is bound to prove that no such custom exists.

The custom recited in the above entry is neither unreasonable nor vague. **C** UMESH CHANDRA DURBAR *v.* CHOWDHURY JAMINI NATH MALLICK **836**

——— **s. 103 B (3), Ch. X**—*Suit for rent—Non-agricultural land—Record of Rights, entry in, whether admissible in evidence.*

Although non-agricultural lands are not subject to the provisions of Chapter X of the Bengal Tenancy Act, an entry in the Record of Rights with respect to the amount of rent of such land, is admissible in evidence, in a suit for the recovery of rent, as corroborative of other evidence in the suit, although the weight to be attached to such entry would depend on the circumstances of each particular case. **C** RAKIMJAN *v.* AMAR KRISHNA CHOUDHURY **169**

——— **s. 153**—*Dispute as to amount of rent payable—Appeal, second, whether lies.*

Where, in answer to a suit for rent, the tenant pleads that the rent claimed by the landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and a second appeal is, therefore, competent in the case. **Pat** RAMESHWAR SINGH *v.* WAZUL HAQUE **463**

——— **s. 153**—"*Has decided a question of title*," *whether qualify decree or order—Order passed in execution, what it must decide.*

The words "has decided a question relating to title, etc.," in section 153 of the Bengal Tenancy Act, qualify both decree and order. Therefore, an order passed in execution of a decree, whether the decree is appealable or not, must be an order which itself decides a question relating to title or to some interest in land as between parties having conflicting claims thereto. **C** JOYMANGALSEN *v.* SARAFAT ALI **236**

——— **s. 167**—*Rent decree—Sale of tenure—Annulment of encumbrance—Mortgage suit instituted by incumbrancer, effect of—Notice issued by Collector—Annulment, whether can be questioned—Burden of proof.*

The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction-purchaser of his right to annul the incumbrance under section 167 of the Bengal Tenancy Act, if the application is made

Tenancy Act—concld.

within the time prescribed by the section, that is to say, within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance.

Where under section 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment, the incumbrance must be deemed to have been annulled. This does not, however, mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. **Pat** NAND KISHORE CHAUDHURI *v.* RAMESHWAR SINGH, 2 P. L. R. 19; (1924) A. I. R. (Pat.) 515 **476**

——— **Sch. III, Art. 3**—*Landlord and tenant—Suit by tenant to recover possession of holding—Dispossession by landlord—Limitation.*

Article 3 of Schedule III to the Bengal Tenancy Act applies to a case where dispossession has been by a person who at the time of dispossession, in whatever way the dispossession might take place, either through a civil wrong or by means of criminal force, occupies the position of a landlord or possesses the character of a landlord and has the capacity of a landlord towards the person dispossessed.

Plaintiff sued to recover possession of a holding on the allegation that she had been dispossessed from it by the defendant landlord in execution of a fraudulent and collusive decree obtained by him against a third person.

Held, that the suit was governed by Article 3 of Schedule III to the Bengal Tenancy Act. **C** KEDAR NATH BISWAS *v.* KAMINI SUNDARI DASSYA, 28 C. W. N. 482; (1924) A. I. R. (C.) 623 **514**

Bengal Touji Manual, rule 61—*Contract Act (IX of 1872), s. 50—Payment of revenue by Revenue Money Order—Time of payment—Payment to Post Office, whether payment in time.*

Under the rules contained in the Bengal Touji Manual, 1918, the question whether a remittance of land revenue remitted by Revenue Money Order reaches the Collector in time depends not on receipt of the money or even of the money order form at the Treasury, but on the date when the Post Master fills the Treasury voucher.

Under rule 61 of the Bengal Touji Manual, 1918, read with section 50 of the Contract Act, a payment of land revenue to the Post Office by means of a Revenue Money Order before the last day of payment is a good payment in time. **C** BILAST CHANDRA ROY *v.* RAJENDRA CHANDRA DAS ROY, 51 C. 776 **661**

Berar Inam Rules, rule V—*Succession to* Inam—Madatmash Inam—*Alienation.*

A person succeeds to the *inam* property in Berar not as an heir under the Hindu Law but as an heir to the last holder under the Berar Inam Rules which regulate the devolution and incidents of an Inam Estate in Berar subject entirely to the *sanad*, or certificate or other documents evidencing the special terms of the grant in each particular case.

Madatmash inam is a grant for maintenance or subsistence under rule V of the Inam Rules and any permanent alienation or a transaction likely to result in a permanent alienation can only be acted upon during the lifetime of the then certificate-holder and at his death by the order sanctioning the appointment of another *inamdar*, the *inam* land passes on to him free of any encumbrance imposed on the land by the last holder. **N** BALIRAM SINGH *v.* RAMCHANDRA **77**

Berar Land Revenue Code, 1896, s. 211 (2)—*Pre-emption—Sale in consideration of old debts—Market value, how to be ascertained.*

Where property is sold in lieu of old debts and the debts are wiped out by the sale, the consideration for the sale for purposes of pre-emption is not the nominal value of the debts, *i.e.*, their arithmetical total, but their present or market value. **N** AMIRKHAN *v.* SHANKAR **218**

——— **s. 220**—*Suit for declaration of grazing rights, whether cognisable by Civil Court.*

A suit for a declaration that certain land is reserved for grazing village cattle and that the *malguzar* has no right to let it out does not fall under any of the heads of section 220 of the Berar Land Revenue Code, and is, therefore, cognisable by a Civil Court. **N** RAMBUX *v.* MOTI, 20 N. L. R. 70 **872**

Bihar and Orissa Public Demands Recovery Act (XIV of 1914), Sch. II, r. 43—*Sale in execution of certificate for arrears of cess—Judgment-debtor, whether can be purchaser—Sale, validity of—Purchase by co-sharer, whether for benefit of all co-sharers.*

The prohibition contained in r. 43 of Schedule II to the Bihar and Orissa Public Demands Recovery Act applies only to a sale of a tenure in execution of a certificate for arrears of rent due from the tenure. It does not apply to sales held in execution of certificates for any other dues, such as, cess. An execution with respect to a certificate for cess is, therefore, governed by the general provisions of the Civil Procedure Code, which enjoins no prohibition on a judgment-debtor making a purchase in execution.

The purchase by a judgment-debtor of a tenure or holding with respect to which the prohibition contained in r. 43 of Schedule II to the Bihar and Orissa Public Demands Recovery Act applies, does not in itself render the sale void, but the sale can be avoided upon an application made by the decree-holder or any other person interested in the sale.

Where a tenure is sold owing to the default of all the co-sharers and is purchased by one of them, the purchase does not enure for the benefit of all the co-sharers. **Pat** MASUDANLAL *v.* RAM GULAM SAHU, 3 Pat. 458; 5 P. L. T. 447; (1924) Pat. 240 **807**

Bill of Lading, office of—Exemption clauses. *See* SHIP **972**

Bombay District Municipal Act (III of 1901), s. 48 (j)—*Bye-laws for refund of octroi duty—Goods imported duty free but retained within Municipal limits beyond prescribed period—Lia-*

Bombay District Municipal Act—concld.

bility of Municipality to refund octroi duty subsequently levied—Compliance with bye-laws essential even though rendered impossible owing to Municipal action.

If a person imports goods on a *rahdari* pass under which no octroi duty is payable at the time of the import, on the stipulation that the goods will be detained in the Municipal limits for 48 hours only, but retains the goods for more than the stipulated period and subsequently pays octroi duty in respect of the goods, he cannot obtain a refund of the duty so paid unless he makes an application for it within the time prescribed by Bye-laws of the Municipality for the purpose, even though his inability to do so arises from the fact that the Municipality recovered the octroi duty at a time when the claim for refund was, under the Bye-laws, time barred. **S** FIRM OF NARUMAL BHAGCHAND *v.* THE SEHWAN MUNICIPALITY 432

Burden of proof—Admission of thumb impression on blank paper - Execution. *See* ADMISSION 104

——— Claim proceedings—Title suit. *See* CIVIL PROCEDURE CODE, O. XXI, R. 58 287

——— Dispossession and discontinuance of possession—Constructive possession of owner. *See* LIMITATION ACT, SCH. I, ART. 182 679

——— *Ex parte* decree, application to set aside Due service of summons—Burden of proof *See* CIVIL PROCEDURE CODE, O. V, R. 17 889

——— *Pardahnashin* lady—Husband, position of—Good faith. *See* EVIDENCE ACT, S 111 850

——— *Pardahnashin* lady, person claiming under transfer by, duty of. *See* PARDAHNASHIN LADY. 180

——— Re-sale—Notice *See* CONTRACT ACT, S 107 1026

——— Wagering contract Agreement not to make or demand delivery *See* CONTRACT ACT, S. 30 966

——— , *when loses significance Discharge of burden by cross-examination of opponent's witnesses.*

Although the burden of proof remains constantly shifting in the course of the trial, according as one fact or the other is brought out in evidence by one party or the other, the question of burden becomes immaterial when evidence has been adduced by both the parties and the relevant facts are before the Court.

It is not always necessary that the party who has the burden must himself lead evidence. It is open to him to sustain the onus cast upon him by the facts which he may elicit by cross-examination of the other party's witnesses. **N** BALIRAM *v.* KAMALJA 330

Calcutta Improvement Appeals Act (XVIII of 1911)—*Market value of land Evidence—Price paid in sales of land—Previous decision in land acquisition cases—Price of land with buildings—Relevancy.*

In assessing the market-value of a piece of land the price paid in other transactions relating to land in the neighbourhood is admissible in evidence, as previous decisions in land acquisition cases are relevant in a subsequent case where the market-value of lands in the same neighbourhood is in issue.

Calcutta Improvement Appeals Act—concld.

In determining the value of a piece of land, the evidence as to the sale of land with a building thereon is not inadmissible. **C** MADAN MOHAN BURMAN *v.* SECRETARY OF STATE 557

Calcutta Rent Act (III of 1920), s. 15—*Standardisation of rent, application for—Applicant ceasing to be tenant, effect of—Abatement—New tenant, whether necessary party—Procedure.*

There is nothing in the Calcutta Rent Act which indicates that a proceeding regularly started under the Act comes to a determination as soon as the relationship of landlord and tenant between the parties has ceased.

The Calcutta Rent Act does not make it obligatory upon an applicant for standardisation of rent to make all persons interested in the litigation parties to the proceedings, except the landlord.

Where an applicant for standardisation of rent ceases to be the tenant before the proceeding is terminated and the premises are let to a new tenant the latter, if he so chooses, may make an application to the Rent Collector to be heard at the time of the hearing of the case. **C** BELLOW *v.* [illegible], 31 C 577 574

Carriage of goods—*Risk Note B—Railway Company, liability of Damage to goods*

Under the Risk Note B, a Railway Company is liable only for the loss of a complete consignment or of one or more complete packages, and is not liable for damage done to the goods, for instance, by being exposed to rain in transit. **C** EAST INDIAN RAILWAY COMPANY *v.* KUSHABRAM GOPIRAM 413

Caste Disabilities Removal Act (XXI of 1850), effect of. *See* HINDU LAW 749

"Cause of action," meaning of. *See* CIVIL PROCEDURE CODE, S. 20 (*c*) 991

——— , meaning of *See* COURT FEES ACT, S. 17 415

C. P. Municipal Act (XVI of 1903), s. 31—*Contract, what is—Auction sale, whether contract Writing, whether necessary.*

Contracts made by a public body must be strictly in conformity with the mode of making such contract as prescribed by Statute.

The word "contract," as used in section 31 of the C. P. Municipal Act, must be taken in its ordinary sense.

A sale by auction by a Municipality is a contract within the meaning of section 31 of the C. P. Municipal Act and in order to be binding on the Municipality must be in writing.

Section 31 of the C P. Municipal Act does not lay down that a contract should be in any particular form, except that it should be in writing. **N** ABDUL AZIZ KHAN *v.* THE MUNICIPAL COMMITTEE, KHANDWA 1052

C. P. Tenancy Act (XI of 1898)—*Absolute occupancy tenant—Transfer of holding Malguzar lambardar, whether can avoid transfer.*

A *malguzar lambardar* has a right of re-entry if an absolute occupancy tenant transfers the holding without his consent. **N** GANPAT *v.* MANOHAR HARBAJI, 7 N. L. J 105 834

———Lambardar—*Tenancy created by* lambardar, *whether can be challenged—Consideration for lease, failure to pay, effect of.*

It is impossible to challenge a tenancy purporting to have been created by the *lambardar* more than a quarter of a century ago, except on the allegation that it never was in fact created and that the transaction was a mere pretence on paper and that the ostensible tenant has never had possession of the land. If the *lambardar* did in fact create the tenancy, the question of the actual payment of the consideration for the lease does not arise. **N** RADHABAI *v.* PANDURANG **535**

——— **ss. 2, 89** -Surrender. *See* REGISTRATION ACT, s. 17 **134**

——— **s. 45**—*Mortgage of* sir *land—Sanction of Revenue Officer—Arbitration—Award—Decree—Assignment of decree—Fresh sanction, whether necessary—Civil Procedure Code (Act V of 1908), s. 97—Preliminary decree, whether can be questioned in appeal from final decree.*

A dispute arose between the parties with reference to two mortgage-deeds in respect of which the sanction of the Revenue Officer had been obtained for the transfer of cultivating rights in *sir* land. The dispute was referred to arbitration but all that the arbitrator had to decide was what sum was due under the mortgages and in what period of time it was to be paid The arbitrator gave his award and a preliminary decree was passed in accordance with the award directing payment in a certain manner and allowing foreclosure in case of default. The decree-holders assigned the decree to one *T*, the judgment-debtors failed to appeal against it and the decree was made final:

Held (1) that as the award flowed from the mortgages it could not be said that the rights of the parties were created by the award;

(2) that the sanction of the Revenue Officer for the transfer of cultivating rights in *sir* land having been obtained at the time of execution of the mortgages, no fresh sanction was necessary at the time of making the award or at the time of the assignment of the decree in favour of *T*;

(3) that the judgment-debtors having failed to appeal against the preliminary decree were precluded under section 97 of the Civil Procedure Code, from questioning the correctness of that decree in an appeal from the final decree. **N** GANPATRAO *v.* TULSABAI **853**

C. P. Tenancy Act (I of 1920), ss. 5, 11 *Tenancy—Hindu Law—Succession by survivorship, whether applicable.*

The Hindu Law of succession by survivorship and as to the vesting of a son's interest by birth is not applicable to a tenancy governed by the C. P. Tenancy Act of 1920. **N** GOWRA *v.* CHAITRAM **63**

——— **s. 49**—*Mortgage of* sir, *without sanction—Foreclosure, effect of—Surrender of occupancy in favour of* lambardar, *validity of—Mortgagee, rights of.*

On the foreclosure of a mortgage of *sir* lands, where the mortgage is without sanction to transfer cultivating rights in *sir*, the mortgagor becomes an occupancy tenant of the *sir* fields of which he is in possession, under the mortgagee and cannot surrender the fields to the *lambardar*. On surrender the fields become the *khudkasht* of the mortgagor, and the *lambardar* has no power to deal with them. **N** NANDKISHORE *v.* LALSINGH **730**

——— **s. 104, Sch. II, Art. 1**—*Suit to recover possession by tenant—Dispossession by person not claiming through landlord—Limitation.*

The words "by any person" in paragraph 1 of Schedule II to the C. P. Tenancy Act of 1920, have their ordinary meaning and are not confined to a person claiming under the landlord, they are wide enough to include a trespasser. **N** MEGHRAJ *v.* RAMGOPAL, 20 N. L. R. 103 **743**

——— **Sch. II, Art. 1,** *applicability of, to part of holding.*

Article 1 of Schedule II to the C. P. Tenancy Act, applies to the case of dispossession from part of a holding as well as to dispossession from an entire holding **N** BUDGA *v.* CHAIN **214**

Charitable and Religious Trusts Act (XIV of 1920), s. 3—*Proper party, who is*

The Charitable and Religious Trusts Act does not become inapplicable because the trustee has parted with the entire trust property.

A person who claims adversely to the trust and who is not liable under section 3 of the Charitable and Religious Trusts Act (XIV of 1920) is not a proper party to proceedings under the Act. **C** REZA ALI *v.* KAZI NUR-UD-DIN AHMED **174**

Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 14—"*Successor*", "*Resumption*", *meaning of.*

The word "successor" in section 14 of the Chota Nagpur Tenancy Act means not only a successor *de jure* but also a successor *de facto*.

The word "resumption" in section 14 of the Chota Nagpur Tenancy Act means an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter upon the land. **Pat.** KUMAR KAMAKSHYA NARAYAN SINGH *v.* SURAJNATH MISRA, 5 P. L. T. 85; (1924) Pat. 60; 2 P. L. R. 69; 3 Pat. 320; (1924) A. I. R. (Pat) 449 **474**

——— **s. 181**—*Appellate decree, execution of—Limitation, commencement of.*

The period of limitation fixed by section 181 of the Chota Nagpur Tenancy Act for the execution of an appellate decree runs from the date on which the decree is signed and not from the date of the judgment. **Pat.** BISHUN LAL *v.* BINDESHWARI SAHU, 2 P. L. R. 7; 5 P. L. T. 374 **224**

Civil Procedure Code (Act V of 1908), s. 2 (11), O. XXI, r. 22 *Defendant attaining majority, whether "legal representative"—Execution of decree—Judgment-debtor attaining majority—Notice, fresh, whether necessary.*

A party who on attaining majority is entitled to appear to the exclusion of the guardian appointed during his minority is not a "legal representative" within the meaning of section 2 of the Code of Civil Procedure and is not entitled to fresh notice of execution proceedings under O. XXI, r. 22 of the Code.

Where such a party is aware of the decree under execution and the execution proceedings, and does not appear and take any objection thereto, he is not, by reason merely of the failure to give him notice thereof afterwards, entitled to question the validity of the execution proceedings and the Court sale following thereon. **M** NAGAPPA CHETTY *v.* MUTHURAMAN CHETTY **12**

——— **s. 4**—*Mortgage-suit—Preliminary decree passed before coming into force of Code—Final decree passed after Code—Execution of decree—Application made more than twelve years after date of decree, whether barred.*

A preliminary decree in a mortgage-suit was passed before the coming into force of the Civil Procedure Code of 1908, but the final decree was passed after that Code came into force. The last application for execution of the decree was made after the expiry of twelve years from the date of the final decree :

Held, that the execution of the decree was governed by the Civil Procedure Code of 1908 and the application for execution was, therefore, barred by time. **A** BOHRA TARA CHAND *v.* MURTAZA HUSAIN, 10 O. & A. L. R. 244 **1030**

——— **s. 9**- Gains made by helping religious ceremonies—Suit of civil nature. *See* HINDU LAW—JOINT FAMILY **256**

——— **s. 11**—Res judicata *between co-defendants, requisites of.*

Where it is absolutely essential for the determination of a suit to decide a question *inter se* between co-defendants and the question is decided after contest between the co-defendants it operates as *res judicata* between the contending co-defendants. **N** MUNNA *v.* SUKLAL **987**

——— **s. 11**—Res judicata—*Co-defendants—Fraud—Party, whether can plead his own fraud—Estoppel.*

No estoppel can be created between co-defendants so as to invoke the doctrine of *res judicata* unless there was a *litis contestatis* as between the defendants *inter se*.

C sold certain properties to *P* and the latter sold the same to *R* who in turn transferred the same to *A*. On *C* being adjudicated an insolvent, the Official Assignee challenged the alienations as being not *bona fide* and as being without consideration. The Trial Court and the Appellate Court set aside the alienations on the ground of want of good faith but the appellate judgment contained expressions of opinion that the alienations did not bear consideration. In a suit by *A* against *R* for damages for breach of covenant for quiet enjoyment :

Held, (1) that the decision in the insolvency proceedings as to the fraudulent nature of the transaction was not *res judicata* in the present suit ;

(2) that the defendant who was a party to the fraud was also estopped from relying upon the fraudulent character of the transfer so as to defeat the plaintiff in this suit. **M** RAMASWAMY NAICKER *v.* ALAMELU AMMAL, 46 M. L. J. 298; (1924) M. W. N. 204; (1924) A. I. R. (M.) 604 **921**

——— **s. 11**—*Res judicata*—Decision in Appellate Court confined to one ground—Other grounds, whether matters of estoppel. *See* RES JUDICATA **353**

——— **s. 11**—Res judicata, *essential requisites of—Finding in unnecessary suit, whether constitute res judicata.*

The only conditions necessary to constitute a matter *res judicata* are that,—

(1) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit ;

(2) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim ;

(3) the parties as aforesaid must have litigated under the same title in the former suit ;

(4) the Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised ;

(5) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

It is not a necessary condition that the suit must be one which the plaintiff was bound to institute, there is no warrant in law for the proposition that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not operate as *res judicata* in a subsequent suit relating to the same matter if the other requirements of law as laid down in section 11 of the Civil Procedure Code have been fulfilled and a finding given in a suit which the plaintiff need not have instituted, but has in fact instituted is as much *res judicata* as one given in a suit which he was bound to institute. **L** HATHI KHAN *v. Musammat* ALMO **3**

——— **s. 11**—Res judicata—*Mortgage suit—Paramount title—Failure to plead, effect of.*

If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor, he is not bound to set it up by way of defence to the mortgage suit and his omission to do so will not, therefore, render this question of his title *res judicata* against him. **N** HEMRAJ *v.* SURYABHAN **118**

——— **s. 11**—Res judicata—*Suit dismissed—Findings adverse to defendant.*

A decision cannot be said to be based on a finding unless an appeal can lie against that finding and it cannot operate as *res judicata* unless the decision upon such a finding is appealed against.

A suit for ejectment against a sub-tenant was dismissed on the ground that the defendant was not served with a valid notice under law. It was pleaded that the defendant was an occupancy tenant not a sub-tenant as alleged and the plea was found against defendant. In a subsequent suit for ejectment the defendant is not precluded by reason of *res judicata* from pleading that he is an occupancy tenant. **N** GIRJABAI *v.* PURUSHOTTAMDAS **147**

Civil Procedure Code—1908—contd.

——— **s. 11**—Res judicata—*Suit to recover whole property dismissed—Suit to recover portion, whether barred*—Res judicata *between co-defendants, requisites of.*

Where a suit to recover possession of the whole of a certain property is dismissed, a subsequent suit to recover a portion of that property based on the same title will be barred by *res judicata.*

A finding will not operate as *res judicata* between co-defendants unless there was an active contest between them on the point and the decision of the question was necessary in order to dispose of the plaintiff's suit. **M** MOHAMMAD ESUF ROWTHER *v.* SULTAN ABDUL KADIR, 34 M. L. T. 147; 47 M. L. J. 20; (1924) M. W. N. 569 **1055**

——— **s. 11**—Status as agriculturist not pleaded by defendant—*Ex parte* decree passed—Whether defendant can plead to be agriculturist in execution proceedings *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 3 (*w*) **806**

——— **s. 11**, *whether exhaustive*—Res judicata—*Husband and wife, question of divorce decided between—Question, whether can be re-agitated by wife's father.*

The rules of procedure are framed for aiding justice and should not be so interpreted as to operate against the course of justice.

Section 11 of the Civil Procedure Code is not exhaustive as to the principles of *res judicata.*

Where it has once been decided between a husband and wife that there has been no divorce of the wife by the husband, the question cannot be re-agitated at the instance of the wife's father in a subsequent suit by the husband for restitution of conjugal rights to which the former happens to be a party. **A** KHATOON BIBI *v.* NAZIR **1049**

——— **s. 11, O. II, r. 2**—*Dismissal of suit for misdescription of property—Subsequent suit, whether barred.*

The dismissal of a suit on the ground of misdescription of the property in suit is not a bar to a subsequent suit on the same cause of action either on the ground of *res judicata* or under O. II, r. 2, of the Civil Procedure Code. **L** BIKA *v.* BALANDA **579**

——— **s. 11, expl. IV**—*Suit to protect property from sale as* wakf, *dismissal of—Suit, subsequent, on basis of personal right*—Res judicata.

It is not obligatory on a party seeking to protect certain property as *wakf* property from an impending sale, to assert in the same suit any personal right thereto, to which he may afterwards find himself entitled, in case the property is not found to be *wakf* property, and the omission to set up a personal right in the suit does not operate as *res judicata* in a subsequent suit in which such a right is set up. The identity of the causes of action for the two suits is immaterial. **A** KANHAYA LAL *v.* ASHRAF KHAN, 10 O. & A. L. R. 380; 46 A. 230; (1924) A. I. R. (A.) 355 **402**

——— **s. 20 (c)**—*Place of suing—Goods sent for sale—Conversion—Suit to recover value of goods—Jurisdiction—Cause of action, meaning of.*

Plaintiff sent certain bales from a place within the jurisdiction of the Akola Court to defendants in Bombay. The bales were to be sold by the defendants in accordance with instructions to be sent by the plaintiff, and accounts were to be rendered and money was to be paid to the plaintiff at the place of despatch. Plaintiff did not desire the bales to be sold and asked the defendants to return them and on their failure to do so, sued them at Akola for the value of the bales :

Held, that the cause of action arose in part within the jurisdiction of the Akola Court and that Court could, therefore, entertain the suit.

The expression "cause of action" means the whole bundle of relevant facts which the plaintiff must allege and prove in order to succeed. **N** FIRM JOHARMAL RUPMAL ADTIA *v.* SUNDERLAL NARAYANDAS **991**

——— **ss. 22, 23**—*Transfer of case—Issues settled—Application, whether maintainable.*

The provisions of section 22 of the Civil Procedure Code are mandatory, and an application under that section must be made, in a case where issues are settled, at or before such settlement is made.

An application under this section is not maintainable after all the issues arising out of the pleadings have been settled and an issue relating to the jurisdiction of the Court has been disposed of. **L** FIRM BEHARI LAL-KANHAYA LAL *v.* OFFICIAL RECEIVER, INSOLVENT ESTATES, LAHORE **608**

——— **s. 24**—Transfer of case—Notice, whether necessary. *See* CIVIL PROCEDURE CODE, s. 115 **614**

——— **s. 33, O. XVI, r. 9, O. XLVIII, r. 1 (4)**—*Process-fees, order directing immediate payment of, validity of.*

An order to a party to pay process-fees "at once" militates against both the spirit and the letter of O. XLVIII, r. 1 (2) of the Civil Procedure Code. The fixation of time within which to pay process-fees conveys an idea of giving reasonable facilities to a litigant who seeks the help of the Court in the matter of summoning witnesses, to obey the order. This means that the Court with due regard to the provisions of O. XVI, r. 9, of the Code makes terms with the party who requires its help and declares to him that it will try to procure the attendance of witnesses to be summoned for the hearing provided the process-fees are paid within the time fixed by it, and that if he delays such payment he does so at his own risk. To call upon him to pay process-fees *at once* is virtually to insist on immediate payment of process-fees and to decline to help in the matter of enforcing the attendance of witnesses and in effect to penalise the default by dismissing the suit ultimately. **N** PANDU *v.* RAJESHWAR **996**

——— **s. 34, applicability of**—*Damdupat* rule of, applicability of — Interest — *Pendente lite,* whether can be allowed. *See* HINDU LAW—JOINT FAMILY—ALIENATION **711**

——— **s. 34**—*Redemption suit—Interest from date of suit—Discretion of Court*—Damdupat, *rule of, applicability of.*

Under section 31 of the Civil Procedure Code a Court has a discretion in a redemption suit to award interest from the date of suit to the due date fixed for redemption even in cases to which the rule of *damdupat* applies at the date of suit. N WILAYAT ALI KHAN *v.* MAROTI 632

——— s. 47—*Dispute between judgment-debtor and auction-purchaser, nature of.*

A dispute between a judgment-debtor and an auction-purchaser as to the extent of the property sold at the auction sale does not fall within the purview of section 47 of the Civil Procedure Code. A MUKHTAR AHMAD *v.* KABIR AHMAD 666

——— s. 47—*Execution—Collusiveness of decree—Execution Court, power of.*

An Executing Court cannot go behind the decree. Therefore, the question of the decree being a collusive one cannot be tried in execution proceedings. N BIHARISINGH *v* NEWALSINGH, 20 N. L. R 24, (1911) A. I. R. (N.) 81 136

——— s. 47—*Execution of decree—Decree-holder purchaser, whether party to suit—Possession, delivery of—Separate suit, whether lies.*

A decree-holder by becoming a purchaser at a Court-sale does not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code and proceedings for delivery of possession of property purchased by the decree-holder are proceedings in execution of the decree and fall within the scope of section 47 and a separate suit for the purpose is barred under that section. S PIRIMAL *v.* SANGHAR 930

——— s. 47—*Mortgage decree, effect of—Execution of decree—Objection by defendant absolved from liability—Procedure.*

A mortgage decree is passed against property standing in the name of a particular person and implies that the interests of that particular person in the specified property are to be sold.

In a suit on a mortgage against two mortgagors it was held that the mortgage was valid as against one of them only and the suit was decreed as against him and was dismissed as against the other. When the mortgaged properties were about to be sold the absolved mortgagor filed an objection that the properties belonged to him alone and should not be sold, and that if they were sold, it should be proclaimed at the time of the sale that the judgment-debtor had no right, title, or interest in the properties ;

Held, that the objector was a party to the suit in which the decree was passed and that the objection related to the satisfaction of the decree, within the meaning of section 47 of the Civil Procedure Code, and the objection should, therefore, be decided on the merits. A MAHADEI *v.* JAGANNATH DAS, (1924) A. I. R. (A.) 313 225

——— ss. 47, 49, O. XXI, r. 2—*Sale of decree—Execution by purchaser—Plea that decree was satisfied before sale—Certification, absence of, effect of—Failure to certify, whether amounts to fraud.*

Where a decree is sold in execution of another decree and the purchaser seeks to execute it against the judgment-debtor, it is open to the latter to plead that the decree had been satisfied by him before it was sold, although the satisfaction was not certified in accordance with the provisions of r. 2 of O. XXI of the Civil Procedure Code; sub-r. (3) of r. 2 of the Order is no bar to such a plea which must be enquired into by the Court under section 47 of the Code.

The mere omission on the part of a decree-holder to certify satisfaction of the decree does not amount to fraud. O SURJI NARAIN MISRA *v.* ULAND SINGH, 10 O. & A. L. R. 375 776

——— ss. 47, 73—*Contract Act (IX of 1872), s. 262—Rateable distribution, object of—Decree against partner in personal capacity—Decree against partnership—Order directing rateable distribution—Appeal, whether lies—Partner agreeing to share of other partner being sold, effect of.*

J and *A* were two partners in a certain business. *D* obtained a decree for money against *A* in his personal capacity which was put into execution and certain moveable properties belonging to the partnership were attached upon which *J* preferred a claim and his half share was released on his agreeing to the other half being sold as the property of *A*. In the meantime, one *S* obtained a decree against *J* and *A* in respect of monies due from the partnership and attached and sold all the moveables belonging to the partnership including the half share already attached in execution of *D's* decree who then applied for rateable distribution. *J* objected to the rateable distribution and the Executing Court overruling the objections ordered rateable distribution but the order was reversed by the District Judge on appeal :

Held, Per *Walmsley, J.*— That no appeal lay to the District Judge as the addition of *D*, who was a stranger to the suit, to the proceedings had destroyed the sanctity of the element of identity which was a necessary ingredient of a proceeding under section 47 of the Civil Procedure Code and that that section was, therefore, inapplicable.

Per *Mukerji, J.*— (1) that the order of the Executing Court was passed in a matter relating to the satisfaction of the decree between parties to the suit and was one falling within the purview of section 47 of the Civil Procedure Code and was, therefore, appealable;

(2) that the conduct of *J* in agreeing that the half share of moveables may be sold as *A's* property amounted to a declaration that the partnership had ceased and had the effect of divesting the said half share of moveables of its character as partnership property and that the provisions of section 262 of the Contract Act were, therefore, no longer applicable to such property ;

(3) that, consequently, the property was liable to rateable distribution.

An order under section 73 of the Civil Procedure Code is not appealable unless it also comes under section 47 of the Code and satisfies all the requirements thereof.

One object of section 73 of the Civil Procedure Code is to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree-holders, each competent to

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execute his decree by attachment and sale of a particular property the necessity of each and every one attaching and separately getting the property sold. The other object of the section is to secure an equitable administration of the property by placing all the decree-holders upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. **C** DWARKADAS v. JADUB CHANDRA GANGULI, 28 C. W. N. 704; 39 C. L. J. 439; 51 C. 761 **731**

——— **ss. 47, 115, O. XXI, r. 16**—*Execution of decree—Assignees, dispute between—Question tried in form of suit—Appeal—Revision.*

Two persons applied for execution of the same decree, each claiming to be an assignee from the decree-holder. The matter was treated as one under section 47 of the Civil Procedure Code and eventually the Court converted the proceeding into a suit and decided that the assignment in favour of one of the parties must prevail over the assignment in favour of the other. The latter filed an application for revision against the order.

Held, that no revision lay against the order passed by the Trial Court, for if the matter was one arising under section 47 of the Civil Procedure Code, the order was open to appeal and not to revision, and if it arose out of a suit the remedy again was by way of appeal against the decree in the suit, but if, on the other hand, it was one to be treated as failing under O. XXI, r 16 of the Civil Procedure Code, it could not be said that by trying it in the form of a suit, the Court had passed an order without jurisdiction. **Pat** RUN BAHADUR SINGH v. BAJNANJI PRASAD SINGH, 3 Pat 341; (1924) Pat. 193 **495**

——— **ss. 47, 151** *Partition decree Execution of decree Recovery of land in excess of share Restoration Amendment of decree Jurisdiction.*

A Court has jurisdiction in execution under sections 47 and 151 of the Civil Procedure Code to amend its final decree for partition and order restoration of land recovered by a party in excess of that awarded by the decree and a separate suit is not necessary for the purpose. **S** DANDUMAL v. DWARKAMAL **1039**

——— **s. 47, O. XXIII, r. 3**—*Compromise decree—Matters extraneous to suit—Execution as to such matters—Separate suit.*

A compromise decree including matters covered by the suit as well as matters extraneous to it can be executed only to the extent it relates to matters in suit and not with regard to matters outside the scope of the suit.

The power of a Court to pass a consent decree is restricted to matters covered by the suit But if the agreement refers to matters extraneous to the suit forming consideration for the compromise or settlement of the matter included in the suit, such extraneous terms should also be recorded in the decree. It does not, however, follow that such extraneous terms can be enforced in execution of that decree. In fact, they can be enforced only by a separate suit. **C** ARJUN KAPALI v. ASVINI KUMAR KAPALI **317**

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——— **s. 51 (1)**—*Receiver, appointment of, whether a form of execution.*

The appointment of a Receiver is a form of execution under section 51 (1) of the Civil Procedure Code. **N** RAMSWARUP v. RAGHUNANDAN **1031**

——— **s. 51 (d), O. XL, r. 1**—*Receiver—Appointment in form prescribed—No power reserved—Possession, whether necessary for validating appointment—Power of owner to lease—Reference by Receiver to Court—No order passed—Lease by Receiver, validity of*

A Receiver may be appointed even when the property has not been attached.

In the absence of reservation of any powers, the Receiver has full powers of the owner with reference to the property when his appointment is made in the form provided in the Code of Civil Procedure, expressly giving full powers under the provisions of O. XL of the Code

The validity of the Receiver's appointment does not depend on his taking possession of the property, but the powers commence immediately on his appointment by the Court.

The appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them from interfering with his possession except by permission of the Court.

The owner of the property is incompetent to deal with the property including a lease from the date on which the Receiver is appointed in respect of the same.

The failure of the Court to pass orders on the reference of a Receiver does not invalidate a lease if it was within his competence to grant it under the terms of his appointment. **N** DEO BAKSH v. KALURAM, 7 N L. J 16 **811**

——— **s. 53**—*Hindu Law—Joint family—Nephew taking property by survivorship, whether liable as legal representative.*

It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under section 53 of the Civil Procedure Code. The section does not apply to the case of a nephew succeeding by survivorship. **A** BALKARAN LAL v. MALIK NAMDAR **637**

——— **ss. 55, 145**—*Execution of decree—Arrest of judgment-debtor—Surety, extent of, liability of—Notice to surety, whether necessary.*

A judgment-debtor who was arrested in execution of a decree was produced before the Court and was released on giving security. The surety undertook to pay the decretal amount if the judgment-debtor failed to make an application for insolvency within one month, or if the surety failed to produce him in Court when called upon to do so:

Held, (1) that the surety was not released from liability merely on the judgment-debtor filing an application for insolvency within time and that he was also bound to produce the judgment-debtor in Court when called upon to do so;

(2) that before the decree could be ordered to be executed against the surety, the latter must be called upon to produce the judgment-debtor in

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Court, and it was only on his default that the surety would become liable under the bond. L DHARAM SINGH *v.* NAND SINGH **447**

——— **s. 60 (e), O. XXI, r. 46**—*Breach of contract—Right to sue for damages, whether debt—Attachment, whether valid—Sale—Vendee, title of.*

A right to sue for damages arising out of a breach of contract is not a debt within the meaning of O. XXI, r. 46, Civil Procedure Code and is not attachable; consequently, any sale thereof under an attachment is invalid and confers no title on the vendee. S GORDHANDAS KALIDAS *v.* FIRM OF GOKAL KHATAOO **409**

——— **s. 60 (m), O. XXXVIII, r. 5**—*Attachment before judgment, application for, form of—Affidavit containing necessary allegations—Contingent debt, whether can be attached—Garnishee, whether can appeal against garnishee order.*

When a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal, the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the Appellate Court to decide at the hearing of the appeal.

A debt in order to be attachable need not be ascertained but must be accruing or have accrued, that is to say, a *debitum in præsenti solveendum in futuro.*

Defendant first party sold certain property to defendants second party and a sum of three lakhs was left with the vendees to pay off a mortgage on the property. It was stipulated that if the mortgage amount turned out to be less than three lakhs the balance should be paid to the vendor. Plaintiff filed a suit against the defendants to recover a certain amount which he alleged was the balance of the unpaid purchase-money in respect of the same property which he had sold to defendant first party. He made an application under O. XXXVIII, r. 5 of the Civil Procedure Code for attachment before judgment of the sum of three lakhs which was in the hands of the defendants second party. The application did not contain the allegations necessary to bring it under O. XXXVIII, r. 5, but the affidavit accompanying it contained the requisite averments. The Trial Court granted the application. Both sets of defendants appealed:

Held, (1) that although the application was not in proper form the defect was cured by the affidavit accompanying the application;

(2) that as the defendants second party were prevented by the order complained of from paying the money even to the mortgagees and were likely to be prejudiced by the order, their appeal was maintainable;

(3) that the interest of defendant first party in the sum of three lakhs in the hands of defendants second party was a merely contingent interest which was not liable to attachment under section 60 (*m*) of the Civil Procedure Code, and the order of the Trial Court must, therefore, be set aside. C SUGHDEODAS REKHABDAS *v.* TRIKUMDAS CALLIANJI **881**

Civil Procedure Code—1908—contd.

——— **s. 68, Sch. III, paras. 1, 7**—*Mortgage decrees—Earlier decree paid off by subsequent decree-holder, effect of—Sale—Purchase-money, how to be employed—Collector, jurisdiction of, extent of.*

Two mortgage-decrees were passed in respect of the same property and were put in execution and were sent to the Collector for execution. The decree-holder under the subsequent mortgage paid off the decree on the earlier mortgage and the property was sold free from incumbrances and was purchased by the decree-holder under the subsequent mortgage. He then applied to the Collector for an order declaring that the purchase-money should be paid first towards the satisfaction of the earlier decree and the balance towards his own decree and that the property should be deemed to have been sold free from incumbrances. This application was refused:

Held, (1) that the duty of the Collector was to find out the best method of raising the money for the satisfaction of the decree passed by the Civil Court and he had no jurisdiction to decide as to how the purchase-money was to be employed;

(2) that the consent of the decree-holder did not confer any such jurisdiction on the Collector and the decree-holder was not, therefore, bound by the order of the Collector refusing his application;

(3) that the only way of dealing with the matter was to declare that the property had been sold free from incumbrances and that the purchase-money was to be employed first towards the satisfaction of the earlier decree and the balance towards part-payment of the subsequent decree. A ABDUL SHAKUR *v.* MUHAMMAD MATIN, 22 A. L. J. 202; (1924) A. I. R (A.) 307; 46 A 414 **429**

——— **s. 73**—Rateable distribution, object of. *See* CIVIL PROCEDURE CODE, s. 47 **731**

——— **ss 83, 87,** *applicability of—Agra Tenancy Act (II of 1901), s. 165—Suit against Ruling Chief as co-sharer—Property in suit outside State territory—Suit, whether maintainable without consent of Government.*

The provisions of sections 83 to 87 of the Code of Civil Procedure apply to suits under the Agra Tenancy Act

The fact that a Ruling Chief may own immoveable property within the limits of British India and outside his own State territories, does not entitle the Courts to treat him, with respect to the latter property, as an ordinary private citizen. A KANHAYA LAL *v.* HIS HIGHNESS THE MAHARAJA SRI PRABHU NARAIN SINGH BAHADUR, 22 A. L. J. 317; 46 A. 355; (1924) A. I. R. (A.) 422 **559**

——— **s. 92,** *suit under—Relief against alienee of trust property—Trustee de son tort, liability of.*

No relief can be granted against alienees of trust property in a suit under section 92 of the Civil Procedure Code.

But a suit under section 92 of the Civil Procedure Code will lie against a trustee *de son tort* who is a trustee *de facto* though not *de jure.* M PERIA NATTAMAI MALKAJIGUNTA *v.* THIPPA RAMASWAMI CHETTIAR **980**

Civil Procedure Code—1908—contd.

——— **ss. 96, 97**—*Preliminary and final decrees—Appeal against preliminary decree—Final decree passed after filing of appeal—Procedure.*

Where the dates of a preliminary decree and a final decree permit an appellant to challenge both decrees within the time allowed by law, it is unreasonable to allow him to avoid the provisions of the Court Fees Act and to obtain a reversal of the final decree by a circuitous method by appealing against the preliminary decree only, when the direct method is open. In such a case the proper course is to allow the appellant a reasonable time within which to amend his appeal.

Where, however, an appeal against the preliminary decree is filed before the final decree is made and the dates of the two decrees do not allow an appeal against both being filed, the subsequent passing of the final decree would not render the appeal against the preliminary decree nugatory, and the final decree would depend on the preliminary decree and if the latter is set aside the former would fall with it. **S** ISHAK *v.* FATMA **978**

——— **s. 97**—Preliminary decree, whether can be questioned in appeal from final decree. *See* C. P. TENANCY ACT, s. 45 **853**

——— **s. 99, O. XVII, rr. 2, 3**—*Adjournment granted at request of plaintiff—Default on adjourned date—Procedure—Arguments, failure to hear—Irregularity.*

Where an adjournment is granted at the request of the plaintiff and the plaintiff fails to appear on the adjourned date, the Court is entitled to proceed under O. XVII, r. 3 of the Civil Procedure Code and is not bound to proceed under r. 2 of the Order.

After the evidence in a case had been recorded an adjournment was granted at the request of the plaintiff to enable his Counsel to appear and argue the case. At the adjourned hearing Counsel for the plaintiff did not appear and the Court proceeded to dispose of the suit under O. XVII, r. 3, of the Civil Procedure Code and eventually dismissed it:

Held, (1) that the Court was entitled to proceed under O. XVII, r. 3 of the Code and was not bound to proceed under r. 2 of the Order;

(2) that, in any case, the mere omission to hear arguments amounted only to an irregularity which was covered by section 99 of the Civil Procedure Code. **L** JHANDA SINGH *v.* SADIQ MUHAMMAD, 5 L. 218 **453**

——— **s. 100**—*Question of fact—Finding of lower Appellate Court based on one out of two inferences—Second Appellate Court's power to upset.*

The mere fact that a Court of appeal draws one of two possible inferences on a question of fact does not entitle the Second Appellate Court to interfere with the finding based upon such inference. It is only when only one legal inference is possible and that has not been drawn that interference is justified. **N** MATHURABAI *v.* LAL-SINGH **112**

Civil Procedure Code—1908—contd.

——— **s. 100**—*Second Appeal—Grounds.*

The general rule as to the grounds of Second Appeal is that a party is not entitled to a relief upon facts or documents not referred to or stated in the pleadings, nor on any ground which has never been considered, taken or tried in the Courts below, unless it is a pure point of law going to the question of jurisdiction of the lower Court and capable of being determined without a consideration of any other evidence than that on the record. **N** GOWRA *v.* CHAITRAM **63**

——— **s. 102**—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 6, 11—Suit for money based on hypothecation bond, nature of—Amount claimed under Rs. 500—Appeal, second, whether lies.*

Where a plaintiff asks for a simple money-decree on the basis of a hypothecation bond and expressly abandons all claims against the mortgaged property, the suit is a pure money suit and does not fall under Art. 6 or Art. 11 of Schedule II to the Provincial Small Cause Courts Act, and where the amount claimed is less than Rs. 500, a second appeal will be barred under section 102 of the Civil Procedure Code. **A** LAKHAN SINGH *v.* LAL SINGH **652**

——— **s. 103**—*Appeal, second—Finding based on inadmissible evidence—Procedure.*

Where, in second appeal, it is discovered that a finding of fact arrived at by the lower Appellate Court is based partly on inadmissible evidence, the High Court is bound to remand the case for a fresh decision and can neither affirm the finding of the Court nor determine the matter itself under the provisions of section 103 of the Civil Procedure Code. **C** JAGADISH CHANDRA *v.* HARIHAR, 40 C. L. J. 39 **219**

——— **ss. 105, 109, 115, 151**—*Final order, what is—Order restoring suit—Revision—Order refusing to interfere, whether final—Leave to appeal to His Majesty in Council.*

An order passed under section 115 of the Civil Procedure Code refusing to interfere in revision with an order of a Subordinate Judge passed under section 151 of the Code restoring to file a suit which had been disposed of upon an alleged compromise between the parties is not a "final order" within the meaning of section 109 of the Code and leave cannot, therefore, be granted to appeal to His Majesty in Council against such an order.

An order is a final one under section 109 of the Civil Procedure Code if it finally disposes of the rights of the parties.

Section 105 of the Civil Procedure Code is inapplicable to appeals to His Majesty in Council. **M** JOHN JOSEPH BRITO *v.* MRS. S. S. BRITO, 46 M. L. J. 357; 19 L. W. 458; 34 M. L. T. 112; (1924) M. W. N. 380 **938**

Civil Procedure Code—1908—contd.

——— **s. 107, O. XLI, r. 25**—*Issues, framing of —Duty of Court—Failure of lower Courts to frame proper issues—Procedure—Remand.*

In a suit for redemption of a mortgage, the plaintiff based his title on a legacy under a Will and also on a lease. The defendants denied plaintiff's title under both heads. There was a specific issue as to the genuineness of the Will but none as to the lease, except the general issue as to whether plaintiff's suit was maintainable. The Court of first instance found the Will to be genuine and decreed the suit but the Appellate Court reversed the finding and dismissed the suit. The question of the lease was not gone into in either of the Courts. On second appeal to the High Court :

Held, (1) that it was primarily the duty of the Court to frame the necessary issues though in framing issues parties were entitled to be heard ;

(2) that the proper course to follow in the case was not to set aside the decree and remand the whole case including the question of genuineness of the Will to be gone into again *ab initio*, but to frame issues under O. XLI, r. 25 of the Civil Procedure Code and refer the same to the lower Appellate Court and direct it to take the additional evidence required on the issues and return the same to the High Court with its findings. **M** KORU KUTTY *v.* AHAMMAD **1**

——— **s. 109, O. XLI, r. 23**—*Suit dismissed on preliminary point -Remand for further hearing —Order, whether final—Leave to appeal to Privy Council.*

A suit for the removal of the defendant from the office of *shebait* and for an account of his dealings with the trust funds was dismissed by the Trial Court on the ground that the plaintiffs had no *locus standi* to sue. On appeal, the High Court, holding that the plaintiffs had a *prima facie* interest in the subject-matter of the suit, remanded the case for further hearing :

Held, (1) that the order of the High Court was of a merely interlocutory character, no final decision having been arrived at as to the relative position of the parties or as to the liability of the defendant to render accounts to the plaintiffs ;

(2) that the order was not, therefore, a final order within the meaning of section 109 of the Civil Procedure Code. **C** HARI NARAYAN DE *v.* HARI BHUSAN DE **117**

——— **s. 109 (c)**—*Certificate—Question, whether an acknowledgment was evidence of debt within the meaning of Art. 1, Sch. I of Stamp Act—Value of subject-matter less than Rs. 10,000.*

The question whether a certain acknowledgment which was given of a debt was given in order to supply evidence of such debt within the meaning of Art. 1, Schedule I, of the Stamp Act and, if so, whether it would be admissible in evidence without being stamped is not one of public importance or of great private importance, nor can a decision on the point be regarded as an important precedent governing numerous other cases, so as to render it a fit one for granting leave to appeal to His Majesty in Council under section 109 (c), where the value of the subject-matter of the appeal is less than Rs. 10,000. **M** ANANTA LAL DAMANI *v.* SURJIMULL MURLIDHAR CHANDIK, 46 M. L. J. 239; 19 L. W. 372; 34 M. L. T. 1; (1924) M. W. N. 319; (1924) A. I. R. (M.) 616 **165**

——— **s. 110**—*Leave to appeal to His Majesty in Council—Substantial question of law, what is.*

In order to justify the grant of a certificate for leave to appeal to His Majesty in Council under the latter portion of section 110 of the Civil Procedure Code, the High Court must be satisfied that a substantial question of law is involved in the case : that is to say, a question of law in respect of which there may be difference of opinion. **L** GOKAL CHAND *v.* SANWAL DAS, 6 L. L. J. 180; (1924) A. I. R. (L.) 473; 5 L. **260**
417

——— **s. 115**—*Arbitration - Illegality - Revision, whether lies.*

Semble :—Where an award has been accepted by the Court and a decree has been passed in accordance with it, no revision lies against the legality of the award. **M** VATHINATHA AIYAR *v.* SUBRAMANIA AIYAR **238**

——— **s. 115** -*Equities equal - Revision.*

Where equities are equal on both sides the High Court will interfere in revision under section 115, Civil Procedure Code. **C** GIRIBALA DASI *v.* TARAK NATH **149**

——— **s. 115**—Finality. *See* MADRAS LOCAL BOARDS ACT, s. 57 **98**

——— **s. 115**—*Finding that party was misled by information given by Court.*

No party should be prejudiced by the act of a Court or by mistake that is attributable to that act. What constitutes an act of Court must, however, depend on the circumstances of each case. **M** ADIMOOLA MUDALIAR *v.* MANICKA MUDALIAR, 19 L. W. 238; 46 M. L. J. 329; (1924) M. W. N. 230; 34 M. L. T. 10; (1924) A. I. R. (M.) 592 **142**

——— **s. 115**—*Order dismissing suit as not maintainable—Refusal to exercise jurisdiction—Revision.*

Where an Appellate Court throws out a suit on the erroneous ground that it is not maintainable, it declines to give a decision on the merits and its action amounts to a refusal to exercise a jurisdiction vested in it by law, within the meaning of section 115 of the Civil Procedure Code. **L** IMAM DIN *v.* DITTU **445**

——— **s. 115**—*Order refusing leave to amend—Revision, whether competent.*

An order refusing to allow an amendment of the plaint disposes of the case so far as the question of amendment is concerned and is, therefore, open to revision under section 115 of the Civil Procedure Code. **N** SHANKAR *v.* MURARJI **510**

——— **s. 115**—Order under section 12 of the Court Fees Act—Revision, whether lies. *See* COURT FEES ACT, s. 12 **968**

Civil Procedure Code—1908—contd.

——— **s. 115**—Probate, application for—Valuation by District Judge—Order, whether final—Appeal—Refusal to exclude properties from valuation—Revision. **901**

——— **s. 115**—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Error of law—Revision Small Cause suit tried by Munsif—Appeal heard by District Judge—Second appeal—Under which section revision lies.*

The scope of section 25 of the Provincial Small Cause Courts Act is very wide and gross errors of law come within it. But an error of judgment on questions of law does not come under section 115 of the Civil Procedure Code.

Where a suit of a Small Cause nature is tried by a Munsif and an appeal against the decree is heard by a District Judge, no second appeal lies, nor does a revision lie under section 25 of the Provincial Small Cause Courts Act. **A** MUTHURA PRASAD *v.* BOMBAY BARODA AND CENTRAL INDIA RY Co. **434**

——— **s. 115**—*Revision.*

It cannot be laid down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith, interference cannot be made under section 115, Civil Procedure Code, as there may be cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings. **C** DEBIR-UD-DIN *v.* AMINA BIBI **335**

——— **s. 115**—*Revision—Remedy, other, open—Interference by High Court.*

Where an order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed, and it is not shown how the aggrieved party will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. **L** NAND KISHORE *v.* SARDAR NARAIN SINGH, 6 L. L. J. 137; (1924) A. I. R. (L.) 471 **350**

——— **s. 115**—*Revision—Remedy, other, open—Interference by High Court.*

The High Court will not interfere in revision in a case where there is another remedy open to the aggrieved party. **L** WISAKHI RAM *v.* ALWAL, 6 L. L. J. 153; (1924) A. I. R. (L.) 487 **408**

——— **s. 115**—*Transfer of case—Notice, whether necessary—Revision, whether lies.*

An application for transfer is a particular branch of a case for which a special procedure is provided in the Civil Procedure Code, and an order on such an application amounts to a decision of a case within the meaning of section 115 of the Code and is, therefore, open to revision.

Section 24 of the Civil Procedure Code requires the Court to issue notice to the parties before it makes an order of transfer otherwise than of its own motion. An order of transfer made at the instance of one party without notice to the other is liable to be set aside in revision. **L** LABHU RAM *v.* KARTA RAM **614**

——— **ss. 115, 148**—*Decree directing payment of money within certain period—Default—Extension of time—Power of Court—Revision.*

Civil Procedure Code—1908—contd.

An order dismissing an application under section 148 of the Civil Procedure Code for extension of the time limited for the payment of money under a decree is open to revision.

A Court has no jurisdiction to extend time for the payment of money prescribed in a decree when the effect of such an extension would be to alter the terms of a decree which has become final between the parties. **O** TIRBHAWAN DIT SINGH *v.* SURAJ BALI, 11 O. L. J. 119; 10 O. & A. L. R. 650 **387**

——— **ss. 115, 151**—*Order granting adjournment—Revision, whether lies.*

Section 115 of the Civil Procedure Code refers only to cases of failure to exercise or improper exercise of jurisdiction.

The High Court has no power under section 115 or section 151 of the Civil Procedure Code to revise an order of a Trial Court adjourning the hearing of a suit or application, even where the order is inexpedient. **N** RAJABAI *v.* JAGANNATH, 7 N. L. J. 183 **969**

——— **s. 115, O. VII, r. 11 (4), O. XXXIII, r. 7**—*Undervaluation of suit—Order directing amendment and payment of additional Court-fees—Order refusing leave to sue* in forma pauperis—*Order rejecting plaint—Appeal—Revision.*

A suit was found to have been undervalued and the Court called upon the plaintiff to amend the valuation and pay additional Court-fees. The plaintiff, thereupon, applied for leave to continue the suit *in forma pauperis*, which was refused. The plaint was then rejected on the ground that the plaintiff had failed to make the necessary amendment and to pay additional Court-fees. The plaintiff filed a revision against the order refusing to allow him to continue the suit *in forma pauperis*:

Held, (1) that the order complained against had merged in the order rejecting the plaint;

(2) that the latter order was a decree and was appealable as such, and that, therefore, the application for revision was not maintainable.

The remedy by way of revision is an exceptional remedy and is to be resorted to only when there is no other remedy available to the aggrieved party. **L** AZIM BIBI *v.* IMTIAZ BEGAM **604**

——— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit—Formal defect—Failure to give evidence—Discretion of Court—Revision.*

Where an order under O. XXIII, r. 1 of the Civil Procedure Code is passed without the conditions laid down in the rule being complied with, the order is without jurisdiction and may be made the subject of revision.

Where, however, the Trial Court has exercised a judicial discretion in allowing the suit to be withdrawn, the High Court will not interfere in revision. The Trial Court cannot be said to have exercised a judicial discretion where it has misunderstood the nature of the conditions

laid down in O. XXIII, r. 1 of the Civil Procedure Code.

The failure of a plaintiff to adduce evidence to identify the property in dispute as belonging to himself is not a "formal defect" within the meaning of O. XXIII, r. 1 of the Civil Procedure Code, so as to justify the Court in granting leave to withdraw the suit with liberty to bring a fresh suit. **O** DAULA *v.* DWARKA PAL **121**

——— **s. 115, O. XLI, r. 33**—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Court, whether can vary decree in favour of non-petitioner—Discretion of Court.*

Revisional jurisdiction is a discretionary jurisdiction, and the discretion should not ordinarily be exercised in favour of a negligent party. Where, however, an erroneous view of the lower Court has contributed to the bringing about of a result which requires to be redressed, the High Court would be failing in its duties if it were to refuse to exercise its revisional powers of supervision and correction which it exercises even *suo motu* for undoing any injustice which may have been done by decisions of lower Courts to litigants in cases in which no appeal lies to the High Court.

The High Court can deal with a case under section 115 of the Civil Procedure Code or section 25 of the Provincial Small Cause Courts Act, without there being any application by any of the parties, and in special cases can apply the principle underlying the provisions of r. 33 of O. XLI of the Code, to applications in revision. **N** RANGRAO *v.* PANDURANG **736**

——— **s. 115 (c)** —"*Acting illegally*," *meaning of.*

The expression "acting illegally" in section 115 (*c*) does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. This part of the clause was advisedly left open in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of injustice resulting from it. **C** SATISH CHANDRA BHATTACHARJEE *v.* SRI JOGUNNESSA BIBI **958**

——— **s. 144**—*Pre-emption suit—Amount enhanced on appeal—Failure to pay enhanced amount—Dismissal of suit—Amount paid, whether can be withdrawn.*

Where a pre-emption suit is dismissed automatically owing to the pre-emptor's failure to pay into Court the enhanced amount decreed on appeal, the pre-emptor is entitled, under section 144 of the Civil Procedure Code, to the return of the amount deposited by him in Court under the decree of the Trial Court. **L** DIWAN CHAND *v.* HIRA NAND **971**

——— **ss. 144, 151**—Application for restitution, nature of. *See* LIMITATION ACT, Sch. I, Art. 181 **200**

——— **ss. 144, 151**—*Restitution—Inherent power of Court—Possession delivered under erroneous interpretation of decree, whether can be restored.*

The power of a Court to order restitution is by no means confined to the terms of section 144 of the Civil Procedure Code. It is the inherent power of a Court to do what is right and proper under the circumstances which have happened

When under a wrong interpetation of a decree the Court executing the decree delivers possession of the disputed property to a party who is not entitled to possession of it, and the interpretation adopted by it is subsequently held to be erroneous, the Court has ample jurisdiction to restore the party who was dispossessed by the erroneous order of the Court to possession of the property. **Pat** KAMLANATH JHA *v.* MOHIT NARAIN JHA, 5 P. L. T. 553 **310**

——— **s. 148**—Pre-emption suit—Failure to deposit one-fifth of purchase-money—Extension of time—Procedure. *See* PUNJAB PRE-EMPTION ACT, s. 22 (4) **61**

——— **s. 151**—*Amendment of decree after appeal—Inherent power of Court*

A Court of law has authority over its own record and may amend the record or the decree passed by it even after an appeal has been filed against the decree. **Pat** REWA MAHTON *v.* DALU MAHTO, 2 P. L. R. 6; (1921) A. I. R. (Pat.) 528; 5 P. L. T. 588 **794**

——— **s. 151**—*Injunction staying suit pending in another Court—Declaratory suit—Inherent power of Court.*

The High Court has inherent power to grant an injunction in suitable cases irrespective of the provisions of O. XXXIX of the Civil Procedure Code

An injunction will not be granted in a suit which is of a merely declaratory nature staying proceedings in another suit pending in another Court. **L** SAMANDAR *v.* FAZAL **862**

——— **s. 151**—*Minor not properly represented—Decree against minor nullity—Decree declared not binding—Power of Court to revive original suit against minor—Inherent powers of Court.*

A decree which declares that a prior decree obtained against minors was not binding upon them on the ground that they were not validly represented therein has merely the effect of remitting the parties to their original rights and does not involve the re-trial afresh of the earlier suit. Therefore, the Court which originally disposed of that suit has no jurisdiction to restore the suit to its file and re-try it.

A Court has no inherent powers under section 151 of the Civil Procedure Code to restore a suit once disposed of or to add parties to it who were not represented at the original trial.

If a minor is not properly represented before a Court a decree passed against him is a nullity. **M** ARUMUGA GOUNDAN *v.* PERIAVANJIAPPA, 19 L. W. 233; 46 M. L. J. 348; (1924) M. W. N. 289; 34 M. L. T. 94; (1924) A. I. R. (M.) 489 **76**

——— **s. 151**—*Remand under inherent power of Court—Order, whether can be re-considered at final hearing.*

No appeal lies from an order of remand made

Civil Procedure Code—1908—contd.

in the exercise of the inherent power of an Appellate Court, and that Court has jurisdiction to consider the correctness of the order of remand when the case comes before it for final decision. **Pat** BABU RAM RAI *v.* MAHESHWAR PRASAD SINGH **466**

——— **s. 151,** *scope of.*

Section 151 of the Civil Procedure Code cannot be called to aid to justify an act, which instead of being necessary for the ends of justice or to prevent abuse of the process of the Court, not only causes or is likely to cause incalculable mischief but also perpetrates injustice to third persons who are neither parties to the suit nor bound by the decree passed therein. **N** PANNALAL *v.* BHAGIRATHIBAI, 20 N. L. R. 11; (1924) A. I. R. (N.) 98 **601**

——— **ss. 151, 152**—*Misdescription of property in plaint—Error—Accidental slip or omission—Deliberate error—Fraud—Duty of Court—Inherent power of Court—Limitation.*

In order to attract the application of the provisions of section 152 of the Code of Civil Procedure, the error must be a natural consequence of an accidental slip or omission. The mere misdescription of the property in the plaint and the repetition of the error in the decree will not suffice.

Where an error is deliberate, it is settled law that the provisions of section 152, Civil Procedure Code, cannot be invoked for the purpose of correcting such errors.

In the case of a deliberate error, the person committing it is guilty of fraud on the Court and when the fraud is brought to the notice of the Court the latter cannot let it stand and countenance its perpetration, lapse of time being immaterial. The action of the Court under such circumstances would clearly rest on the provisions of section 151, Civil Procedure Code, and the aggrieved party cannot be left to seek his remedy by a regular suit.

Under section 151 the Court has the inherent power to act *ex debito justitiæ* and to do that real and substantial justice for which it alone exists.

There are certain limitations on the powers of the Court acting either under section 151 or 152, Civil Procedure Code, even an accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. **O** MATA DIN SINGH *v.* SHEO DARSHAN SINGH, 11 O. L. J. 227 **96**

——— **ss. 151, 152, O. XXIII, r. 3**—*Limitation—Inherent jurisdiction—Compromise of appeal out of Court—Appeal dismissed—Help of Court.*

There is no limitation for an application under section 152 of the Civil Procedure Code.

A Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would meet the necessity of the case.

If, as the result of a compromise effected out of Court, an appeal is withdrawn unconditionally and is consequently dismissed, the parties cannot get help from Court if one of the parties resiles from the compromise. **N** MULIA *v* PARTAB **72**

——— **s. 151, O. XLI, rr. 17, 19**—*Appeal—Dismissal for default—Restoration—Remedy—Inherent power of Court, when to be exercised.*

Section 151 of the Civil Procedure Code cannot be applied where the rule of procedure applicable to the case has been expressly laid down in the Code.

Where an appeal is dismissed for the appellant's default under O. XLI, r. 17 of the Civil Procedure Code, the remedy of the appellant is by way of an application for restoration under r. 19 of the Order. Section 151 of the Code has no application to such a case. **A** JOSHI SHIB PRAKASH *v.* JHINGURIA, 46 A. 144; (1924) A. I. R. (A) 446 **415**

——— **s. 151, O. XLIII, r. 1 (4)**—*Remand under inherent power of Court—Appeal—Revision.*

There is no appeal provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by section 151 of the Civil Procedure Code, to remand a case for re-trial.

The validity of such an order can, however, be impugned in a second appeal to the High Court against any decision which may subsequently be passed by the lower Appellate Court on appeal from the decree of the Court of first instance. **L** WISAKHI RAM *v.* ALWAL, 6 L. L. J. 153; (1924) A. I. R. (L.) 487 **408**

——— **s. 151, O. XLVII, r. 1**—*Execution of decree—Dismissal for default—Restoration, application for—Review—Appeal, whether lies.*

An execution case was erroneously dismissed for default and the decree-holder applied for restoration of the case by way of review and also headed his application under section 151 of the Civil Procedure Code. The application was allowed:

Held, that the application for restoration was one under section 151 of the Civil Procedure Code and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration. **C** SARADINDU MUKERJEE *v.* GIRISH CHANDRA TEWARI **816**

——— **s. 151, Sch. II, para. 3 (2).** *See* RECEIVER, APPOINTMENT OF **84**

——— **s. 152**—*Amendment of decree—Clerical error—Mistake due to party, whether can be corrected.*

A mistake in the final form of an order or decree may be due to an original mistake made by the party or his lawyer in the application or pleadings, but that is no reason for refusing to correct the mistake. **A** ALLAH DIA *v.* RAHIM-UD-DIN, 22 A. L. J. 215 **166**

——— **O. I, r. 10**—*Limitation Act (IX of 1908), s. 22—Suit against wrong defendant—Amendment after limitation, whether permissible.*

Where the party intended to be sued and substantially sued has been misdescribed in the cause title, there is complete power in the Court to make the necessary correction without any regard to lapse in time.

Where, however, there are two known persons in existence and plaintiff brings his suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other, and in substance sued the other, and no question of representation arises, the case is not one of misdescription, and the Court will be justified in refusing leave to bring the real defendant on the record at a time when the suit has become barred by time against him.

A suit against the Agent of a Railway Company in his personal capacity cannot be regarded as, in substance, a suit against the Railway Company. **P** EAST INDIAN RAILWAY CO. *v.* RAM LAKHAN RAM, (1924) Pat. 9; 3 Pat. 230 **312**

——— **O. I, r. 10** *-Suit for dissolution of partnership - Death of defendant—Son's application to be brought on record out of time on account of amendment of Limitation Act—Parties, adding of.*

In a suit for dissolution of partnership after the preliminary decree was passed, the defendant died on 30th September 1920 and his son applied on 6th January 1921 to be brought on the record. Meanwhile, the Limitation Act was amended so as to reduce the period of limitation for applications under Art. 177, from six months to 90 days:

Held, that, in the circumstances of the case, and in the interests of justice, all parties interested should be added under O. I, r. 10, Civil Procedure Code. **M** RAMASWAMI CHETTIAR *v.* ADAPPA CHETTIAR **168**

——— **O. II, r. 2** *Partition suit Parties - Stranger alienee in possession of part of joint family property, whether necessary party.*

O. II, r. 2 of the Civil Procedure Code does not require that every suit should include every claim or every cause of action which the plaintiff may have against the defendant.

In a suit for partition of joint family property the plaintiff is not bound to join as party a stranger alienee in possession of a part of the joint property and, therefore, a subsequent suit for recovery of possession of the property from the alienee is not barred by O. II, r. 2 of the Civil Procedure Code. **N** SONBA *v.* BADYA, 20 N. L. R. 28; (1924) A. I. R. (N.) 89 **376**

——— **O. II, rr. 2, 4**—*Suit for possession—Mesne profits from date of decree to date of possession, whether can be claimed—Separate suit, maintainability of.*

The law permits a plaintiff in a suit for possession to claim mesne profits not only up to the date of suit or decree but up to the date of delivery of possession, and the failure of a plaintiff to make the claim in the suit for possession debars him from putting it forward in a separate suit. **A** GIRWAR SINGH *v.* RAM PIARI KUER **326**

——— **O. II, r. 4** *—Mortgage—Redemption suit—Persons claiming paramount title, whether can be joined as defendants.*

Although it is, as a general rule, desirable in mortgage-suits to exclude all issues between the parties except those immediately concerned with the mortgage suit itself, the Court may, in certain cases, if it thinks fit, allow other issues to be determined in such a suit, even if they depend upon separate causes of action. Under O. II, r. 4, of the Civil Procedure Code a plaintiff in a redemption suit may ask to be put in possession of the mortgaged property, and where the defendants raising a paramount title are those in possession of the property and likely hereafter, if their differences are not settled by the mortgage-suit, to resist the possession of the plaintiff, it would, in many cases, be very convenient to allow the issues which have been raised, to be determined in the mortgage suit so that after determination of those issues the plaintiff may know whether he will or will not get undisturbed possession of the property instead of having to bring a separate suit later on. **P** KHUB LAL UPADHYA *v.* JHABSI KANDU, 3 Pat. 244; 5 P. L. T. 573 **885**

——— **O. III r. 4**—Vakalatnama *—Person able to sign—Mark made with his consent Presentation of plaint by Pleader, whether valid.*

A person who, though able to write his name, intending to give a *vakalatnama* to a Pleader, touches the pen of a scribe who makes his mark, satisfies the provisions of O. III, r. 4 of the Civil Procedure Code in executing a valid *vakalatnama* in favour of a Pleader and the presentation of a plaint by the latter is not invalid. **N** GULAM MOHIUDDIN *v.* SHANKAR **79**

——— **O. V, r. 1, O. IX, r. 3** *Date fixed for plaintiff to attend and find out date of hearing - Absence of plaintiff Dismissal for default, legality of - Procedure.*

Where no date has been fixed for the appearance of the defendant within the meaning of O. V, r. 1, of the Civil Procedure Code, the Court has no power to dismiss the suit in default under O. IX, r. 3 of the Code.

When a date is fixed for the plaintiff to attend and find out what date has been fixed for the appearance of the defendant, and the plaintiff fails to attend on that date, the Court ought to fix a date for the appearance of the defendant, and to proceed with the suit under O. IX, r. 3 of the Code, if on the date so fixed the plaintiff fails to put in an appearance. **L** ISHAR SINGH *v.* SHARAF **15**

——— **O. V, r. 17, O. IX, r. 13**—Ex parte *decree, application to set aside—Due service of summons—Burden of proof—Summons delivered to defendant—Acknowledgment, refusal to give—Procedure.*

When a defendant applies to set aside an *ex parte* decree on the ground that the summons was not

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duly served on him, the *onus* is on him to establish the absence of due service.

Where service of summons has been effected by delivering it to the defendant personally, the service is complete, and no irregularity by the process-server or other ministerial officer of the Court such as the omission of the process-server to obtain the signature of the defendant or to affix a copy of the summons to the door of his house will invalidate it.

Per *Foster, J.*—Where a defendant upon whom a summons has been served retains the copy that is put into his hands and refuses to give an acknowledgment, he makes it impossible for the peon to affix that copy to the door of his house, and the requirements of r. 17, of O. V of the Civil Procedure Code are complied with **Pat** NAGISHWAR BUX RAI *v.* BISSESWAR DAYAL SINGH, 2 P L R 58; 3 Pat. 236; (1924) A. 1 R. (Pat) 446; 5 P. L. T. 576 **889**

——— **O. VI, r. 17**—*Amendment—Discretion*

The powers of allowing amendments under the new Civil Procedure Code are much wider than those under the old Code

The discretion that vests in Courts in the matter of allowing amendments of pleadings is always regulated by sound principles of law. It is to be exercised in a judicial manner and an amendment should not be arbitrarily refused

To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief or a new cause of action in the plaint and no prejudice can result to the defendant especially when he has sought the disclosure or discovery. **N.** SITARAM *v.* NANDRAM **234**

——— **O. VI, r. 17** *Amendment of plaint, when to be allowed.*

All amendments of a plaint should be allowed which are intended to shorten litigation and to put the case of the plaintiff more eminently and clearly, if by reason of the plaintiff's case being misconceived in the first instance, it has not been put in proper form. **N.** SHANKAR *v.* MURARJI **510**

——— **O. VI, r. 17**—*Amendment, when allowed—Plaintiff, whether can set up fresh claim—Description of defendant, correction of.*

A plaintiff should not be allowed by amendment to set up fresh claims barred by limitation.

The general rule enacted in O. VI, r. 17, Civil Procedure Code, permitting amendment of pleadings to determine the real questions in controversy between the parties is subject to the limitation that the case tried must be consistent with the case originally laid and that the state of facts and equities and grounds of relief originally alleged and pleaded should not be departed from.

A suit for settlement of partnership accounts was instituted against the firm of P. C. carrying on business by their Managing Partner, P. J. Subsequently, the plaintiff applied for permission to amend the description of the defendant, substituting the description "P. J. carrying on business in the name and style of P. C.":

Held, that it was a case of mere misdescription of the defendant who was on the record and fully aware of the nature of the relief sought and of the *bona fide* mistake made by the plaintiff and that it was a fit case where the plaintiff should be allowed to amend his plaint. **S** DIPCHAND DOWLAT RAM *v.* PARMANAND CHIMANDAS **905**

——— **O. IX, r. 3**—Date fixed for plaintiff to attend and find out date of hearing—Absence of plaintiff—Dismissal for default, legality of—Procedure. *See* CIVIL PROCEDURE CODE, O. V, r. 1 **15**

——— **O. IX, r. 8, O. XVII, rr. 2, 3**—*Suit adjourned for appointment of guardian* ad litem—*Plaintiff, absence of—Dismissal for default, legality of.*

Where a suit is adjourned for the purpose of appointing a guardian *ad litem* for a minor defendant and the plaintiff is absent on the adjourned date of hearing, the Court has no jurisdiction to dismiss the suit in default, as the suit is not ready for disposal and the adjourned date was not fixed for the hearing of the suit. **Pat** BALMAKUND RAM *v.* MADHO PRASHAD, (1924) Pat. 215; 5 P. L. T. 424 **224**

——— **O. IX, rr. 8, 9, 13**—Ex parte *decree, application to set aside, dismissal of, in default—Fresh application, whether maintainable—Application for restoration, whether lies.*

Where an application to set aside an *ex parte* decree is dismissed in default, a fresh application for the same purpose is maintainable.

Order IX, r. 9 of the Civil Procedure Code has no applicability to an application to set aside an *ex parte* decree which is dismissed in default. **A** PITAMBAR LAL *v.* DODER SINGH, 22 A. L. J. 191; 46 A. 319 **358**

——— **O. IX, r. 9**—*Dismissal of suit for default—Restoration, application for—Sufficient cause—Duty of Court—Rules of procedure, object of.*

Where a suit is dismissed in default and an application is made for the restoration of the suit, the Court ought to institute an enquiry into the merits of the application and should not surrender its jurisdiction to the dictation of the defendant.

On a suit being called on for hearing plaintiff's agent after informing the Reader of the Court, went to call Counsel who was present in the compound of the Court, but before the agent or Counsel could return to the Court-room the suit was dismissed for default. On an application for restoration of the suit being made the defendant agreed to the restoration of the suit provided the plaintiff paid Rs. 300 to him. The Court made an order in accordance with the terms proposed by the defendant:

Held, (1) that the suit should not have been dismissed without waiting for plaintiff's agent or Counsel;

(2) that the Court should not have passed the order for restoration at the dictation of the defendant;

(3) that there was sufficient cause for restoration of the suit without imposing any conditions on the plaintiff.

Rules of procedure are not made for the purpose of hindering justice. **O** MANNI LAL *v.* SHEO BARAN, 10 O. & A. L. R. 136; 27 O. C. 103; 11 O. L. J. 412 **157**

——— **O. IX, r. 9**—*Dismissal of suit for default—Restoration—Sufficient cause.*

On a suit being called on for hearing the clerk of the plaintiff's Pleader went to call the latter from the Bar-room. Before the Pleader could reach the Court-room the suit was dismissed in default:

Held, (1) that the Court had acted in a precipitate manner in dismissing the suit without waiting for the plaintiff's Pleader;

(2) that there was sufficient cause for the restoration of the suit. O KARAMAT ALI *v.* HARDWAR PANDE, 11 O. L. J. 243 **123**

——— **O. IX, r. 13**—Ex parte *decree against several defendants- Set aside on application of some—Set aside against all—Revision—Necessary parties.*

An *ex parte* decree passed against a large number of defendants, if set aside on the application of two of them, is set aside against all and, therefore, all of them are necessary parties to a revision petition against the order setting aside the *ex parte* decree. C PROFULLA CHANDRA GHOSE *v.* TARA CHAND **132**

——— **O. IX, r. 13**—*Mortgage—Joint liability of defendants—Mortgage decree passed* ex parte *against some defendants, whether can be set aside against only some defendants.*

The liability of the defendants in a mortgage suit being a joint liability a decree in such a suit, passed *ex parte* against some of the defendants and on contest against the rest, is of such a nature that, under the provisions of O. IX, r. 13, Civil Procedure Code, it cannot be set aside against all the defendants and not only against any particular defendant Pat RAGHUBAR CHOWDHURY *v.* RAMASRAY PRASAD, (1924) Pat. 252 **408**

——— **O. XI, r. 21** *-Order directing discovery—Procedure- Order of dismissal, when should be made.*

The terms of O. XI, r. 21 of the Civil Procedure Code contemplate two orders being made: (1) an order for the answer to the interrogatories or for the discovery or inspection of documents, as the case may be, within a specified time; and (2) upon the failure to comply with such an order, a further order dismissing the suit.

It is desirable that this course should ordinarily be followed and an order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. C JAGANNATH MOTI LAL *v.* BALA PROSAD ARJUNDAS **859**

——— **O. XIII, rr. 1, 2**—*Documents, production of, at late stage—Admission—Discretion of Court.*

Rule 2 of O. XIII of the Civil Procedure Code gives no discretion to the Court to receive documentary evidence at a later stage than that mentioned in the previous rule unless good cause is shown to the satisfaction of the Court for the non-production thereof.

The scope of the rule has sometimes been enlarged by allowing the late production of documents in cases where it is quite obvious that no prejudice would arise to the other party by their late production and where the genuineness of the documents sought to be admitted is beyond all question.

The object of the Legislature in enacting this rule was to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings.

But the mere fact that a document has been in existence for more length of time before proceedings were instituted is not in itself a sufficiently good cause for allowing it to be produced at a late stage of the proceedings Pat TAIBUNNISSA BEGUM *v.* JAGDIP PANDEY, 2 P. L. R. 1; (1924) A. I. R. (Pat.) 517 **489**

——— **O. XVII, rr. 1, 2**—*Adjournment costs—Rejection of application for non-payment, whether valid.*

An application for adjournment granted with a direction to pay costs ought not to be rejected because of the applicant's failure to pay the costs fixed by the Court on the day the order was made. The party should be given sufficient time and opportunity to produce the money as litigants are not expected to come to Court with sufficient money to meet all unforeseen contingencies. C DELARUDDIN HALDAR *v.* DEOLAR BUN MOLLA **125**

——— **O. XVII, rr. 2, 3,** *distinction between—Procedure under r 3—Remedy of aggrieved party—Appeal—Appellate Court, power of.*

No valid distinction can be drawn between action taken under O. XVII, r. 2 of the Civil Procedure Code and action taken under the provisions of O. IX of the Code. Order XVII, r. 2, refers back to O. IX and gives the Court permission to decide the case in one of the ways prescribed by the latter Order.

Order XVII, r 3 of the Civil Procedure Code is, however, different; it does not refer back to O. IX in any way, and a decision given under it is given on the merits. In such a case the remedy of the aggrieved party is by way of an appeal from the decree, and if the Appellate Court finds that the Trial Court was wrong in proceeding under the rule it has jurisdiction to set aside the decree and remand the case to the Trial Court for disposal according to law.

Rule 3 of O. XVII of the Civil Procedure Code applies where two elements combine, *viz.*, (1) the adjournment must have been at the instance of a party, and (2) there must be materials on the record for the Court to proceed to decide the suit. It is immaterial, however, whether the defendant is present or absent. O RAMESHAR DUT SINGH *v.* MAHARAJA JAGJIT SINGH **340**

——— **O. XX, r. 14**—*Limitation Act (IX of 1908), s. 4—Pre-emption decree—Payment of purchase-money, time fixed for—Court closed before expiry of period—Payment on re-opening of Court.*

Where a pre-emption decree directs the payment of the purchase-money within a certain period, but the Court closes for the vacation before the expiry of that period, a payment

made on the day on which the Court re-opens will amount to a compliance with the decree. **A** MUHAMMAD JAN *v.* SHIAM LAL, 22 A. L. J. 110; (1924) A. I. R. (A.) 218; 46 A. 328 **1014**

——— **O. XXI, r. 10**—Execution application—Decree transferred to another Court—Application in the Trial Court. *See* LIMITATION ACT, SCH. I, ART. 182 (5), (6) **241**

——— **O. XXI, 11 (2)**—Omission to mention adjustment in execution application, effect of. *See* CIVIL PROCEDURE CODE, O. XXXII, r. 7 **291**

——— **O. XXI, r. 15**—*Joint mortgage-decree—Execution by one decree-holder—Property purchased by decree-holder, whether for benefit of other decree-holders.*

A mortgage-decree was passed in favour of several co-mortgagees. One of the decree-holders issued out execution of the decree subject to the reservation of the rights of his co-decree-holders, and himself purchased the property of the judgment-debtor setting off the purchase-money against a portion of the decretal amount:

Held, that the purchase must be deemed to have been made for the benefit of all the decree-holders and that the decree-holders other than the purchaser were entitled to recover from the latter their proportionate shares of the property. **A** KHUB CHAND *v.* TODAR MAL **814**

——— **O. XXI, r. 16**—Benamidar—*Right to execute decree.*

A *benami* assignee of a decree for one of the judgment-debtors cannot apply to execute against the other judgment-debtor under the provisions of O. XXI, r. 16 of the Civil Procedure Code. **N** NANHELAL *v.* MANGILAL, 19 N. L. R. 151; (1924) A. I. R. (N.) 41 **372**

——— **O. XXI, r. 16,** *whether mandatory—Assignment of decree—Notice—Judgment-debtor present in Court, effect of—Transmission of order in Council to lower Courts, application for, failure to make, effect of.*

The provisions of O. XXI, r. 16 of the Civil Procedure Code are of a mandatory character and non-compliance with them renders all proceedings in execution void.

Where, however, it is shown that the judgment-debtors had notice of the application by being present when the petition for substitution was being considered by the Court, the mere fact that a written notice was not served on them will not nullify the proceedings.

An application under O. XXI, r. 16 of the Civil Procedure Code made during the pendency of execution proceedings is not an application for fresh execution but an application for the continuation of the pending execution case.

Order XXI, r. 16 of the Civil Procedure Code requires notice of the application for execution, and not of the assignment, to be given to the transferor and the judgment-debtor, and, therefore, where the assignee applies during the pendency of the execution case to continue it, he does not apply for fresh execution and no notice under the rule is necessary. **Pat** BHAGWANTA KOER *v.* ZAMIR AHMED KHAN, 5 P. L. T. 451; (1924) Pat. 221; 2 P. L. R. 249; 3 Pat. 596 **766**

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——— **O. XXI, r. 33 (1)**—*Restitution of conjugal rights, decree for—Direction that wife shall not be imprisoned—Appellate Court, interference by—Imprisonment, object of.*

Where a lower Appellate Court directs under O. XXI, r. 33 (1) of the Civil Procedure Code, a decree for restitution of conjugal rights shall not be enforced by imprisonment of the wife, the High Court will be very slow to interfere with the exercise of the discretion.

Imprisonment, if allowed in such cases, is not a penalty for anything the wife may have done, but a means of forcibly compelling her return to her husband.

The tendency of modern legislation is against sending a woman to Jail in such cases. **A** DHARINEE *v.* PIARI **190**

——— **O. XXI, r. 46 (3)**—*Attachment of debt—Debtor, whether can be ordered to deposit the amount in Court—Procedure.*

The Civil Procedure Code does not empower a Court attaching a debt to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect.

An executing Court is not bound to satisfy itself as to the existence of the debt but it can cause it to be sold or appoint a Receiver with powers to sue the garnishee to recover the debt from him. **N** PANNALAL *v.* BHAGIRATHIBAI, 20 N. L. R. 11; (1924) A. I. R. (N.) 98 **601**

——— **O. XXI, rr. 58, 63**—*Claim proceedings—Title suit—Burden of proof.*

Where a title-suit is instituted after a summary rejection of an objection under O. XXI, r. 58 of the Civil Procedure Code, the *onus* to establish that the transaction on which the suit is based was *bona fide* and for good consideration, lies on the plaintiff.

Where evidence has been adduced by both sides, the question of the burden of proof is of little importance. **N** SARASWATIBAI *v.* YADORAO **887**

——— **O. XXI, r. 66,** *proceedings under, nature of—Decision, whether* res judicata *in subsequent regular suit.*

Proceedings under O. XXI, r. 66 of the Civil Procedure Code are of a non-judicial or *quasi* judicial character and any decision come to in those proceedings cannot operate as *res judicata* on the point raised in a regular suit later on. **A** TOTA RAM *v.* GOURI SHANKAR **582**

——— **O. XXI, r. 66**—*Proclamation of sale—Court fixing order of saleable properties—Appeal whether lies.*

An order directing that properties advertised for sale in a sale proclamation be sold in a particular order is administrative in its character and is not appealable. **M** LANKA RAMAKRISHNA NAIDU *v.* LANKA RAMAKRISHNA NAIDU, 46 M. L. J. 192; 19 L. W. 235; (1924) M. W. N. 220; (1924) A. I. R. (M.) 527 **829**

——— **O. XXI, rr. 66, 90**—*Execution of decree—Sale proclamation, settling of—Notice to judg-*

ment-debtor—Notice affixed to door of house, whether sufficient service—Failure to attend—Objection to valuation, whether can be urged.

Where a judgment-debtor is duly apprised of the date fixed for settling the details of the sale proclamation and he fails to attend, without explanation, he is debarred from urging successfully, in an application to set aside the sale that the value entered in the sale proclamation was inadequate.

Where a notice under O. XXI, r. 66 of the Civil Procedure Code cannot be personally served on the judgment-debtor the affixing it on the door of his house followed by the receipt by the judgment-debtor of a registered notice by post is sufficient service of the notice. **C** DEBI PROSAD BHAKAT *v.* NAGENDRA KUMAR NAG **727**

——— **O. XXI, rr. 68, 90**—*Execution of decree—Sale proclamation, publication of, less than thirty days before sale—Irregularity—Substantial injury, proof of.*

The mere fact that a sale proclamation is published less than thirty days before the date of the sale is a mere irregularity which does not vitiate the sale in the absence of proof that substantial injury has been caused to the judgment-debtor as a result of the irregularity. **N** RAMJI PATEL *v.* KARKAJI **746**

——— **O. XXI, r. 71**—*Contract Act (IX of 1872), s. 230—Auction-sale, parties to—Auction-purchaser's default—Re-sale resulting in deficit—Judgment-debtor, right of—Plea of agency when can be sustained—Interest, whether can be recovered.*

In a Court auction-sale, the auction purchaser is one party to the contract; the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in Court-auction, the Court acts under the statutory powers given to it by the Code and not as the agent of any party and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side and the auction-purchaser whose bid is accepted on the other.

Therefore, where on account of the action of an auction-purchaser in not completing a Court-sale by depositing 25 per cent. of the purchase money a re-sale is ordered and a deficit is caused, O. XXI, r. 71 of the Civil Procedure Code empowers the Court to collect, at the instance of the judgment-debtor, the deficit that has been caused in a summary manner by way of execution.

The defaulting auction-purchaser, however, is not liable for interest on the deficit amount from the date of the sale to the date of the order of the Court directing him to re-pay.

The auction-purchaser at a Court sale is personally liable to the judgment-debtor for the deficit on a re-sale. He cannot plead that he was merely the agent of some other person at the auction.

In such cases before clause (2), of section 230 of the Contract Act can be excluded it must be alleged and proved by the party wishing to take advantage of section 230, clause (1) that when making the bid or before doing so, he has informed the Court or the Court Officer who was acting on behalf of the Court in selling the property, that he was making the bid only as the agent of some named third party. **M** GANGABATTULLA KANTHAMMA *v.* MANCHIRAJU REDDI, 46 M. L. J. 134; (1924) M. W. N. 122; 19 L. W. 197; (1924) A. I. R. (M.) 476; 34 M. L. T. 358 **296**

——— **O. XXI, r. 89**—*Sale in execution, when only can be set aside.*

A sale held in execution of a decree can only be set aside under r. 89 of O. XXI of the Civil Procedure Code when the whole amount specified in sub-rule (1) has been deposited by the applicant within the time stated. **N** NARAYAN *v.* RAMKRISHNAJI **705**

——— **O. XXI, r. 89, Sch. III, Para. 11**—*Collector—Satisfaction of decree—Termination of powers—Deposit of 5 per cent. not made—Auction-sale, whether can be set aside—Auction-sale wrongly set aside by Collector—Private sale by judgment-debtor, validity of.*

The powers of a Collector under Schedule III of the Civil Procedure Code terminates when the decree transferred to him for execution is satisfied and the incompetency under paragraph 11 of the Schedule to transfer the property ceases.

A failure to observe the provisions of O. XXI, r. 89, Civil Procedure Code, is not a mere irregularity and an auction-sale cannot be set aside when the full amount of 5 per cent. of the purchase-money has not been deposited. No allowance has been made by the law for any miscalculation, even though it is based on a wrong information supplied by the Court.

The proceedings for the execution of decrees by a Collector should be regarded, for the purposes of transfers of the property in his hands, as continuing till their final disposal on appeal. So long as such proceedings are liable to revision or appeal, it is open to the Collector to set aside the sale or to order the property to be sold or take such other action as he is empowered to do by the Third Schedule of the Civil Procedure Code. **N** BALLABHDAS *v.* SOBHA SINGH **270**

——— **O. XXI, r. 90**—*Execution of decree—Mortgage-decree—Sale—Order in which properties to be sold, settlement of—Court, duty of—Equities of parties, disregard of—Irregularity.*

In the absence of a direction in the mortgage-bond or in the mortgage-decree specifying the order in which the mortgaged properties are to be sold, the decree-holder is primarily entitled to sell the properties in the order he thinks best, in order to satisfy his decree. But the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties.

Where an executing Court directs the sale of mortgaged properties in execution of a mortgage-decree in a certain order in disregard of the equities affecting the judgment-debtors *inter se*,

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the sale is liable to be set aside on the ground of irregularity in the conduct of the sale. **Pat** RAGHUNATH SAHAI *v.* DAROGA SAHU **609**

——— **O. XXI, r. 90**—*Execution of decree—Sale—Collusive decree against judgment-debtor notified in sale proclamation—Decree set aside after sale—Suit to set aside sale on ground of fraud and collusion, maintainability of—Remedy, proper.*

During the pendency of an execution proceeding when certain property belonging to the judgment-debtor was about to be sold, the latter allowed a collusive decree to be passed against him *ex parte* declaring a prior charge on the property. This decree was notified in the sale proclamation drawn up in the earlier execution proceedings with a rider that the decree-holder objected to the later decree as fraudulent. The notification of the later decree in the sale proclamation deterred possible bidders from coming forward to purchase the property and it was finally knocked down to the judgment-debtor's brother at a low price. The judgment-debtor subsequenty applied to have the later *ex parte* decree set aside, which was granted and the plaintiffs in that suit allowed the suit to be dismissed. The creditors of the judgment-debtor thereupon brought a suit to set aside the auction sale in favour of the judgment-debtor's brother on the ground of fraud and collusion :

Held, (1) that there was no fraud in conducting and publishing the sale and that, therefore, the plaintiffs' proper remedy was not by way of an application under O. XXI, r. 90 of the Civil Procedure Code ;

(2) that the decree in the second suit having been passed and set aside by fraud and collusion the present suit was maintainable and the plaintiffs were entitled to succeed ;

(3) that there must be a re-sale of the property after a proper proclamation. **M** VENKATARAMA AIYAR *v.* PARAMASIVA AIYAR **108**

——— **O. XXI, r. 90**—*Execution of decree—Sale—Property sold only portion of property proclaimed for sale—Irregularity.*

What is sold at an execution-sale can be nothing but the property attached and proclaimed for sale, but an execution-sale is not invalid merely because the property sold is only a portion of the property proclaimed for sale. **Pat** BAIDYANATH SARKAR *v.* PRABHABATI DASI, 5 P. L. T. 443 **315**

——— **O. XXI, r. 90**—*Judgment-debtor should have saleable interest at the time of the Court-sale—Transferees after mortgage not impleaded in mortgage suit, effect of.*

The interest of a judgment-debtor contemplated in O. XXI, r. 90, Civil Procedure Code, is that which he has in the property sold at the time of the sale by the Court.

If a purchaser of the equity of redemption from a mortgagor is not made a party to the mortgage-suit and a decree obtained, it is not binding on him and the purchaser of the mortgaged property at the sale held in execution of the mortgage-decree acquires only the right of the mortgagee. **S** SIND BANK, LD. *v.* AMERSI DYAL **279**

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——— **O. XXI, rr. 90, 92**—*Judgment-debtor, if can dispute sale in suit for possession by decree-holder.*

The provisions of O. XXI, r. 92, Civil Procedure Code, preclude a judgment-debtor from asking the Court, in a suit by the decree-holder for possession, to go into question which affect nothing but the regularity of the sale **C** JAGNESWAR SIKDAR *v.* KAILASH CHANDRA, 28 C. W. N. 821 **126**

——— **O. XXI, rr. 91, 93**—*Execution of decree—Sale—Auction-purchaser, right of, to refund of purchase-money—Suit to recover purchase-money, whether maintainable.*

A suit by an auction-purchaser for recovery of the purchase-money paid by him from persons to whom it has been paid on the ground that the judgment-debtor did not possess a saleable interest in the property sold, is not maintainable, his right to obtain a refund of the purchase-money in such circumstances being entirely the creation of rr. 91 and 93 of O. XXI of the Civil Procedure Code. The only remedy of the auction-purchaser in such a case is to get the sale set aside by the method prescribed by the Code.

An auction-purchaser made an application under O. XXI, r. 91 of the Civil Procedure Code for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. The application was dismissed in appeal and the auction-purchaser was directed to pay into Court the purchase-money which he had withdrawn under the orders of the lower Court. The auction-purchaser thereupon filed a suit for a declaration that he was not bound to re-pay the purchase-money into Court as the judgment-debtor had no saleable interest in the property sold :

Held, that the suit was in effect for a refund of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold, and was, therefore, not maintainable. **L** HATIM MIRZA *v.* BHAGWANA **517**

——— **O. XXI, r. 100**—Execution of decree—Dispossession, objection to—Collector, whether Court. *See* LIMITATION ACT, s. 14 **580**

——— **O. XXII**, *scope of—Dead man made respondent—Legal representatives, whether can be brought on record—Person already on record in his own right—Memorandum of appeal, amendment of.*

Order XXII of the Civil Procedure Code applies only to the death of a party to a suit or appeal. When, therefore, a dead man is made a respondent to an appeal the Court has no jurisdiction to allow the names of his legal representatives to be substituted.

When a memorandum of appeal is sought to be amended so as to make a person already on record a party not only in his own right but also as a legal representative of another person, an addition is merely made to his description and no prejudice to him arises under section 22 of the Limitation Act. **S** MANAGER, ENCUMBERED ESTATES IN SIND *v.* THARUMAL **569**

——— **O. XXII, r. 3**—*Death of plaintiff after preliminary decree—Legal representative not brough*

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on record—Abatement—Subsequent application to pass final decree.

Where after the passing of a preliminary decree, the plaintiff dies and his legal representative does not bring himself on the record within the time prescribed, the suit abates and after such abatement, an application to pass a final decree if not made within the time provided by law is time-barred.

A suit in which a preliminary decree is passed continues till the stage of final decree is reached. **M** NATESA *v.* KANNAMMAL, 19 L. W. 173; 46 M. L. J. 181; (1924) M. W. N. 216 **64**

——— **O. XXII, r. 3**—*Interlocutory order—Appeal—Names substituted in appeal from interlocutory order, effect of.*

The introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages even if it be made in appeal from a mere interlocutory order. **Pat** GOBIND SAHU *v.* ZAFAR KARIM **436**

——— **O. XXII, rr. 3, 9 (2)**—*Abatement—Substitution made after time without objection—Opportunity, if to be given to set aside abatement.*

Where, during the pending of an application under O. XXI, r. 90, Civil Procedure Code, the applicant having died, and his heirs were not substituted till after the expiry of time allowed by law without any objection from the opposite party and on appeal the District Judge held that the substitution was incompetent by reason of abatement having taken place under O. XXII, r. 3, Civil Procedure Code, which abatement was not set aside in accordance with O XXII, r. 9 (2), Civil Procedure Code:

Held, that the order of the District Judge was right in law but that, by reason of the application for substitution having been readily allowed and no objection having been taken at any stage of the proceeding, the order of the District Judge unjustly deprived the petitioner of an opportunity to make an application under O. XXII, r. 9 (2) and had left him altogether without any remedy. **C** SATISH CHANDRA BHATTACHARJEE *v.* SRI JOGUNNESSA BIBI **958**

——— **O. XXII, r. 9**, *applicability of—Death of one of several defendants—Abatement* in toto—*Application to set aside abatement, maintainability of—Appeal, whether lies.*

Order XXII, rule 9 (2), of the Civil Procedure Code is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representatives of the deceased party, and has no application to cases in which the suit abates on account of some other cause, *e. g.*, when the Court holds that the right to sue does not survive or that the death of one of several defendants causes an abatement *in toto*. In the latter case the order of the Court is a decree and as such is appealable. **L** THE GENERAL TRADING CO., KAHUTA *v.* NIHAL SINGH **22**

——— **O. XXIII, r. 1**—Withdrawal of suit—Formal defect—Failure to give evidence—Discretion of Court. *See* CIVIL PROCEDURE CODE, s. 115 **121**

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——— **O. XXIII, r. 1**—*Withdrawal of suit—Leave to bring fresh suit, whether must be given expressly.*

There is nothing in r. 1 of O. XXIII of the Civil Procedure Code requiring that leave to bring a fresh suit should be given expressly. It may be given impliedly without being recorded. **N** SAVITRI *v.* MADHORAO **772**

——— **O. XXIII, r. 3**—*Adjustment of suit—Agreement, executory, whether adjustment.*

A decree cannot be passed in accordance with an adjustment which depends upon a future contingency which may or may not happen.

An agreement between the parties to a suit that if the plaintiff eats food cooked by a particular person the whole suit may be decreed, is merely executory and does not amount to an adjustment of the suit within the meaning of O. XXIII, r. 3 of the Civil Procedure Code. **O** GOURI SHANKAR *v.* BAKSI DUBE, 10 O. & A. L. R. 140; 11 O. L. J 306 **540**

- - - - - - - **O. XXIII, r. 3**—Compromise of appeal out of Court—Appeal dismissed—Help of Court. *See* CIVIL PROCEDURE CODE, s. 151 **72**

——— **O. XXIII, r. 3**—*Compromise decree—Unlawful terms—Execution.*

The inclusion of an invalid or illegal provision in a decree does not validate it and so far as a decree embodies unlawful terms of a compromise it is inoperative and cannot be enforced. Therefore, a consent decree directing the sale of trees which stand on agricultural land and cannot be sold apart from the land cannot be executed. **N** PARASHRAM *v.* SITARAM, 20 N L. R. 1; (1924) A. I. R. (N.) 84 **357**

——— **O. XXVI, r. 4**—*Defendant residing beyond Court's jurisdiction, examination of—Refusal of Court to issue commission—High Court, whether can interfere—Revision.*

In a suit brought in a Court at Ramnad, the defendant applied for a commission to examine himself as his own witness. It appeared that he had been residing in Rangoon with his family for many years and was served with summons there. It appeared, further, that the plaintiff himself was a resident of Rangoon and was examined on commission there. The Court having refused to issue the commission, the defendant applied to the High Court in revision:

Held, (1) that in these circumstances the defendant should have been allowed to be examined on commission,

(2) that in refusing to examine defendant on commission in the circumstances of this case the Court had acted with material irregularity and it was open to the High Court to interfere in revision. **M** VISVANATHAN CHETTY *v.* SOMASUNDARAM CHETTY, 46 M. L. J. 131; (1924) M. W. N. 191, (1924) A. I. R. (M.) 541 **407**

——— **O. XXXII, rr. 3, 4**—*Minor defendant—Guardian* ad litem, *appointment of—Irregularity, effect of.*

Where a minor is properly a party to a suit, that is to say, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such

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jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian as laid down in rr. 3 and 4 of O. XXXII of the Civil Procedure Code.

It was proposed to appoint the fathers of certain minor defendants as their guardians *ad litem* and notice of this was given to the minors and their fathers. The latter did not consent to act as guardians and the Court without any further notice appointed a Pleader as guardian *ad litem* to the minor defendants As the Pleader was unable to get any instructions from the minors the suit was decreed *ex parte*:

Held, that in the absence of prejudice to the minors it could not be held that the appointment of the Pleader as guardian *ad litem* was invalid for want of notice to the minors. **Pat** PRITAM RAM *v.* DHARU RAM, (1924) Pat. 216 **613**

——— **O. XXXII, r. 5** - *Guardian* ad litem, *appointment of, whether lapses*

When a guardian *ad litem* has once been appointed his appointment enures for the whole of *lis* in the course of which it has been made unless and until it is revoked by the Court **N** ABDUL HUSAIN *v.* MEGHRAJ, 7 N. L. J 110 **780**

——— **O. XXXII, r. 7** -Agreement to refer to arbitration, whether agreement within the meaning of O. XXXII, r. 7 *See* CIVIL PROCEDURE CODE, SCH II ARBITRATION **335**

——— **O. XXXII, r. 7, O. XXI, r. 11 (2)** - *Minor decree-holder Execution proceedings—Compromise by next friend or guardian- Managing member or father—Adjustment of decree by Collector without sanction of Court Adjustment, whether voidable or void -Omission to mention adjustment in execution application, effect of— Application to Collector regarding adjustment not signed by all decree-holders, validity of - Powers of Collector to record adjustment*

The provisions of r. 7 of O. XXXII of the Civil Procedure Code apply to proceedings in execution, and the next friend or guardian of a minor cannot, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, even if he happens to be the father of the minor, or the managing member of the family.

An adjustment of a decree by a Collector is voidable at the option of a minor, under r. 7 of O. XXXII if it has not been sanctioned by the Court.

Till it is avoided it is a subsisting adjustment and the decree-holder is bound to mention it in the application for execution under clause (*e*) of rule 11 (2) of O. XXI. An omission to mention such an adjustment vitiates the application and it is not in accordance with law.

It is not necessary that an application to the Collector for certifying an adjustment of a decree should be signed by all the decree-holders nor is it necessary that there should be any written application at all.

The Collector is invested with powers of recording the adjustment of a decree. **N** PERABAI *v.* BHAWANI PRASHAD **291**

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——— **O. XXXIV, r. 4**—*Mortgage-decree— Sale, order of—Court, power of, to direct order of sale.*

Ordinarily, the right of selling mortgaged properties in execution of a mortgage-decree in a particular order rests with the decree-holder and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realisation of his mortgage-debt. But the Court can, in the particular circumstances of a case and in view of the equities arising in favour of the various parties, apart altogether from any question of marshalling, direct, under O. XXXIV, r 4 of the Civil Procedure Code, the order in which the properties should be sold. **Pat** RAJKESHWAR PRASHAD NARAIN SINGH *v.* MUHAMMAD KHALIL-UL-RAHMAN, 5 P. L T. 223; 3 Pat. 522; (1924) A I. R (Pat) 459 **796**

——— **O. XXXIV, r. 14,** *object of.*

The object of O. XXXIV, r 14 of the Civil Procedure Code is to prevent mortgagees from suing their mortgagors on the mortgage-debt as such, and in execution selling the bare equity of redemption, thereby depriving the mortgagor of the right of redemption that would be given to him by the decree for sale. **S** MURAD *v.* DAYARAM **49**

——— **O. XXXVII, r. 3,** *scope of -Leave to defend, when given--Defendant, duty of—Conditional leave.*

The question to be considered on an application under O. XXXVII, r 3 of the Civil Procedure Code is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. It is not enough for the defendant to say that he has got a good defence but he must say what the defence is, and, as a rule, bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend.

Where there is a triable issue, leave to defend must ordinarily be given unconditionally. It is only in exceptional cases that the exception of O XXXVII comes into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence, and where there is one, effect must be given to that fact and leave to defend should be granted, and it should be made conditional only in cases, where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in order to obtain further time.

When the defendant sets up some sort of defence which does not bear the stamp of truth as, for instance, when it is contradicted by documents, the Court may make the leave to put that defence conditional on the defendant being prepared to give security for the amount claimed. **M** PERIYA MIYANA MARAKAYAR AND SONS *v.* SUBRAMANIA IYER, 46 M. L. J. 255; 19 L. W. 342; (1924) M. W. N. 240; (1924) A. I. R. (M.) 612 **505**

——— **O. XXXIX, rr. 1, 2**—Injunction staying suit pending in another Court—Declaratory suit, *See* CIVIL PROCEDURE CODE, s. 151 **802**

——— **O. XL, r. 1, O. XLIII, r. 1 (s)**—*Receiver, appointment of—Objection, dismissal of—Objector not party to suit—Appeal, whether lies.*

An order dismissing an objection to the appointment of a Receiver of property, the objector not being a party to the suit, falls under O. XL, r. 1 of the Civil Procedure Code, and is appealable at the instance of the objector under O. XLIII, r. 1 (*s*) of the Code. **N** RAMSWARUP *v.* RAGHUNANDAN **1031**

——— **O. XL, rr. 1, 4**—*"Person," meaning of—Order refusing to remove Receiver—Appeal, whether competent.*

An order refusing to remove a Receiver already appointed does not come either under r. 4 or r. 1 of O. XL and is not appealable. The "person" in cl. (*b*) of O. XL, r. 1 refers to a person other than a Receiver. **M** RAMASWAMI NAIDU *v.* AYYALU NAIDU, 46 M. L. J. 196; 19 L. W. 247; 34 M. L. T. 6; (1924) A. I. R. (M.) 614 **625**

——— **O. XLI, r. 1**—*Appeal, whether can be preferred without decree—Copy, application for, when to be made.*

A memorandum of appeal is not a good memorandum in law unless it is accompanied by a copy of the decree appealed against. The Appellate Court cannot dispense with a copy of the decree and a copy of the judgment only is not sufficient.

The right of appeal, therefore, does not come into play until a proper decree comes into existence.

Where a Court writes a judgment which should be followed by a decree but fails to draw up such decree, the remedy of the party who wants the decree for the purpose of appeal or execution, is to apply for it, and if it is refused, to move the High Court in revision. But until the decree has been drawn there can be neither appeal nor execution. **N** PANDU *v.* RAJESHWAR **996**

——— **O. XLI, r. 1**—*Decrees, two, in one suit—Appeal, single, whether competent.*

Where separate appeals preferred by two sets of defendants were accepted, and the plaintiff filed only one second appeal against the appellate decree but impleaded both sets of defendants as respondents to the appeal:

Held, that the second appeal was maintainable and that the failure to prefer two separate appeals was only a technical defect which could be overlooked, especially in view of the fact that both sets of defendants had been impleaded as respondents. **A** BIJAI BAHADUR *v.* PARMESHWARI RAM **1026**

——— **O. XLI, rr. 17, 19**—Appeal—Dismissal for default—Restoration—Remedy—Inherent power of Court, when to be exercised. *See* CIVIL PROCEDURE CODE, s. 151 **416**

——— **O. XLI, r. 22**—*Appeal, withdrawal of, effect of—Cross-objections, after withdrawal, whether competent.*

The dismissal of an appeal on withdrawal has the effect of a decision on the merits. It leaves the finding of the Trial Court final against the appellant and the rule of *res judicata* applies.

Rule 22 of O. XLI of the Civil Procedure Code allows a respondent to take a cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him.

The expression "cross-objections" in r. 22 of O. XLI of the Civil Procedure Code implies that the objections are taken in answer to a pending appeal. Cross-objections cannot be filed where the appeal has been withdrawn. **A** PARBHU DAYAL *v.* MURLI DHAR, 22 A. L. J. 365; 10 O. & A. L. R. 528 **677**

——— **O. XLI, r. 22**—*Cross-appeals—Cross-objection, whether can be filed in connection with cross-appeal.*

A party who has filed an appeal from one part of a decree can file a cross-objection in regard to another part of the decree in connection with a cross-appeal filed by the other party. **A** KANHAIYA LAL *v.* AZMATUNNISA **877**

——— **O. XLI, r. 25.**

When the finding and evidence upon an issue of fact remanded by the High Court in second appeal under O. XLI, r. 25 of the Civil Procedure Code are returned to the High Court, the finding is conclusive and cannot be challenged on the evidence before the High Court as in the case of a first appeal. **L** RAM MEHR *v.* PALI RAM, 6 L. L. J. 145; (1924) A. I. R. (L.) 455 **404**

——— **O. XLV, r. 15**, *whether mandatory.*

The provisions of r. 15 of O. XLV of the Civil Procedure Code are mandatory and failure to comply with them renders an application for execution liable to dismissal. **Pat** BHAGWANTA KOER *v.* ZAMIR AHMED KHAN, 5 P. L. T. 451; (1924) Pat. 221; 2 P. L. R. 249; 3 Pat. 596 **766**

——— **O. XLVII, and O. XXXVI, r. 14**—*Mortgage suit—Consent decree for instalments, whether final decree—Charge created on mortgaged property.*

In a suit based on a mortgage-bond a consent decree was passed against the heirs of the deceased mortgagor, the decretal amount being made payable by instalments with a charge on the mortgaged property, the personal liability of the judgment-debtors being excluded and property other than the mortgaged property being exempted from liability. It was contended in execution proceedings that this was not a final decree and, further, that it was only a declaratory decree and as such was not capable of execution:

Held, that the decree was a final decree; that the judgment-creditor had the right to bring the property charged to sale in execution proceedings and that no separate suit for the sale of the property was necessary. **S** MURAD *v.* DAYARAM **49**

——— **O. XLVII, r. 1**—Execution of decree—Dismissal for default—Restoration, application for—Review—Appeal, whether lies. *See* CIVIL PROCEDURE CODE, s. 151 **816**

——— **O. XLVII, r. 1**—*Review—Error of Law, whether sufficient ground.*

A Court is not competent to review its judgment which is erroneous on a point of law in view of the exposition of law on the subject by

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a superior Tribunal subsequent to the delivery of the judgment sought to be reviewed. **S** SALLEH MAHOMED UMOR DOSSAL *v.* NATHUMAL KISSAMAL **993**

——— **O. XLVII, r. 7 (1) (c)** — *Limitation Act (IX of 1908), s. 5, Sch. I, Art. 173—Review—Discovery of fresh evidence—Extension of limitation—Sufficient cause—Evidence discovered late.*

Where a review is sought on the ground of discovery of fresh evidence, the fact that the evidence was discovered very late and could not, in spite of the exercise of due diligence, have been discovered earlier, may be a good ground for extending the period of limitation for applying for review under section 5 of the Limitation Act. **N** INDRARAJBHAU *v.* SITARAM **527**

——— **Sch. II**—*Arbitration—Award not submitted within time—Fresh date fixed—Award, whether valid—Agreement to refer to arbitration, whether agreement within the meaning of O. XXXII, r. 7.*

Where under a reference to arbitration made by a Court, the arbitrators do not submit their award within the time fixed by the Court and the Court fixes a date for hearing and, at the same time, issues *Takid* to the arbitrators, the Court's order will be taken as an order for extending the time for filing the award and the award filed before the date thus fixed shall be taken to be filed in time.

Per *Page, J.*—In a suit one of the parties to which is a minor represented by a guardian, if the party to the suit apply to the Court for an order of reference to arbitration the Court in hearing the application for such an order has jurisdiction to consider a petition under O. XXXII, r. 7, Civil Procedure Code. But whether it does or does not consider such application and passes the order of refusal, its order will stand and no question can arise thereafter, as to the regularity of the proceedings preliminary to the order of reference and the arbitrators get jurisdiction to proceed with and to complete the arbitration notwithstanding the fact that a petition has not been preferred under O. XXXII, r. 7, Civil Procedure Code.

Per *Suhrawardy, J.*—An agreement to refer to arbitration is not such an agreement as is contemplated by O. XXXII, r. 7, Civil Procedure Code. But even if it is, where it is entered into without the leave of the Court and the Court overrules an objection against its invalidity, it does not commit such an irregular exercise of jurisdiction as would justify interference in revision. **C** DEBIR-UD-DIN *v.* AMINA BIBI **335**

——— **Sch. II, para. 1 (2)**—*Reference to arbitration with verbal consent of parties—Estoppel by conduct—Dispute in appeal referred to arbitration—Arbitrator's power to take or refuse additional evidence—Award—Appeal.*

The expression "application shall be in writing" in paragraph 1, clause (2) of the Second Schedule, Civil Procedure Code, is not merely directory.

Where with the verbal consent of parties the Judge of an Appellate Court referred the matter in dispute between the parties to arbitration, the parties accepted the reference, signed their names on the order-sheet of the Court, attended the arbitration proceedings, produced certain documentary evidence and the arbitrator gave his award:

Held, that the parties were estopped from impeaching the legality of the award on the ground that the original reference was not in writting.

Where a dispute pending in appeal is referred to arbitration the arbitrator has power to decide whether he should accept additional evidence or not.

An arbitrator is a judge of all matters whether of fact or of law and a Court hearing objection against an award is not a Court of Appeal sitting in judgment over the award. **O** MIRZA MUHAMMAD HASAN BEG *v.* MIRZA SHAKIR BEG, 10 O. & A. L. R. 55; 11 O. L. J. 142 **378**

——— **Sch. II, para. 12**—*Accounts, suit for—Arbitration—Larger sum awarded than mentioned in plaint—Court's power to modify such award—Officer of Court appointed arbitrator—Powers of, and award by, such arbitrator—Award, finality of.*

The mere fact that an arbitrator is an officer of the Court does not affect his power or its exercise, nor does it justify his award to be scrutinized to a greater extent than the award of an independent person.

Where no misconduct of the arbitrator is proved the award is final, and the Courts cannot set it aside except for a patent error apparent on the very face of the award as made.

An award in a suit for accounts cannot be modified by the Court on the ground that the arbitrator has awarded a larger amount than that mentioned in the plaint. **S** JAN MAHOMED *v.* MUKHI GAZI **60**

——— **paras. 14, 15**—*Arbitration without intervention of Court—Award—Arithmetical error—Amendment—Remission to arbitrator for re-consideration—Power of Court.*

A private award cannot be amended by the Court on the ground that the arbitrator has made an arithmetical mistake in arriving at the sum due by one party to the other, nor has the Court power to remit such an award to the arbitrator for re-consideration. **L** RIAZ-UD-DIN *v.* SHUJA-UD-DIN **1042**

——— **para. 14 (c)**—*Arbitration—Hindu Law — Partition — Jeshtabhagam — Extra sum allowed to one party—Illegality.*

A dispute as to partition between Hindu brothers was referred to arbitration. The arbitrator allowed the eldest brother a certain sum of money in excess of his share in consideration of his having to look after and educate his younger brother for many years. He called this sum *jeshtabhagam*:

Held, (1) that the sum awarded to the eldest brother could not be described as "*jeshtabhagam*" under the Hindu Law;

(2) that the award was not illegal within the meaning of paragraph 14 (*c*) of Schedule II to

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the Civil Procedure Code. **M** VATHIANATHA AIYAR *v.* SUBRAMANIA AIYAR 238

——— **Sch. III, para. 11.** *See* CIVIL PROCEDURE CODE, O. XXI, r. 89 270

——— **para. 11**—*Sale, whether void.*

A sale in contravention of the provisions of para. 11, Sch. III, Civil Procedure Code, is void. But if both the vendor and the vendee had arranged it in ignorance of the law, the latter is entitled to demand a refund of the price paid by him. **N** NARAYAN *v.* MOTISA, 20 N. L. R. 87 343

Companies Act (VI of 1882), s. 4—"*Person*," *meaning of.*

The word "person" in section 4 of the Companies Act can be used to include a collection of people, *e.g.*, an association of individuals known as a joint Hindu family or beneficiaries interested beneficially in property vested in a trustee. Therefore, a person who holds shares in a Company personally as well as a trustee for a number of beneficiaries or as a guardian for a minor is to be counted as one individual person. **A** MOTIRAM *v.* KUNWAR MUHAMMAD ABDUL JALIL KHAN, 22 A. L. J. 487; (1924) A. I. R. (A.) 414 441

Construction of deed—Mortgage by conditional sale—Transfer—Agreement to reconvey. *See* TRANSFER OF PROPERTY ACT, s. 58 (*c*) 426

——— *Sale certificate—Conflicting descriptions—Decree, whether may be referred to.*

Where there are two descriptions of the property sold in the sale certificate which cannot be reconciled with each other, it is open to the Court to look at the decree in the suit and to determine which of the descriptions really governs the sale. **A** MUKHTAR AHMAD *v.* KABIR AHMAD 666

Construction of document. *See* APPEAL, SECOND 36

——— Will or gift. *See* WILL 156

——— *Award—Oral evidence, when admissible—Decree passed on award—Executing Court, whether can modify terms of award.*

Where the words used in an award are perfectly clear oral evidence cannot be admitted as to their meaning. Such evidence can only be given where the words are ambiguous or are capable of more interpretations than one.

An award is not a compromise or a contract, and a Court executing a decree passed on an award has no power to modify the terms of the award. **L** KESHO RAM *v.* THAKUR DAS 80

——— Lease *bila miad*, whether perpetual. *See* TRANSFER OF PROPERTY ACT, s. 91 (*a*) 47

——— "*Months*," *meaning of.*

The principle of the English Common Law that the term "months" used in a contract means lunar months, is not applicable to contracts in the vernacular. On the contrary, even when lunar months are mentioned in a vernacular contract, the time is to be calculated by reference to calendar months. **N** HARBHAGAT *v.* NARAYANANRAO 338

——— Mortgage or sale—Test—Precedents, value of. *See* TRANSFER OF PROPERTY ACT, s. 58 (*c*) 547

——— Sale of goods—Condition precedent—Seller bound to give notice after taking delivery of goods—Failure to give notice, effect of. *See* SALE OF GOODS 326

——— *Sale of land with definite boundaries—Sale-deed mentioning smaller area—Rule of interpretation.*

Ordinarily, when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. **M** SUBBAYYA CHAKILIYAN *v.* MANIAM MUTTIAH GOUNDAN, 46 M. L. J. 182; 19 L. W. 245; (1924) M. W. N. 203; (1924) A. I. R. (M) 493 414

——— Sale—Mortgage by conditional sale—Option of re-purchase, whether immoveable property. *See* PRE-EMPTION 171

Construction of Statute.

For the purpose of construing an Act a Court may refer to the statement of objects and reasons. **N** MEGHRAJ *v.* RAMGOPAL, 20 N. L. R. 103 743

Contract Act (IX of 1872), s. 2 *Receipt—Want of consideration—Agreement—Validity.*

A receipt is merely evidence of a fact and is not an agreement requiring consideration to make it a valid contract. **N** SALE MUHAMMAD *v.* RAMRATAN TIWARI 1015

——— **s. 16**—*Undue influence—Unconscionable bargain—Domination of will of borrower—Exorbitant rate of interest—Urgent need of borrower.*

A borrower is not entitled to any relief unless he proves, first, that the lender was in a position to dominate his will, and, secondly, that the bargain was unconscionable within the meaning of clause (3) of section 16 of the Contract Act. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower.

Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act.

The mere fact that the rate of interest is exorbitant is no ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower. **Pat** DEBI BAKCHAND *v.* BARAKATUNISSA 565

——— **s. 24**—Lambardari Huq, *transfer of, whether illegal—Consideration partly illegal—Legality of entire contract.*

Section 24 of the Contract Act applies where the whole contract is one and the legal part cannot be separated from the illegal, otherwise the legal part can be enforced.

A suit on a bond which formed a part of consideration for the sale of 2 annas *malguzari* and *lambardari* rights cannot be maintained as it is covered by section 24 of the Contract Act. **N** CHOONI LAL *v.* NANI SINGH 278

——— **s. 30**—*Wagering contract—Agreement not to make or demand delivery—Burden of proof.*

If a person makes a bet and, in order to protect himself against a refusal by the other person to pay him if he wins, takes great care to clothe the transaction with the appearance of a

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valid contract and to create evidence to that effect, it is not easy for him, if he loses, to remove that clothing and rebut that evidence, and he cannot succeed unless he puts forward evidence to the contrary which is stronger than that which he deliberately created.

In order to establish that a contract is one of wagering it is not sufficient for the defendant to show that neither party intended or contemplated that there should be any delivery of goods; he must show that there was an agreement that neither party would have the right to make or demand delivery. **N** KUNDAN LAL *v.* QADIR AHMAD ALI . **966**

——— **ss. 38, 50** *Transfer of Property Act (IV of 1882), s. 130—Mortgage in favour of two persons—Assignment of interest by one in favour of the other—Payments by mortgagor after surrender—Suit by assignee against mortgagor—Relief for damages against assignor co-mortgagee Debtor of joint family Separation—Knowledge—Payment to one member Discharge—Assignment of mortgage—Notice to mortgagor, whether necessary—Payments after assignment without notice Discharge, whether can be claimed in suit against mortgagor.*

If a mortgagee, after assigning his interest in favour of his co-mortgagee, receives any payment from the mortgagor and appropriates the same, the assignee of his interest is entitled to join him as defendant and to ask relief against him in the alternative in a suit against the mortgagors and the Courts are competent to grant, in order to avoid multiplicity of suits, relief against him, if facts are found against him.

In the case of a debtor to a joint family, in the absence of any evidence to fix him with the knowledge that the joint family has been disrupted, he will be legally justified in believing in the continuance of the self same jointness or common unity of interest between the members of the representatives for the purpose of granting him discharge for payments as existed before.

A mortgage of immoveable property is excluded from the definition of actionable claim.

Section 130 of the Transfer of Property Act does not intend or purport to lay down any mode of transfer for making an assignment, much less does it declare the assignments of mortgage effective or ineffective for compliance or non-compliance with the requirements of that section. It does not also render invalid any dealing by the mortgagor, having no notice of the assignment, with the original mortgagee after the date of the assignment. All such questions arising out of assignment are left out for treatment under the general law relating to contracts, transfers, estoppel and other laws including the personal law of the parties.

The assignee of a mortgage is bound to serve a notice of the assignment on the mortgagor and in a suit by the assignee of a mortgage, the mortgagor is entitled to credit for the re-payments he may have made to the original mortgagee after the assignment but without notice of the transfer, provided that there is no collusion. **N** BASANTRAO *v.* NARAYAN **127**

——— **s. 46**—*Mortgage—Amount left with mortgagee to pay off creditors of mortgagor—Period within which payment must be made—Reasonable time—Failure to make payment, effect of—Mortgagee, whether entitled to possession.*

Where a portion of the consideration of a mortgage is left with the mortgagee in order to pay off the mortgagor's debts, and no time is fixed for the payment of the debts, the payment must be made within a reasonable time. Where it was found that the object of the mortgagor in executing the mortgage was to consolidate his debts and to prevent interest running at a high rate and the major portion of the consideration for the mortgage was left with the mortgagee to pay off those debts:

Held, (1) that the mortgagee was bound to pay off the debts as soon as possible;

(2) that the debts not having been paid off by the mortgagee within a reasonable time he was guilty of a breach of the mortgage contract and was not entitled to possession of the mortgaged property under the terms of the mortgage-deeds;

(3) that his security was, however, good to the extent of the amount actually advanced by him. **O** COLLECTOR SINGH *v.* MADARI LAL **738**

——— **s. 56**—*Performance of contract—Impossibility due to default of party, whether excuses non-performance.*

Section 56 of the Contract Act has no application to a case where the impossibility, if any, is due to the default of the contracting party himself. **Pat** BANARSI PRASAD *v.* MOMI-UD-DIN AHMED, 3 Pat. 581 **723**

——— **s. 61**—*Appropriation of payments, absence of, effect of.*

Under section 61 of the Contract Act where neither party makes any appropriation, payments made by a debtor must be applied in the discharge of debts in order of time. **Pat** AMRIT PAIYAR BILAT MANDAL *v.* SUNDAR RAM RAMLAL RAM **910**

——— **s. 65**—Sale in contravention of law—Refund — Parties *in pari delicto*. *See* EQUITY **343**

——— **s. 68**—*"Necessaries"—A mixed question of law and fact.*

The question of what are "necessaries" within the meaning of section 68 of the Contract Act is not a pure question of law but is a mixed question of law and fact and as such cannot be allowed to be raised for the first time in second appeal when it has no foundation in the pleadings. **N** TULSIRAM *v.* ANUSUYA **360**

——— **ss. 69, 70**—*Person in possession under invalid title—Mortgage paid off—Payment, whether can be recovered from true owner—Subrogation.*

Where a person *bona fide* believing himself to have a claim to property pays off charges on that property, he is entitled to recover the amount paid by him from the true owners of the property, who ultimately get the benefit of the payment, under sections 69 and 70 of the

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Contract Act. A purchaser of land who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off, on the principle of subrogation. **N** THAKURSA *v.* BEHARI, (1923) A. I. R. (N.) 301 **177**

——— **s. 72**—*Money paid by mistake—Consideration, absence of—Refund.*

Plaintiff authorised a broker to purchase a particular property for him and paid a certain sum of money to the broker as earnest-money to be paid to the vendor. The broker made a contract in respect of an entirely different property with a different vendor and paid the earnest-money to the latter who received it in good faith. On discovering the mistake plaintiff sued to recover the money from the vendor to whom it had been paid by the broker:

Held, that the case was covered by section 72 of the Contract Act and the defendant was bound to re-pay the money to the plaintiff. **S** NARUMAL WATOOMAL *v.* YUSIFALLY NOORDIN **794**

——— **s. 73**—Breach of contract to sell land—Damages, measure of. *See* TRANSFER OF PROPERTY ACT, s. 6 (*e*) **87**

——— **s. 107**—*Re-sale—Notice, burden of proof—General rule of law, applicability, whether limited.*

The giving of notice is a condition precedent to the lawful exercise of the power of re-sale given by section 107 of the Contract Act and it is for the person exercising the power under the section to plead and prove that the notice was given and the condition precedent fulfilled. It is not enough to say that the purchaser has suffered no loss on account of the re-sale, inasmuch as where the Legislature enacts a general rule its operation cannot be governed by such considerations as whether looking to the reasons which led the Legislature to enact it, it is necessary to apply the rule or not in particular cases. The rule is expressed in unambiguous language and applied in every case where the facts to which it is intended to apply exist. **N** NARAINDAS *v.* KUNJILAL **1026**

——— **s. 118**—*Contract for sale of goods—Warranty of quality, breach of—Failure to reject within reasonable time—Remedy—Compensation for damage.*

The plaintiff agreed to sell goods to the defendant at Rs. 16-2-0 a bundle describing them as those he had purchased from R. N. & Co., who were buying the same from certain Mills at Rs. 14 a bundle. Some of the goods delivered by the plaintiff in pursuance of the contract were purchased by R. N. & Co. from the Mills at Rs. 9-12-0 but were of the same quality and description as those purchased at Rs. 14. The defendants received the goods at their godown and three months thereafter rejected the goods. In a suit by the plaintiff to recover the purchase-money:

Held, (1) that the contract being in respect of bales sold at Rs. 14 and the goods delivered being those sold at Rs. 9-8-0, there was a breach of the condition of the contract;

(2) but that the defendants having accepted the goods and not having rejected them within a "reasonable time" they were entitled under section 118 of the Contract Act only to claim compensation for damages caused by the breach of warranty of title;

(3), that, however, as the goods delivered were in texture and quantity the same as the goods contracted for the damage caused was *nil* and the plaintiff was, therefore, entitled in full to the purchase-money claimed. **M.** RAMUDU AYYAR *v.* RAMAYYAR **1051**

——— **s. 213**—*Principal and agent—Principal, whether bound to keep account—Accounts, suit for, when maintainable.*

Under section 213 of the Contract Act an agent is under statutory obligation to render accounts to his principal but the principal is under no counter-statutory obligation of the same nature towards the agent. Where no duty is cast upon the defendant under the law to keep an account, the plaintiff cannot demand an account from him merely on the ground that the defendant has, as a matter of fact, kept an account.

The right to claim a statement of account is an unusual form of relief only granted in certain specific cases and can only be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. **L** GHULAM QUTAB-UD-DIN KHAN *v.* FAIZ BAKHSH **959**

——— **s. 230**—Auction-purchaser—Re-sale on default to deposit—Plea of agency, when can be sustained. *See* CIVIL PROCEDURE CODE, O. XXI, R. 71 **296**

——— **s. 253**—Death of a partner. *See* LIMITATION ACT, SCH. I, ART. 106 **198**

Co-owners—*Agreement to sell shares only to co-owners, whether applies to involuntary alienations.*

An agreement between co-owners of a property not to sell or mortgage their shares in the property to anybody except the other co-owners does not apply to involuntary alienations, *e. g.*, sales in execution of decrees. **C** SATISH CHANDRA DE *v.* GAGAN CHANDRA RUDRA **802**

Co-sharers—*Decree for joint possession—Possession disturbed—Fresh suit for joint possession, whether maintainable—Co-sharer in exclusive possession of some land—Claim for joint possession of other land, whether can be allowed.*

If the joint possession obtained under a previous decree is disturbed, a suit may be filed for its restoration.

The circumstance that one of the co-sharers is in exclusive possession of certain home farm land which is recorded as his *sir* at the Settlement is a good ground for not awarding joint possession of the land in dispute. **N** JUGAN *v.* AMANSINGH **390**

Co-sharer landlords—*Occupancy holding, non-transferable, transfer of, to co-sharer landlord—Purchaser, position of—Ejectment.*

When one co-sharer landlord takes a transfer of a non-transferable holding from a tenant, he

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may be treated by the other co-sharer landlords as a trespasser.

Where on a transfer of a non-transferable occupancy holding to a co-sharer landlord another co-sharer landlord sues to eject the transferee to the extent of his own share claiming joint possession with the transferee to the extent of his share, it is not equitable defence for the defendant to say that the plaintiff has been in possession of other lands purporting to hold an occupancy right therein. **C** JAGABANDHU KUNDU *v.* RAJMOHAN PAL **599**

Costs—*Exaggerated claim.*

Where a Court finds that the plaintiff's claim is to a large extent exaggerated and false and decrees only a portion of it, it ought not to award to the plaintiff the amount of full Court-fees paid by him on the plaint. The amount awarded should be proportionate to the success of the plaintiff. **M** KUNDASWAMI NAIDU *v.* KANNIAH NAIDU, 46 M. L. J. 366; (1924) M. W. N. 373; 20 L. W. 60 **573**

———, *whether to come out of the estate when testamentary directions defective.*

Where a litigation owes its origin to the default of the testator by reason of the testamentary directions being vague or uncertain in law or fact, the costs of all parties should be awarded out of the estate of the testator. **S** SHAMBAI *v.* GOVERDHAN **249**

Court-fees—*Two alternative reliefs prayed for—Court-fee payable.*

Where two reliefs are identical in actual money value but different in respect of the Court-fee leviable in each, then the Court-fee is payable on the relief carrying the higher Court-fee. **Pat** DASARATH MESHY *v.* JAY CHAND SUTRADHAR **530**

Court Fees Act (VII of 1870), s. 7 (iv) (c)—*Suit for cancellation of* Samudayam *deed and for injunction and accounts—Plaintiff not party to deed—Valuation—Suit for removal of several trustees—Removal of such trustee, whether separate relief.*

A suit praying for the cancellation of a *Samudayam* deed to which the plaintiff is not a party is in substance a suit for a declaration that the deed is not binding on the *Devaswam* and if an injunction and accounts are also asked as reliefs consequential on such a declaration the suit comes under section 7, cl. iv (c) of the Court Fees Act (VII of 1870), and the recently added proviso to the section does not affect the case, inasmuch as the *Samudayam* deed does not create any charge on immoveable property. In such a case the plaintiff is entitled to place his own valuation on the reliefs claimed but the valuation must be the same for purposes of Court-fee and jurdisdiction.

A suit for the removal of several trustees on the ground of their having executed an illegal document on behalf of the *Devaswam* is governed by Art. 17 (B) of Schedule II of the Court Fees Act, as amended by Madras Act X of 1922, but the removal of each trustee is not a separate relief and only one fee of Rs. 100 is leviable since the ground for removal, namely, the execution of the deed, is the same in the case of each and the removal of each is not a separate relief. **M** VELLORA KARUPPAN VETTIL *v.* KALLUR VENGAYIL, 19 L. W. 249; (1924) M. W. N. 210; (1924) A. I. R. (M.) 611 **118**

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——— **s. 8, Sch. I, Art. 1, Sch. II, Art. 17 (A) (ii)**—*Award by Land Acquisition Officer—Reference to Court—Amount increased—Appeal—Court-fee payable.*

Where in a proceeding under the Land Acquisition Act, the Court increases the amount of the award originally made by the Land Acquisition Officer, the stamp fee payable on an appeal by the Crown against such increase is governed by Art. 1 of Schedule I of the Court Fees Act. Neither section 8, nor Art. 17 (A) (*ii*) of Schedule II of the Act is applicable to such a case. **M** *In re* ASSISTANT COMMISSIONER OF LABOUR, 46 M. L. J. 150; (1924) M. W. N. 108; 19 L. W. 207; (1924) A. I. R. (M.) 489; 34 M. L. T. 357 **435**

——— **s. 12,** *order under—Revision, whether lies.*

Semble:—An order under section 12 of the Court Fees Act is only final as regards the valuation of a suit and not when it relates to the category into which a suit falls. In the latter case the order is open to revision. **M** SANDATTIKALAI PANDIA CHINNA THAMBIAR *v.* VEERAPPA GOUNDAN, 46 M. L. J. 450; 34 M. L. T. 216; 19 L. W. 629; (1924) A. I. R. (M.) 623 **968**

——— **s. 17**—*Distinct claims—Suit to recover possession from one defendant or refund of consideration from other defendant—Court-fees, separate, whether payable.*

Plaintiff sued defendant No. 2 for possession of certain land on the ground that the land had been surrendered to him by defendant No. 1 and in the alternative claimed to recover from the defendant No. 1 the amount of consideration for the surrender paid to the latter as on a failure of consideration:

Held, that the suit embraced two distinct claims within the meaning of section 17 of the Court Fees Act and separate Court-fees must be paid on each part of the claim. **N** HIRDERAM *v.* RAMCHARAN **703**

——— **s. 17**—"*Subject*," *meaning of*—"*Cause of action*," *meaning of.*

The word "subject" in section 17 of the Court Fees Act means "cause of action," and cause of action means "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."

The question whether a suit does or does not embrace two or more distinct causes of action must be decided on the terms of the plaint. **Pat** EAST INDIAN RAILWAY CO. *v.* AHMADI KHAN, (1924) Pat. 175 **415**

——— **s. 19 H**—*Probate, application for—Valuation by District Judge—Order, whether final—Appeal—Refusal to exclude properties from valuation—Revision.*

Where an applicant for Probate refuses to amend the valuation of the estate to the satisfaction of the Collector, and the latter applies to the District Judge asking that an enquiry may be

made into the true value of the property, the finding of the District Judge as to the value of the property under sub-section (5) of section 19 H of the Court Fees Act is final and no appeal lies against it by virtue of the provision contained in sub-section (7) of the section.

Where, however, the applicant alleges that certain properties have been erroneously included in the schedule, and that they are trust properties and not part of the estate of the deceased and should, therefore, be excluded from the valuation, it is the duty of the District Judge to go into the matter, and his failure to do so amounts to a refusal to exercise a jurisdiction vested in him by law and renders his order open to revision under section 115 of the Civil Procedure Code. **C** CHINMATHA NATH PAL CHOUDHURI *v.* THE SECRETARY OF STATE FOR INDIA **901**

——— **Sch. II, Art. 17 (iii)**—*Suit for declaration that mortgage shall not bind mortgaged property, nature of—Court-fee payable.*

A suit by a co-parcener in a joint Hindu family for a declaration that a mortgage of joint family property effected by another co-parcener shall not be binding on the property mortgaged is not a suit for the cancellation of the mortgage but a mere suit for a declaration falling under Art. 17 (*iii*) of Schedule II to the Court Fees Act, and does not require an *ad valorem* stamp. **L** SHAM DAS *v.* CHARAN DAS **782**

——— **Art. 17, (iii), (vi)**—*Suit for commutation of rent—Appeal, valuation of—Court-fee payable.*

Certain tenants filed a suit against their landlord for commutation of grain rents into money rents, and the Deputy Collector fixed the rate at which commutation was to be made. The landlord appealed on the ground that the rate fixed was too low and calculated the value of the relief sought at the difference between the amount fixed by the Deputy Collector and the amount which he alleged to be correct and paid *ad valorem* fees on that amount:

Held, that the provision applicable to the case was Art. 17 (*iii*) or Art. 17 (*vi*) of Schedule II to the Court Fees Act and Court-fees must be paid as laid down in that Article. **M** SANDATTIKALAI PANDIA CHINNA THAMBIAR AVO *v.* WEERAPPA GOUNDAN, 46 M. L. J. 450; 34 M. L. T. 216; 19 L. W. 629; (1924) A. I. R. (M.) 623 **968**

——— **Art. 17 (vi)**—*Suit for cancellation of decree—Value of subject-matter—Court-fee payable.*

Where the relief claimed in a suit is the cancellation of a mortgage-decree, which leaves the defendant with the right and the opportunity to obtain another similar decree on the same mortgage in a properly framed suit, the value of the subject-matter of the suit is not capable of ascertainment and the suit falls within Art. 17 (*vi*) of Schedule II to the Court Fees Act. **N** MAHADEO GANESH SOHNI *v.* SADASHIV **437**

Custom—*Attachment, whether affects reversioner—Declaration, suit for, maintainability of.*

The mere attachment of ancestral property in execution of a decree does not in any way injuriously affect the interests of a reversioner,

and he cannot, therefore, sue for a declaration that the attachment shall not affect his reversionary rights. **L** SHIB DEO SINGH *v.* UTTAM SINGH **926**

——— *Blacksmith, additions made by, to dwelling—Zemindar, failure of, to object—Acquiescence—Renewal of additions.*

When an addition made by a blacksmith to his dwelling is allowed to exist by the *zemindar* without any objection for several years, the presumption is not only that the *zemindar* has acquiesced in the addition being made but that he has accepted it as a reasonable appurtenance of the blacksmith's dwelling, and if the construction comes to an end the latter has a right to replace it. **A** PANDIT ISH NARAIN UPADHIA *v.* RAMESHAR LOHAR, 22 A. L. J. 244; (1924) A. I. R. (A.) 433 **164**

——— **Adoption**— Daughter's son — Bhitwaria Brahmins of village Beri, Rohtak District. *See* HINDU LAW **74**

——— **Alienation**—*Necessity—Money borrowed to carry on trade—Brahmins.*

The rule prevailing among Jats who have been agriculturists from time immemorial, that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible, cannot properly be applied to a community of Brahmins who have taken to agriculture comparatively recently and among whom agriculture is not the only means of earning a livelihood. **L** RAM KISHEN *v.* KHIALI **148**

——— *Tiwanas of Shahpur District—Unrestricted powers.*

Tiwanas of the Shahpur District have an unrestricted right of alienating their ancestral property. **L** SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN **451**

——— **Ancestral property,** *whether liable for debts of predecessor*— Mauzah *Narah*, Tahsil *Sonepat*, *Rohtak* District.

There is no custom in village Narah, *Tahsil* Sonepat, Rohtak District, under which ancestral immoveable property is liable in the hands of the holder for the just debts of his predecessor. **L** RAM MEHR *v.* PALI RAM, 6 L. L. J. 145; (1924) A. I. R. (L.) 455 **404**

——— **Gift** *to collateral in presence of nearer collateral*— Mutti Jats *of Hoshiarpur District.*

Among *Mutti Jats* of the Hoshiarpur District a gift of ancestral property in favour of an agnate in the presence of a nearer agnate in consideration of services rendered to the donor is valid by custom. **L** POHLO *v.* DALIP SINGH **995**

——— **Pre-emption** — *Entry in Settlement Record of 1885—Presumption—Contract of pre-emption.*

A peculiar weight must be assigned to entries relating to a custom of pre-emption made in Settlement Records of 1885, as special instructions had been issued by the Board of Revenue to Settlement Officers regarding the Record of Rights of pre-emption.

But entries relating to rights of pre-emption made in such Settlements are not conclusive proof of the custom recorded therein and are not binding on the Civil Courts.

Where a plaintiff relies upon a contract in order

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to succeed in a suit for pre-emption, the contract must be expressly pleaded and the plaintiff must show that the person through whom he claims was one of the contracting parties. **A** SHEO PRASAD DUBE *v.* SARJU MAHTO, 46 A. 35 **519**

——— **Pre-emption**—Hissedar karibi, *meaning of—Hindu widow, whether* karibi *of co-widow.*

The word *karibi* means a relation by blood or marriage. A Hindu widow is, therefore, a *karibi* of her co-widow.

When custom allows a preferential right of pre-emption to a *hissedar karibi* over a mere *hissedar*, a Hindu co-widow who is also a co-sharer has a preferential right of pre-emption in respect of a sale by her co-widow as against a co-sharer who is a mere stranger. **A** MANNI LAL *v.* RANI, 22 A. L. J. 247; 46 A. 327 **382**

——— *Partition, effect of—Custom, whether abrogated.*

The effect of a partition may be to deprive a certain number of those who were formerly entitled to pre-empt of their right, but a partition does not entirely abrogate a custom of pre-emption. The custom may still apply to other classes whom the partition has not deprived of the right of pre-emption. It will continue to apply to all who, notwithstanding the partition, continue in the same relation or relations as formerly entitled them to claim pre-emption **A** MUHAMMAD NAZEER *v.* MUHAMMAD SULAIMAN, 46 A. 424 **659**

——— *Proof of custom—Change in custom, whether permissible.*

A right of pre-emption must, in the absence of a Statute, be based either on contract or custom.

In the absence of a statutory enactment or an entry in a public Record of Rights, the custom may be deduced from a long series of cases.

When a rule of custom is deduced from previous judgments, it should not in any way be departed from merely on the ground that it is now thought more equitable or convenient that a new rule should prevail. **A** AMLA NAND *v.* NANDU, 22 A. L. J. 126; (1924) A. I. R. (A.) 318 **145**

——— Wajib-ul-arz, *entry in—Preference among co-sharers.*

The *wajib-ul-arz* of a village provided that every co-sharer had a right to transfer his share but at the time of transferring it, it was incumbent on him to inform the nearer co-sharers and in case of their refusal the other co-sharers of the village, and in case both these sets of co-sharers refused, then he was entitled to sell it to whomsoever he liked. A later *wajib-ul-arz* provided that when a co-sharer wished to sell his share, a co-sharer who was a near relation, then a co-sharer who is a distant relation, then all co-sharers in the *patti* and then co-sharers in the *lambardari* and then the other co-sharers of the village would have priority and preference:

Held, that under the provisions a nearer co-sharer had a preferential right of pre-emption as against a distant co-sharer. **A** DHANRAJ MISIR *v.* RAMESHWAR MISIR, 21 A. L. J. 948; 46 A. 170; (1924) A. I. R. (A.) 227 **904**

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——— **Pre-emption**—Wajib-ul-arz, *entry in value of—Right denied to one class of co-sharers, effect of.*

Although a *wajib-ul-arz* raises a *prima facie* presumption of the existence of the custom it recites, nevertheless, if it contains certain other matters relating to that right which cannot possibly form the subject of a custom, there would be no justification for presuming that the entry is one of custom.

It is impossible to conceive of a custom of pre-emption which makes distinctions between persons who have inherited by collateral succession and persons who have inherited by direct descent. All such persons become co-sharers in the village, and have equal status and rights in the eye of the law.

An entry in a *wajib-ul-arz* which sets forth a custom of pre-emption but winds up by saying that the right is denied to a person who becomes a co-sharer by collateral inheritance cannot be regarded as a record of custom of pre-emption. **A** KARAMAT *v.* WAZIR HUSAIN, 46 A. 1.0 **587**

——— **Succession**—*Cognates, rights of, as against stranger—Son of predeceased daughter, position of.*

The general principle of customary law is that in the absence of all agnates of a childless proprietor any cognate, however distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village or a stranger.

Custom does not exclude a daughter's son from inheritance on the ground of his mother having predeceased her father or grandfather. **L** CHAMELI *v.* BISHNA **778**

——— Custom *v.* Personal Law—*Banias* of *Mauza* Devi Nayar, *Tahsil* Khanar, Ambala District. *See* HINDU LAW—SUCCESSION **717**

——— Marwari Silawata community—Exclusion of females from inheritance—Evidence—Instances. Opinion Burden of proof—Essentials of valid custom. *See* MUHAMMADAN LAW **23**

——— *Personal law, when to be applied—Court, duty of*—Riwaj-i-am, *entry in, value of—Mother, whether includes grandmother—Uncle* v. *grandmother*—*Sikh* Jats *of Lahore District.*

Among parties generally following Customary Law it is permissible to fall back *as a last resort* on their personal law for the decision of a point on which no definite rule of custom applicable can be found. The function of a Court in matters of disputed custom, is to discover the actual practice and to give effect to it.

The *Riwaj-i-am*, even when unsupported by instances, is an important piece of evidence in support of the custom which it records to which serious regard must be paid.

The word "mother" in a *riwaj-i-am* must be presumed to carry its plain literal meaning, in default of any evidence that it was intended to mean or include somebody else. A grandmother

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cannot, therefore, be included within the word mother used in a *riwaj-i-am*.

Among Sikh *Jats* of the Lahore District a paternal uncle is to be preferred to the grandmother. **L** TABI *v.* SAUDAGAR SINGH **932**

——— **Village sites**—*Proprietors, rights of—Village becoming town, effect of—Administrative act declaring certain area to be town, effect of Presumption—Kulachi in Dera Ismail Khan District, whether town Evidence Act (I of 1872), s. 110.*

An administrative act including an area within the limits of a Municipality or a Notified Area does not necessarily operate to destroy the pre-existing character of that area, and such administrative act is not in itself sufficient to make the area so included a sub-division of a town; but such inclusion is strong evidence of the urban character of that area.

The fact that an area is urban immoveable property for purposes of pre-emption is not in itself conclusive proof that the village proprietary tenure of sites no longer exists in that area, but it does give rise to a presumption to that effect.

It is possible for an area in course of time completely to change its character, and what was originally a village may become a town.

Where a village has become definitely and unmistakeably a town, even the most shadowy title of a ground landlord may disappear altogether, leaving in operation the ordinary presumption that possession of a site implies ownership of that site unless the contrary is proved.

That portion of Kulachi which is within the city walls has become a town. **Pesh** ALI KHAN *v.* MALIK MAIDAN **552**

——— **Will**—*Rajputs of Ganachaur, Tahsil Nawashahr, Jullundur District Right to challenge alienation Collaterals in 7th degree Ancestral land—House situate in same village, character of—Defendant not in possession of land—Declaration, suit for, whether competent.*

Where a devisee under a Will is not in possession of the land devised to him, the reversioners of the testator are competent to challenge the validity of the Will in the form of declaratory suit, and it is immaterial that they are not themselves in possession.

A house owned by a person in the same village in which he owns ancestral land must be regarded as an appanage to the land.

When an alienation of ancestral land is challenged by the reversioners of the alienor the burden is on the alienee to justify the alienation even when the persons challenging it are related to the alienor in the seventh degree.

A Rajput of Guna Chaur in the Nawashahr Tahsil of the Jullundur District is not competent by custom to bequeath ancestral land in favour of a distant collateral in the presence of nearer collaterals. **L** KYAS MUHAMMAD *v.* BANNA **183**

Cutchi Memons—*Succession—Inheritance—Hindu Law.*

In matters of succession and inheritance *Cutchi Memons* are governed by Hindu Law. **S** YUSIF MAHOMED *v.* ABUBACKER IBRAHIM **817**

Damages—Breach of contract to sell land—Measure of damages. *See* TRANSFER OF PROPERTY ACT, s. 6 (*e*) **87**

——— *Water collected on land—Overflow—Injury to neighbour's land—Land not capable of cultivation—Damages, whether can be awarded.*

A person who for his own purposes brings on his land and collects and keeps there such a quantity of water as is likely to do mischief if it escapes, must keep it in at his peril, and if he does so, and does not succeed in confining it to his own property, he is answerable for all the damage which is the natural consequence of its escape, though the escape may not be due to any fault or negligence on his part.

There is, however, no logic in making a person liable in damages for causing an alleged injury to a thing which from its nature is incapable of sustaining such injury. For instance, a person cannot be held liable for causing damage to another by rendering his land unfit for cultivation by reason of submersion owing to the overflow of water from the former's land, where it is found that the submerged land was not capable of cultivation at all. **N** GOPALA *v.* DOMA **656**

Declaratory suit—Attachment, whether affects reversioner, maintainability of. *See* CUSTOM—ATTACHMENT **926**

Decree *against minor set aside—Revival of original suit—Procedure.*

Where a decree passed against a minor is set aside on the ground that he was not properly represented in the suit the parties are restored to the position which they occupied on the date of the decree, and, the plaintiff is entitled to apply to the Court to proceed with the hearing of the original suit. **C** ICHHAMOYI PAL *v.* PEARYMOHAN SHAH **427**

———, amendment of—Clerical error—Mistake due to party, whether can be corrected. *See* CIVIL PROCEDURE CODE, s. 152 **166**

———, *construction of—Judgment and pleadings, whether can be referred to.*

Where a decree is clear in its terms, and is not in any way ambiguous, it does not require to be interpreted in the light of the pleadings and the judgment. **Pat** KISHUNDEO SINGH *v.* JAGLAL SAHU, 5 P. L. T. 603 **774**

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Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2—"*Agriculturist*," *meaning of.*

The definition of an "agriculturist" in section 2 of the Dekkhan Agriculturists' Relief Act is not limited to a judgment-debtor being an agriculturist at the date of the suit or of the decree. It is comprehensive enough to include an agriculturist at any stage of the proceedings. **S** HARIOMAL *v.* HAZARISING **583**

Dekkhan Agriculturists' Relief Act—concld.

———— **ss. 3 (w), 7 and 12**—*Status as agriculturist not pleaded by defendant*—Ex parte *decree passed*—*Whether defendant can plead to be agriculturist in execution proceedings*—*Civil Procedure Code (Act V of 1908), s. 11*—Res judicata.

Where defendant in a suit falling within clause (*w*) of section 3 of the Dekkhan Agriculturists' Relief Act, does not expressly raise the pleas either that he is an agriculturist or claims to be tried under the provisions of that Act, and the Court passes an *ex parte* decree against him without examining him and the plaintiff under sections 7 and 12 of the Dekkhan Agriculturists' Relief Act, the Courts must be deemed to have decided by necessary implication that the defendant is not an agriculturist, and it is not open to the defendant to contend in execution proceedings that he was not an agriculturist at the time of the passing of the decree. **S** LAWRENCE PHILLIPS & Co. *v.* NAZARETH **[806**

Divorce cases—*Damages*—*Assessment* — *Principles.*

The damages in divorce cases are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife—whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the Judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife, or on her children, or otherwise dealt with in the discretion of the Court, on now well established principles. **M** JAMES RALPH FREER *v.* H. A. JOHNSON, 46 M. L. J. 282; 19 L. W. 374; 34 M.L.T. 163; (1924) A. I. R. (M.) 446 **120**

Easement—*Prescription.*

The right to bury dead bodies in land belonging to another is not an easement recognised by the law and cannot be acquired by prescription. **L** MANGAT RAM *v.* SIRAJUL HASAN, 6 L. L. J. 130; (1924) A. I. R. (L.) 492 **152**

————Quasi-*easement, what is*—*Partition of joint property*—*Right of lateral support*—*Joint wall*—*Rights of parties.*

The term "*quasi*-easement" is applied to those easements which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly unit-

Easement—concld.

ed in the sole or joint possession, or ownership, of one or more persons.

The principle is that, on the grant by the owner of an entire property of part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, termed *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant in use for the benefit of the part granted.

As between co-parceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of a Court of Law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted. One of such easements is the right of support, including lateral support, which passes by implication of law to a grantee, and it is applicable to the case of a party wall which is allotted entirely to one of the co-parceners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. **C** BHOLA NATH DUTTA *v.* RADHANATH BISWAS, 51 C. 789 **908**

———*Severance of tenements—Implied grant—Equity, justice and good conscience.*

Where a person grants a portion of his property reserving a portion to himself, he grants with it all the easements and *quasi*-easements, which had been formerly used, over the part reserved, by the part granted and which are necessary to the reasonable enjoyment of the part granted.

The doctrine of implied grant of easements on severance of tenements is in accord with justice, equity and good conscience. **L** FAIZ MUHAMMAD *v.* LATIF **561**

Easements Act (V of 1882), s. 15 *Easement over land belonging to Government—Period of user—Easement, whether can be acquired against occupier.*

An easement is a right which attaches to one piece of land or building over another piece of land, and a person cannot have an easement over a piece of land against one person and not against another.

When a person claims an easement over land which belongs to the Government, he must prove user of the kind mentioned in section 15 of the Easements Act for a period of at least 62 years. If he fails to establish an easement over the land, he cannot establish an easement against a person who is merely in occupation of that land, by proving user for a lesser period, *viz.*, twenty years. **A** NARAIN DAS *v.* BEHARI KAHAR **844**

——— **ss. 28, 33, 35**—*Extent of easement—Mode of enjoyment how fixed—Right to light and air—Damage, when substantial.*

The mode of enjoyment of an easement must be fixed with reference to the purpose for which the right was acquired.

Easements Act—concld.

Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is considered substantial within the meaning of sections 33 and 35 of the Easements Act, unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as he might have done previous to the disturbance.

Each case of an alleged disturbance of an easement of light and air must be decided on its own facts.

Where the defendant constructed his wall in such a manner as to block a window in the plaintiff's verandah which opened towards the defendant's land and the plaintiff sued for the demolition of the wall:

Held, that the obstruction of the window did not, in the circumstances of the case, involve any material interference with the access of light and air, and the plaintiff was not entitled to any relief. **A** DURGA PRASAD *v.* LACHMI NARAIN, 22 A. L. J. 314; (1924) A. I. R. (A) 394 **563**

Ejectment—*Improvements made by person without title—Compensation, whether can be awarded.*

Where a person in possession of land knowing that he has no title to the land plants trees on the land or makes other improvements he cannot claim compensation for the improvements on ejectment. **N** MUNNA *v.* SUKLAL **987**

Equity—*Contract—Contract Act (IX of 1872), s. 65—Sale in contravention of Law—Refund—Parties in* pari delicto.

The obligation to do justice rests upon all persons natural and artificial; if one obtains the money or property of others, without authority, the law will compel restitution or compensation.

Before an illegal purpose is carried out, wholly or in part, and the parties are *in pari delicto*, the general rule is, that no suit will lie to recover money paid under the unlawful agreement. **N** NARAYAN *v.* MOTISA, 20 N. L. R. 87 **343**

Estoppel by conduct. *See* CIVIL PROCEDURE CODE, SCH. II, PARA. 1 (2) **378**

——— False representation by transferor. *See* EVIDENCE ACT, s. 111 **850**

———Mortgagor, whether can deny title to property mortgaged—Mortgagee aware of defect in mortgagor's title. *See* EVIDENCE ACT, s. 116 **398**

Evidence—*Admissibility—Objection not taken in First Court—Appeal.*

If no objection is taken in the First Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. **N** ROHILKHUND AND KUMAON RY. CO. *v.* ZIBRUS SYED ALVI **34**

Evidence Act (I of 1872), s. 21—*Admission by judgment-debtor, whether binding on auction-purchaser—Admission of prior mortgage by mortgagor in suit on subsequent mortgage, effect of.*

A purchaser at an execution-sale is in privity with, and the representative-in-interest of, the judgment-debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions. Where, therefore, in a mortgage-suit the mortgagor admits a prior mortgage, the purchaser of the property in execution of the mortgage-decree is bound by the prior mortgage. **N** HARBHAGAT *v.* NARAYANANRAO **338**

——— **ss. 21 (1), 32, 35, 79, 114 (e)**—*Bengal Regulation (VIII of 1799), s. 48—Bengal Regulation VII of 1793, s 15—Return filed by* Zemindar, *with Collector, admissibility of—Certified copy—Presumption—Admission, value of.*

A return filed by a *zemindar* in the Collector's Office under section 48 of Bengal Regulation VIII of 1793 and section 15 (8) of Bengal Regulation VII of 1793 does not fall within the purview of section 35 of the Evidence Act.

The presumptions contained in sections 79 and 114 (e) of the Evidence Act would, however, apply to a certified copy of such a document.

The legal effect of such a document or the weight to be attached to it would have to be determined by the application of such tests as have to be applied to all other statements. If it is sought to be used as an admission against the party making it, its probative value would be considerable. Where it is sought to be used in favour of the party who made it, it must fulfil the requirements of section 21 (1), read with section 32, of the Evidence Act, or it must be relevant otherwise than as an admission. In either case its value would be slight. **C** TARAK CHANDRA CHAKRABURTY *v.* PROSANNA KUMAR SAHA, 28 C. W. N. 679; 39 C. L. J. 389 **719**

——— **s. 32 (3)**—*Recitals in consent decree, whether admissible—Failure to object, effect of.*

The recitals in a consent decree which sets out the terms of the arrangement arrived at between the parties but does not embody the statements of the parties as to their rights in the subject-matters of the litigation, are not admissible in evidence under section 32 (3) of the Evidence Act.

An erroneous omission to object to the admission of evidence which is not admissible under the provisions of the Evidence Act, does not render it admissible. **C** JAGADISH CHANDRA *v.* HARIHAR, 40 C. L. J. 39 **219**

——— **s. 32 (3)**—*Statement by executant of pro-note as to consideration, admissibility of.*

A statement by the executant of a promissory note, who is dead, that a particular sum was due to him as the consideration for the promissory-note, is admissible in evidence under section 32 (3) of the Evidence Act to prove the real consideration for the promissory-note. **A** KALYAN RAI *v.* JAGANNATH **1033**

Evidence Act—contd.

——— **s. 33**—*Deposition of one person in one proceeding, whether admissible in evidence to contradict another person.*

Under section 33 of the Evidence Act, the deposition of a witness in a former proceeding is admissible as substantive evidence in a later proceeding if certain conditions prescribed by it are found to exist; but it cannot be used even with the consent of parties merely for the purpose of contradicting the statement of another person in such proceeding. **M** BOBBA BHAVAMMA *v.* BOBBA RAMAMMA, 19 L. W. 205; (1924) M. W. N. 270; 34 M. L. T. 355; (1924) A. I. R. (M.) 537 **176**

——— **ss. 59, 71**—*Attesting execution, whether includes attestation and admission of execution.*

Section 69 of the Evidence Act applies only where no attesting witness can be found, but where an attesting witness is called and examined and denies execution of the document, the provisions of section 71 come into operation.

The "execution" of a deed designates the whole operation including both the signature by the executant and the attestation thereof by the subscribing witnesses. **N** BALIRAM *v.* KAMALJA, **330**

——— **s. 63 (3)**—*Secondary evidence—Will—Copy prepared by Sub-Registrar.*

A Will was submitted for registration, but as the Sub-Registrar had doubts as to its execution he referred the matter to the District Registrar. The latter required a copy of the Will to be submitted to him. The Sub-Registrar prepared a copy of the Will and submitted it to the Registrar. The Will was not registered and in a suit relating to the Will the copy of the Will submitted by the Sub-Registrar to the Registrar was sought to be proved as secondary evidence of the Will:

Held, that the copy was admissible under section 63 (3) of the Evidence Act. **N** BAYA *v.* BHAURAO **865**

——— **s. 65 (g)**—*Abstract from register of mutation to prove custom, admissibility of.*

An abstract from mutation records showing the number of alienations of land which have taken place in a particular tribe is admissible in evidence under section 65 (*g*) of the Evidence Act in order to prove that members of that tribe have unrestricted powers of alienation. **L** SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN **451**

——— **s. 73**—*Hand-writing, comparison of—Opinion formed by Judge in absence of evidence, danger of.*

The practice of a Judge declaring whether a disputed signature agrees with the other signatures of a certain person without the assistance of any evidence but merely on his own inspection cannot be approved. It is especially undesirable that a Judge should take upon himself the task of comparing signatures in order to find out whether there has been a forgery in a case, where there is nothing to show on the record that

Evidence Act—contd.

the signature was alleged by any person to be a forgery.

Evidence relating to dissimilarity of signatures is peculiarly fallacious, where the dissimilarity relied upon is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a place more or less inclined -nay, the materials, as pen, ink, etc., being different at different times -are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of this sort few individuals write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person. **C** GLASTAUN *v.* SONATAN PAL **668**

——— **s. 92**- *Agreement reduced to writing Oral evidence, whether admissible.*

Where an agreement is not required by law to be in writing or to be registered it is not necessary to prove the agreement by the production of a written document.

Where, however, the terms of an agreement have been reduced into writing, the writing alone is the evidence of the agreement and no oral evidence can be adduced to prove the agreement. **A** BISHUNATH OJHA *v.* SHEOPRAGASH OJHA **1043**

——— **s. 92** — *Mortgage-deed -Oral agreement varying rate of interest, whether can be proved- Conduct of parties, effect of.*

Evidence of a contemporaneous oral agreement between the parties to a mortgage-deed that compound interest should be mentioned in the deed but that simple interest only would be realised and compound interest would never be claimed, is not admissible by virtue of the provisions of section 92 of the Evidence Act. Nor would the fact that only simple interest was, as a matter of fact, realised entitle the mortgagor to a variation of the written contract. **C** ABDUL AZIZ MIA *v.* AMANMAL BATARA **742**

——— **s. 92**—*Oral agreement varying terms of written contract when admissible—Agreement reset off, whether can be proved.*

When, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, oral evidence of such agreement is admissible to show that the condition has not been performed and, consequently, that the written agreement has not become binding.

But when a promissory-note expressly provides that amount due therein is payable on demand with interest at a specified rate, an oral agreement between the parties that the said amount was to be set off against the amount due to the executant of the promissory-note on some other account is not a condition precedent to the enforcement of liability under the promissory-note and such agreement is not admissible in evidence. **S** RAM SINGH *v.* IBRAHIM **418**

——— **s. 111**—Pardahnashin *lady—Husband, position of -Good faith- Burden of proof.*

Where a husband stands in a position of active confidence to his wife and he manages her property the burden of proving good faith is on him.

In the case of a mortgage purporting to be executed by his *pardahnashin* wife it must be proved not merely that she knew what she was doing or had done, but also how her intention to act was produced, whether all that care and providence was placed around her as against those who advised her which from their situation and relation with respect to her duty were bound to exert on her behalf **O** DWARKA PRASAD *v.* NASIR AHMED, 11 O. L. J. 219 **850**

——— **s. 115** -Estoppel Partition Co-sharer, permitting another person to remain recorded as co-sharer and participate in partition proceedings —Representation. *See* U. P. LAND REVENUE ACT, s. 233 K **1035**

——— **s. 115** - *Estoppel --Proposition of law.*

A representation of a proposition of law cannot effect an estoppel under section 115 of the Evidence Act. **N** JAGESHWAR *v.* PANDURANG, 7 N. L. J. 82; (1924) A. I. R. (*N.*) 73 **840**

——— **s. 116** - *Estoppel- Mortgagor, whether can deny title to property mortgaged- Mortgagor aware of defect in mortgagor's title.*

In a mortgage-suit, the mortgagor is estopped from pleading that he had no title to the property mortgaged and the date of the mortgage.

The plea of estoppel is not, however, available to the mortgagee if he is proved to have been aware of the actual state of facts as regards the mortgagor's title to the property. **N** TULSIRAM *v.* TUKARAM **398**

—— —— **s. 145.**

Under section 145, Evidence Act, a witness may be contradicted by previous inconsistent statements of himself, but not those of a third party. **M** BOBBA BHAVAMMA *v.* BOBBA RAMAMMA, 19 L. W. 205; (1924) M. W. N. 270; 31 M. L. T. 355; (1924) A. I. R. (M.) 537 **176**

Execution of decree--Adjustment of decree by Collector without sanction of Court—Adjustment, whether voidable or void - Application to Collector regarding adjustment not signed by all decree-holders, validity of—Powers of Collector to record adjustment. *See* CIVIL PROCEDURE CODE, O. XXXII, r. 7 **291**

——— Admission by judgment-debtor, whether binding on auction-purchaser—Admission of prior mortgage by mortgagor in suit on subsequent mortgage, effect of. *See* EVIDENCE ACT, s. 21 **338**

——— Arrest of judgment-debtor—Surety, extent of, liability of--Notice to surety, whether necessary. *See* CIVIL PROCEDURE CODE, s. 55 **447**

——— Assignees, dispute between—Question raised in form of suit—Appeal—Revision. *See* CIVIL PROCEDURE CODE, s. 47 **495**

——— *Auction-sale—Bidder, whether can withdraw offer—Bid, whether open for any length of time.*

A bidder at an auction-sale can withdraw his bid before it is knocked down. A bidder at an auction-sale must be presumed to make his offer on the condition that it would be accepted or rejected within the period during which such sales ordinarily last, and the offer cannot be treated as open beyond a reasonable period of time. **C** TULARAM BHUTUNIA *v.* PURNENDRA NARAIN RAI DEB VERMA. **710**

——— *Charged property, whether can be sold in execution—Right of legal representative to claim property in individual capacity in execution proceedings.*

A party to execution proceedings as a legal representative cannot have a claim in his individual capacity inquired into under the provisions of section 47, Civil Procedure Code, but must file a separate suit in respect thereof, for it is only as a third party that such a claim can be preferred by him. **S** MURAD *v.* DAYARAM **49**

——— Compromise decree—Matter extraneous to suit—Execution as to such matter. *See* CIVIL PROCEDURE CODE, s. 47 **317**

——— Compromise decree—Unlawful, whether enforceable. *See* CIVIL PROCEDURE CODE, O. XXIII, R. 3 **357**

——— *Court, duty of—Decree against minor not represented in proceedings—Court, whether can refuse to execute.*

An Executing Court has no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled that is not the function of the Executing Court.

An Executing Court cannot refuse to execute a decree merely on the ground that it was passed against a minor who was not represented in the proceedings in which the decree was passed. **L** THE LAHORE BANK LTD. *v.* GHULAM JILANI, 5 L. 54; (1924) A. I. R. (L.) 448 **460**

——— Decree-holder purchaser, whether party to suit—Possession, delivery of—Separate suit, whether lies. *See* CIVIL PROCEDURE CODE, s. 47 **930**

——— Dismissal for default—Restoration, application for—Review—Appeal, whether lies. *See* CIVIL PROCEDURE CODE, s. 151 **816**

——— Dispossession, objection to—Collector, whether Court. *See* LIMITATION ACT, s. 14 **580**

——— *Duty of Executing Court—Construction of decree.*

An Executing Court has only to interpret the decree under execution. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment on which it is based. **N** BANI *v.* NARSOO **639**

——— *Executing Court, whether can question correctness of decree.*

An Executing Court has no power to enlarge, modify, or change a decree. **N** GANPATRAO *v.* TULSABAI **853**

——— *Executing Court, whether can question decree.*

It is not open to a Court executing a decree to go beyond the decree and to enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint. **Pat** MUHAMMAD IDRIS *v.* LACHMAN DAS, (1924) Pat. 25; 5 P. L. T. 368; (1924) A. I. R. (Pat.) 504 **303**

——— Injunction restraining execution—Step-in-aid of execution—Limitation. *See* LIMITATION ACT, s. 15 **478**

——— Judgment-debtor attaining majority—Notice, fresh, whether necessary **12**

——— *Judgment-debtor dead—Receiver, whether can be appointed.*

Execution of a decree, whether by appointment of a revenue or otherwise, cannot proceed against a judgment-debtor who is dead and whose representatives are not on the record. **N** RAMSWARUP *v.* RAGHUNANDAN **1031**

——— Judgment-debtor, whether can raise plea of being agriculturist—Court, duty of. *See* RULE OF COURT OF JUDICIAL COMMISSIONER, SIND, rule 28 **583**

——— Limitation applicable—Dismissal of application—Continuation—Step-in-aid of application—Limitation, commencement of. *See* LIMITATION ACT, Sch. I, Art. 182 (5) **766**

——— Mortgage-decree—Sale—Order in which properties to be sold, settlement of—Court, duty of—Equities of parties, disregard of—Irregularity. *See* CIVIL PROCEDURE CODE, O. XXI, r. 90 **609**

——— Objection by defendant absolved from liability—Procedure. *See* CIVIL PROCEDURE CODE, s. 47 **225**

——— *Objections to execution, etc., which Court to decide.*

Under the scheme of the Civil Procedure Code the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation.

Such objection should be taken before, and be heard and determined by, the Court to which the decree is transmitted as the Court of execution. Orders of transmission are treated as *quasi*-administrative orders and, on the original side, are made by the Registrar who is vested with jurisdiction to decide such objections. **C** NARAIN DASS DUTT *v.* BANKU BEHARY CHATTOPADHYA **1001**

——— Partition decree—Recovery of land in excess of share—Restoration. *See* CIVIL PROCEDURE CODE, s. 47 **1039**

——— Sale—Auction-purchaser, right of, to refund of purchase-money—Suit to recover purchase-money, whether maintainable. *See* CIVIL PROCEDURE CODE, O. XXI, R. 91 **517**

Execution of decree—concld.

——— Sale proclamation, publication of, less than thirty days before sale—Irregularity, substantial injury, proof of. *See* CIVIL PROCEDURE CODE, O. XXI, r. 68 **746**

——— Sale proclamation, setting of—Notice to judgment-debtor—Notice affixed to door of house, whether sufficient service—Failure to attend—Objection to valuation, whether can be urged. *See* CIVIL PROCEDURE CODE, O. XXI, r. 66 **727**

——— Sale—Property sold only portion of property proclaimed for sale—Irregularity. *See* CIVIL PROCEDURE CODE, O. XXI, r. 90 **315**

——— *Sale—Purchaser, whether takes subject to equities against judgment-debtor.*

A purchaser at a sale in execution of a decree purchases the property subject to all the equities against the judgment-debtor and cannot take up the position of a *bona fide* purchaser for value without notice. **C** GLASTAUN *v.* SONATAN PAL **668**

——— Step-in-aid. *See* LIMITATION ACT, SCH. I, ART. 182 (5), (6) **241**

——— Step-in-aid—Affidavit as to incumbrances, whether application to take step-in-aid of execution. *See* LIMITATION ACT, SCH. I, ART. 182 (5) **631**

——— *Step-in-aid—Application for sanctioning and recording adjustment, whether "step-in-aid of execution."*

An application for sanctioning and recording an adjustment made by the judgment-debtor and decree-holders is an application to the Court to take a step-in-aid of execution of a subsisting decree. **N** PERABI *v.* BHAWANI PRASAD **291**

Family arrangement, *acted upon—Registration.*

A Court of Equity will uphold a family arrangement which has been acted upon, even where legal forms have not been strictly complied with. **N** BAKARAM *v.* NARAYAN **58**

Fraud—*Burden of proof—Findings based on conjectures—Facts twisted to suit law.*

The law presumes good faith in every transaction, and fraud and collusion are exceptions. The burden, therefore, of proving invalidating circumstances such as these lies on the party who affirms them.

Conjectures do not supply the place of evidence and, in the absence of evidence, a Court cannot base its decision on mere conjectures.

Every man must be presumed to have known the law and to have acted for his benefit.

The province of a Judge is first to find facts and then to apply the law to those facts and not to twist the facts to suit the law. **N** TULSIRAM *v.* TUKARAM **398**

——— Duty of Court. *See* CIVIL PROCEDURE CODE, ss. 151, 152 **96**

——— Failure to certify the satisfaction of a decree, whether amounts to fraud. *See* CIVIL PROCEDURE CODE, s. 47 **776**

General Clauses Act (X of 1897), s. 3 (125). *See* TRANSFER OF PROPERTY ACT, 1882, s. 3 **243**

Government of India Act (5 & 6, Geo. V, C. 61), s. 107—*Application by stranger to expunge passages in judgment of lower Court—Jurisdiction of High Court.*

The High Court has no power under section 107 of the Government of India Act to order the expunging of passages in the judgment of a subordinate Court at the instance of a person not a party to the suit.

The High Court in this case refused to grant a petition to expunge certain paragraphs in the judgment of a subordinate Court on the ground that they contained language misrepresenting the conduct of a Vakil and damaging to him. **M** DANDAYUDAPANI IYER *v.* BALAJI RAO **6**

——— **s. 107**—*High Court, power of superintendence of, scope of.*

The power of superintendence vested in the High Court under section 107 of the Government of India Act, was not intended to authorise the Court in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court on the ground that such orders have proceeded on an error of law or an error of fact. **A** RAO ADYA SARAN SINGH *v.* JAGANNATH, 22 A. L. J. 235; 46 A. 323 **391**

Guardian and ward—*Debt incurred by guardian for purchasing lands for minor—Binding character of debt—Creditor's rights—Necessity.*

The guardian of a minor has no right to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate and a debt incurred for such a purchase is not binding on the minor's estate or the heirs of the minor. All that the creditor is entitled to is to have a decree against the lands actually purchased with the money advanced by him. **M** JELADI BURRAYYA *v.* PONDURI RAMAYYA, 19 L. W. 67; 47 M. 449; 46 M. L. J. 49; (1924) M. W. N. 42; (1924) A. I. R. (M.) 472 **90**

Guardians and Wards Act (VIII of 1890), ss. 22, 39, 47, 48—*Civil Procedure Code (Act V of 1908), s. 115—Guardian, removal of—Special allowance, grant of—Jurisdiction—Appeal—Revision.*

A right of appeal must always be founded upon an express rule to that effect or a rule by unavoidable implication.

The words "removing a guardian" in clause (*g*) of section 47 of the Guardians and Wards Act are not descriptive of the section but of the order against which appeal is provided for. Therefore, the only appeal permissible with reference to an order under section 39 of the Guardians and Wards Act is one against an order removing a guardian under that section.

Section 48 of the Guardians and Wards Act attaches finality to orders made under the Act except when they can be challenged either by way of an appeal under section 47 of the Act or by way of an application for revision under section 115 of the Code of Civil Procedure.

Under section 22 of the Guardians and Wards Act a District Judge has jurisdiction to grant an allowance to the guardian.

An order made by a District Judge granting a special allowance to a guardian on his removal for

Guardians and Wards Act—concld.

services rendered to the estate is not open to appeal or revision. O SURAJ NARAYAN SINGH *v.* BISHAMBAR NATH BHAN **138**

——— **s. 30**—*Transfer of minor's property—Sanction not complied with, effect of.*

It is the duty of a person who intends to take a transfer of a minor's property from his certificated guardian to see that the conditions laid down in the sanction granted by the District Judge for the transfer of the property are duly complied with. If the conditions are not complied with, the transfer will not be binding on the minor or on persons claiming through him. A SRI THAKUR KISHORI RAMANJI MAHARAJ *v.* PANDIT DULEY RAM, 22 A. L. J. 155 **226**

Hindu Law—*Breach of promise of marriage—Damages, whether can be recovered.*

Under the Mitakshara Law, a Hindu father is justified in breaking off a contract of marriage for his daughter if a more suitable suitor is found; but in that event he is bound to pay damages to the other party to the contract who will be entitled to recover money actually thrown away as also damages to his credit and reputation by reason of the refusal. M KUNDASWAMI NAIDU *v.* KANNIAH NAIDU, 46 M. L. J. 366; (1924) M. W. N 373; 20 L. W. 60 **573**

———, *definition and applicability of—Dancing girls and prostitutes, whether recognised—Law applicable—Mitakshara Succession—Daughter—Unchastity, whether ground for exclusion—Joint family—Conversion of one member—Separation—Presumption—Re-union—Burden of proof—Caste Disabilities Removal Act (XXI of 1850), effect of.*

The Hindu Law, as now understood, is the law of the Srutis and Smritics including the recognised customs as administered and interpreted in the light of judicial decisions, and this law is applicable to all persons in India who have not adopted some other personal laws of their own.

The Hindu Law applies not only to the Aryan settlers in India and such aboriginal races as have been completely absorbed in the Aryan community, but also to the descendants of the original tribes who more or less avoided complete conversion to the Brahminical religion.

The class of dancing girls and prostitutes have been recognised as a caste among the Hindus, like the four castes, either as a separate fifth caste or as included in the residuary caste of Sudras. They and their parents, the Naiks, are, therefore, governed in matters of succession by the rules laid down in the Mitakshara.

Under the Mitakshara Law an unchaste or immoral daughter is not excluded from succession. By the Caste Disabilities Removal Act the Legislature has virtually set aside the provisions of the Hindu Law which penalise the renunciation of a religion or exclusion from caste.

Therefore, a convert from Hinduism or an outcaste retains his right of inheritance under the Hindu Law whether the right accrues before or after his conversion to another religion or exclusion from caste. Where one member of a joint Hindu

Hindu Law—contd.

family is converted to Islam, there is a disruption of the entire joint family, and all the members must be deemed to be separate unless their re-union is established the *onus* of which lies upon the person who asserts it. It depends upon the circumstances of each case, however, what amount of evidence is required to discharge this *onus*. Pat RAM PARGASH SINGH *v.* DHAN BIBI, (1924) Pat. 85; 5 P. L. T. 203; 3 Pat. 152; (1924) A. I. R. (Pat.) 420 **749**

——— **Adoption.**

In cases where status by adoption has to be established, evidence of repute and recognition by the community is admissible to prove that status. N RAMNATH *v.* SUKALSI **185**

——— *Adopted son, whether divested of property inherited from natural father—Only son of deceased father, whether can be adopted.*

The rule of Hindu Law according to which an adopted son is deprived of the right of succession in his natural family does not apply where succession to the natural father's estate precedes the adoption.

Obiter:—The adoption of a married orphan who is the only son of his natural father is not valid according to Hindu Law L CHHANGA *v.* JAI LAL, 6 L. L. J. 174; (1924) A. I. R. (L.) 480 **161**

——— *Daughter's son—Maharashtra Brahmins of Nagpur.*

Among the Maharashtra Brahmin community of Nagpur, the prohibition of the Hindu Law against the adoption of a daughter's son or of a sister's son has been abolished by custom. N JAGESHWAR *v.* PANDURANG, 7 N. L. J. 82; (1924) A. I. R. (N.) 73 **840**

——— *Suit by adopted son for possession of property—Limitation Act (IX of 1908), Sch. I, Art. 118—Partition between co-widows, whether binding on adopted son.*

A suit by a person alleged to be the adopted son of another for the possession of the estate belonging to the latter after his death where the relief sought is possession, and the validity or factum of adoption is incidentally in issue, is not governed by Art. 118 of Sch. I to the Limitation Act.

A partition between co-widows of the husband's estate before the adoption is not binding on the adopted son who divests both of them of the estate as all co-widows must in law be treated as one person. N ANNAPURNABAI *v.* RUPRAO **284**

——— *Suit by reversioner to contest adoption—Burden of proof.*

In a suit by a Hindu reversioner for a declaration that the defendant was not validly adopted by the last male holder of the property, the burden of proving the *factum* and validity of the adoption lies on the defendant. N LAXMAN *v.* BHULABAI **862**

——— by widow—Mortgage before adoption, whether binding on adopted son. *See* MORTGAGE SUIT **330**

——— **Alienation**—*Benefit of family—Test—Debt secured on family property, whether*

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antecedent—Mortgage by father—Sons not born, whether can contest.

The right way of judging in ordinary cases whether a loan on a mortgage of family property for purchasing an estate constitute a benefit to the family is not by looking at the ultimate result of the purchase many years after but to determine the question of benefit with reference to the time of purchase.

A debt incurred on the security of the family property is not "an antecedent debt."

Sons and grandsons not born at the date of a mortgage take by their birth an interest in the family property subject to the mortgagee's rights, in respect of the father's share as they existed at the date of the mortgage and they are not entitled to object to the alienation of such shares. **N** RAKHMABAI *v.* VITHUS **384**

——— **Berar**—*Mayukha or Mitakshara "Mitakshara read with Mayukha" and other similar expressions, meaning of.*

In Berar Mayukha predominates where it differs from Mitakshara.

In the rulings of Nagpur Judicial Commissioner's Court where expressions such as "Mitakshara read with Mayukha," or "Mitakshara as interpreted in the Bombay Presidency," or "Mitakshara as interpreted in Western India," are used, what is meant is that, where the Mitakshara and the Mayukha differ, the Mayukha is to predominate. **N** SHRIRAM *v.* RAJARAM, 19 N. L. R. 193; (1924) A. I. R. (N.) 83 **367**

——— **Custom**—*Adoption — Daughter's son — Bhitwaria Brahmins of village Beri, Rohtak District.*

In accordance with strict Hindu Law a man cannot adopt his daughter's son although in ancient time such adoptions were recognised.

The present view, however, more especially in the Punjab, is veering round to an acceptance of the adoption of the daughter's son although the theory exists that to qualify for adoption a man must be the son of a woman whom the adoptive father could have married.

A valid custom exists among Bhitwaria Brahmins of the Beri village of the Rohtak District allowing the adoption of a daughter's son.

In that part of the Punjab which adjoins the United Provinces the nomination of an heir on lines resembling the Krittima Hindu adoption is unknown, that is to say, even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family, to his new family, and is entirely cut off from his past. **L** KIRPA *v.* RABI DATT, (1924) A. I. R. (L.) 457; 6 L. L. J. 35; 5 L. 134 **74**

——— **Daughter,** *estate held by—Income—Rent-decree obtained by daughter, whether vests in reversioners after her death.*

Under the Hindu Law the income of a limited estate held by a widow or a daughter is at the disposal of the limited owner, but if the limited owner has made no attempt to dispose of such income during her lifetime such income must follow the estate from which it arose.

A rent-decree obtained by a Hindu daughter and undisposed of by her during her lifetime vests on her-death in the reversioners of her father. **Pat** SHEONANDAN PRASAD *v.* DAMODAR PRASAD **306**

——— **Gift**—*Acceptance by donee, what amounts to.*

Under the Hindu Law express acceptance by the donee is necessary for the completion of a gift.

Even if it is assumed that, under the Hindu Law, acceptance of a gift by the donee may be presumed until his dissent is signified, still upon the whole case the Court must be satisfied that there was acceptance by the donee, before it can give effect to a deed of gift upon which a party to the suit may rely.

Acceptance of a deed of gift is *prima facie* evidence of the acceptance of the gift, but the whole conduct of the donee in connection with the acceptance must be carefully scrutinised for the purpose of determining the question whether there was in fact an acceptance of the gift.

Acceptance of a gift need not be made at once, but it must be made during the lifetime of the donor and while he is still capable of giving.

Whenever a question of acceptance is raised, there are two points which ought to be very carefully considered by the Court; first, whether the donee is in possession of the deed of gift, and, secondly, whether he is in possession of the gifted properties. **Pat** JAMUNA PRASAD SINGH *v.* SHEORATI KUER **469**

——— *Widow, power of, to make gift for spiritual benefit of herself.*

A gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift, however, pious or meritorious, cannot be enforced against the reversioners unless it is proved to be made with that object, and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in question.

A one-fourth share of an estate cannot be described as a "moderate" or "small" share of the estate within the meaning of the above rule. **L** MUNSHI LAL *v.* SHIV DAYI, 4 L. 336; 5 L. L. J. 496; (1924) A. I. R. (L.) 137 **266**

——— **Gonds** — *Rajgonds — Succession — Joint family.*

It is open to a Gond to prove that his family, or any general body of Gonds in which he is included, has adopted all the principles of Hindu Law, and that they are bound by those principles.

Gonds are Rajgonds who are governed by Hindu Law. Therefore, the incidents of a joint family apply to Gonds, and a son among them takes interest by birth. **N** RAMNATH *v.* SUKALSI **185**

——— **Guardianship**—*Mother, whether legal guardian of person and property of son.*

Hindu Law—contd.

Under Hindu Law, after the father the mother is the natural and legal guardian of her minor son's person and property, in a family where the minor is the sole owner of the property and there are no other undivided co-parceners entitled to a share therein. **N** GANPAT SAMBAJI v. MAHADEO **946**

——— **Jains**—*Widow, whether has absolute power over property inherited from husband—Custom, proof of—Judicial decisions, value of.*

Jains are Hindu dissenters and when their customs are set up they must be proved like other customs varying the ordinary law, and, when so proved, effect must be given to them.

When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case.

Judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place.

A Jain widow has absolute power of disposal over property inherited from her husband which was his non-ancestral property. **N** SANO *v.* PURAN SINGH **461**

——— **Joint family**—*Alienation—Concurrence of members in charge of property—Necessity—Presumption.*

The concurrence of all the adult members of a joint Hindu family in an alienation raises a presumption of legal necessity, and the presumption would apply equally where one of the members is working away from home and an alienation is effected by all the remaining members who are in charge of the property and is challenged by the former. **A** BHAGWAN DAS *v.* ALLAN KHAN **649**

——— *Alienation by father—After-born son, whether can challenge alienation—Suit by one of several sons—Alienation for illegal purpose*—In pari delicto potior est conditio possidentis, *applicability of.*

A Hindu son cannot object to an alienation validly made by his father before he was born or at least conceived. This principle, however, does not apply to the case of an invalid alienation as an after-born son has a right to a share in such property on account of the property being joint family property at the date of his birth, not having been validly transferred.

Where a Hindu father mortgages property of which he is sole owner, the transaction cannot be attacked by his sons on the ground that the mortgage-debt was incurred for immoral purposes.

Where a Hindu father improperly alienates family property, any one of his sons can recover not only his share in, but the whole of the property, to be held for the benefit of the joint family.

Hindu Law—contd.

Where the owner of a property transfers it to another for an illegal purpose and such purpose is not carried into execution, neither the vendor nor his heirs can succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. In such a case the burden of proof lies on the plaintiff and the maxim *in pari delicto potior est conditio possidenti* applies. **N** MAN SINGH *v.* KARAN SINGH **260**

——— **Joint family**—*Alienation by father—Antecedent debt—Immoral or illegal debt—Burden of proof—Alienation, whether can be enforced against alienor's share.*

It is only where joint family property has passed out of the family under an alienation in lieu of an antecedent debt incurred by the father or in execution of a creditor's remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral.

An alienation of joint family property by the father which is otherwise invalid cannot be enforced against the father's share in the joint family property in those Provinces in which the right of a co-sharer to dispose of his own share in joint family property is not recognised. **A** MUNESHAR LAL *v.* AMAR NATH **626**

——— *Alienation by father—Antecedent debt—Necessity—Mortgage*—Damdupat, *rule of, applicability of—Interest* pendente lite, *whether can be allowed—Civil Procedure Code (Act V of 1908), s. 34, applicability of.*

A Hindu father who is manager of the joint family is competent to mortgage the family property for payment of antecedent debts or raise money for legal necessity on the security of the larger interest including the shares of his sons.

Where the rule of *Damdupat* recognised in Hindu Law is in force, it applies to simple money debts as also to mortgage-debts. The consequence of this is that in case of a mortgage as soon as the maximum limit of interest is reached the contractual obligation comes to an end, and this may take place before the date of suit. In such a case the rule of *Damdupat* intervenes and precludes the Court from allowing the uniform contractual rate of interest down to the date fixed for redemption. The matter ceases to be any longer within the realm of contract and passes into the domain of judgment as soon as the suit is instituted, and it is here that the discretion which section 34 of the Civil Procedure Code vests in Courts to decree interest *pendente lite* comes into play. **N** MOTILAL RAMLAL *v.* RENI **711**

——— *Alienation by father—Antecedent debt, what is—Barred debt, whether can be antecedent—Debt incurred on security of family property, whether antecedent.*

Antecedent debt means merely a debt which is antecedent in fact as well as in time, that is to say, a debt truly independent of and not part of the transaction impeached.

Per *Lindsay, J.*—If a Hindu father in his lifetime chooses to discharge an antecedent debt by an alienation of family property although the

recovery of that debt would have been impossible under the Law of Limitation at the time the father discharges it, his sons must be held to be bound by the father's transaction.

Per *Sulaiman, J.*—When a debt becomes time-barred it ceases to be a legal debt, and though the Hindu Law does not recognise the principle of limitation, there is no ground for holding that the sons of a Hindu debtor cannot take advantage of the Statute of Limitation which makes such a debt unenforceable.

The basis of the liability of Hindu sons in respect of debts incurred by the father is threefold. That liability may either be based on the existence of a legal necessity or on the ground of the personal obligation of the sons to pay their father's debts or on the ground of the transfer being in lieu of an antecedent debt; and each of these is a distinct and separate basis. The liability on the basis of antecedency of the debt is not affected by the question whether the father who contracted the debt is dead or alive.

A debt does not cease to be an antecedent debt merely because it is secured on the family property; and a mortgage debt can be an antecedent-debt just as much as a simple money-debt can be.

Although, therefore, a debt which has become absolutely barred by time and the liability to pay which has not been undertaken in a previous writing, cannot be deemed to be a good antecedent so as to validate a conveyance by the father in lieu of it, yet where a mortgage-debt as such has not become time-barred but only the personal remedy against the father is barred, it can still be a good antecedent-debt so as to justify an alienation in lieu of it. **A** GAURI SHANKER SINGH *v.* SHEO NANDAN MISRA, 22 A. L. J. 369; 46 A. 384 **911**

——— **Joint family**—*Alienation by father—Enquiry by alienee—Application of money—Antecedent-debt—Carelessness and extravagance, effect of.*

Where a mortgagee from the manager of a joint Hindu family is reasonably satisfied after sufficient enquiry that the money he is going to advance is required for the benefit of the joint family, he is not bound to see that it is applied for the purpose for which it is advanced and is not diverted to other purposes.

Where an antecedent-debt incurred by a Hindu father is not shown to have been in any way immoral, the mere fact that it arose out of extravagance or carelessness will not make it any the less binding on the sons.

An estate is equally in need of money for its preservation, whether the need arises from a lack of proper management in the past or in spite of it. **N** BANSIDHAR *v.* PANDURANG **431**

——— ——— *Alienation by father—Necessity, absence of—Son, whether can sue to recover property—Antecedent-debt.*

The circumstances under which it is necessary for a Hindu son suing to recover family property to show that a debt incurred by the father was illegal or immoral are two; the first is, where property has passed out of the family under a

conveyance executed by the father in consideration of an antecedent-debt or in order to raise money to pay off such debt, and the second is, where property has been sold in execution of a decree for the father's debt. Where, however, an alienation of family property is effected by the father for a cash consideration for which there is no family necessity, a son can recover the property without proof of the fact that the debt was an immoral or illegal one. **A** BALDEO *v.* BHAGWAN MISIR **595**

——— **Joint family**—*Alienation by father—Necessity, proof of—Delay in suing, effect of—Antecedent-debt contracted on security of ancestral property, validity of.*

Where a plaintiff challenges an alienation after the expiry of a long time, his conduct in instituting the suit after a long delay is an important factor in determining the nature of the transaction and in finding out whether the alienation was or was not for necessity.

Where an alienation is effected to pay off an antecedent-debt, it is not the duty of the alienee to make an enquiry into the nature and necessity thereof.

An independent debt, which is neither illegal nor immoral, contracted by a Hindu father on the security of joint family estate, is an antecedent-debt.

A Hindu father has power to alienate the joint family property for an antecedent-debt where such antecedent-debt has been contracted on the security of the family property. **L** DALJIT SINGH *v.* HARI CHAND, (1923) A. I. R. (L.) 669 **11**

——— ——— *Antecedent-debt—Alienation by father, whether binding on sons—Alienation by member to pay off father's debt—Co-parcener, whether bound.*

The sons of a Hindu are bound to the extent of their interest in the joint family property by their father's action in alienating the same in order to pay off antecedent-debts incurred by himself.

A member of a joint Hindu family is justified in alienating his share in the family property in order to pay off an antecedent-debt incurred by his father, but he has no power to alienate the share of his minor brother for the same purpose. **A** ANANTOO KALWAR *v.* RAM PRASAD TIWARI, 22 A. L. J. 182; 46 A. 295 **619**

——— ——— *Managing member, rights and duties of—Misappropriation, what constitutes—Partition—Right of residence, nature of.*

Under the Hindu Law, a managing member is not bound to give a general account of his dealings and in the absence of fraud or misappropriation, he cannot be called upon to justify his past transactions. He is not bound to keep general accounts and co-parceners cannot complain if he, in his discretion, favours in his expenditure one of the co-parceners at the expense of the other.

In this matter there is no difference between the position of an infant co-parcener and another.

Capital monies proved to have come into the hands of a manager must be considered as

Hindu Law—contd.

available for partition in the absence of evidence showing what has happened to them.

In this connection, misappropriation by a manager means nothing more than the expenditure by him of the money on other than justifiable family expenses.

But when assets are traced into the hands of the managing member, he is bound to account for them on partition whether the co-parceners are minors or majors. It is not enough for him to say that he has no longer got these assets.

The right of members of a joint family to residence in a particular house is not a right *in rem*. It is true that while it is being used as a family house, they have a right to reside there. But on partition, it is clearly a matter for the Tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not.

Quaere :-- Whether members of a joint family have a right on partition to any particular separate room in a family house. **M** THE OFFICIAL ASSIGNEE OF MADRAS *v.* RAJABADHAR PILLAI, 16 M. L. J. 145; (1924) M. W. N. 192; (1924) A. I. R. (M.) 458; 19 L. W. 597; 34 M. L. T. 341 **536**

——— **Joint family**- *Mortgage by manager- Interest- Necessity-- Burden of proof.*

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at the rate and upon the terms contained in the mortgage-deed, and if this is not shown, that rate and those terms cannot stand. **O** BAKHTAWAR SINGH *v.* BAKHTAWAR SINGH **232**

——— *Mortgage-suit against father and sons—Compromise-- Son's shares liable to sale under decree--Specification of shares—Decree-holder, right of, to sell shares of sons.*

In a mortgage-suit against a Hindu father and his sons a compromise was arrived at between the plaintiff and the sons, whereby it was agreed that the father's name should be struck out and that if the sons failed to pay the decretal amount the plaintiff would be entitled to sell their shares in the property:

Held, that this amounted to an agreement on the part of the sons to put their shares at the disposal of the decree-holder and operated as a specification of their shares, and that the decree-holder was, therefore, entitled under the compromise decree, to sell the shares of the sons in the property as they stood on the date of the compromise. **Pat** BADRI NARAIN SINGH *v.* DWARKA PRASAD, (1924) Pat 65; (1924) A. I. R. (Pat.) 353; 5 P. L. T. 565 **630**

——— *Partition—Joint property—Burden of proof—Separation in food, effect of—Mutual dealings—Presumption.*

The question whether the members of a Hindu family are joint or separate is ultimately a question of fact to be determined on the evidence produced before the Court, but where a nucleus of joint family properties is admitted, the initial onus is on the party who asserts that there was a separation to prove that the separation did in fact take place. Cesser of commensality is one of the matters to be taken into consideration by the Court in arriving at a finding as to whether there has been separation or not, but it is not by any means conclusive.

Where there have been dealings between the parties themselves, that circumstances may be taken as very strong evidence in favour of the view that there has been a partition. **Pat** HARNARAYAN PANDE *v.* SURESH PANDE **472**

——— **Joint family**--*Partition Separation of some members, effect of- Division* inter se—*Two co-parceners joining in partition suit, effect of—Guardian of minor co-parceners, whether can effect severance* inter se.

Where a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit.

The mere fact that two co-parceners combine to ask for a partition does not indicate an intention on their part to become divided *inter se*.

A guardian of two undivided minors has no power to divide their status so as to make them lose their rights of survivorship *inter se*.

Where two minor brothers by their next friend sued their father for partition of their 2-3rds share in the family property and the decree gave them an undivided 2-3rds share :

Held, that the plaintiffs remained undivided *inter se* and on the death of one his interest survived to the other. **M** SENGODA GOUNDAN *v.* MUTHU GOUNDAN, 46 M. L. J. 401; 19 L. W. 533; (1924) M. W. N. 376; 47 M. 567 **927**

——— *Partition—Transactions between members—Presumption—Possession, suit for—Document executed by third person—Cancellation, whether necessary.*

Separate transactions by members of a joint family do not by themselves establish separation, but mutual transactions between two members of a family furnish very strong evidence of the fact that there was a separation between the parties.

A person who is entitled to possession of property is not bound to set aside a document which may have been executed by somebody else in order to defeat his title. **Pat** JAY NARAIN PANDEY *v.* KISHUN DUTT MISRA, 3 Pat. 575; 5 P. L. T. 581 **705**

——— *Partition, whether must be equal—Arbitration—Reference made by father—Award, whether binding on minor sons.*

There is no absolute rule of Hindu Law that a partition must be equal, although, generally speaking, it is so. A member of a joint Hindu family may of his own free will accept as his share as small a portion of the joint property as seems good to him and renounce all claims to the rest.

A father in a joint Hindu family as manager fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family. It is competent

to him to refer to arbitration the partition of the joint family property, and an award made on such a reference, if valid in other respects, will be binding on the sons, whether adults or minors. **N** SAWAI SINGAI BALCHAND *v.* SAWAI SINGAI LACHMAN PRASAD **1045**

——— **Joint family**—*Purchases made in names of members—Presumption—Purchase made by stranger.*

Where there is a nucleus or joint family property and purchases are thereafter made in the names of different members of the family, then, in the absence of evidence to show that the purchases are made by the members out of their separate funds, they must be treated as a joint family property.

A purchase made in the name of a stranger, however, is *prima facie* a purchase made by him for his own use.

Under the Hindu Law the actual installation of idols or the construction of a temple is not absolutely necessary for validating a deed of *wakf* made for such a purpose. **A** SARAB SUKH DAS *v.* RAM PRASAD, 46 A. 130; (1924) A. I. R. (A.) 357 **1018**

——— *Separation—Notice of separation to co-parceners, whether essential—Gains made by performance of religious service, if can be partitioned—Civil Procedure Code (Act V of 1908), s. 9—Gains made by helping religious ceremonies—Suit of civil nature.*

Separation is an act of individual volition and does not depend for its effect on the consent or agreement of the other co-parceners.

For the severance of interest, notice to other co-parceners of the intention to separate unequivocally expressed is not a condition precedent.

The gains made by helping clients in the performance of religious ceremonies connected with the river such as bathing, offering flowers, etc., at *chaukis* are property in law, and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within the meaning of section 9 of the Code of Civil Procedure. **O** RACHHPALI *v.* CHANDESSARDI, 10 O. L. J. 595; (1924) A. I. R. (O.) 252; 27 O. C. 114 **256**

——— *Separation of one co-parcener—Presumption—Re-union—Burden of proof.*

Where the separation of one co-parcener in a joint Hindu family is proved, there is no presumption either way with regard to the remaining co-parceners, and an agreement between any two or more of them to remain united or to reunite must be proved like any other fact. **A** SAHEB SINGH *v.* INDAR KUAR. **828**

——— *Suit by father to recover possession of family land, nature of—Co-parceners, whether bound by result of suit.*

The question whether a Hindu father represents his co-parceners in a particular litigation is a question to be decided with reference to the circumstances of each case.

There is a great difference between the case of a Hindu father suing in respect of contracts which the Mitakshara Law empowers him as manager to make on behalf of the family and a father suing in respect of rights in immoveable property, rights which he can only hold equally with his co-parceners. At the same time, the right of the father and of the Manager to represent the joint family in the latter class of suits has been recognised traditionally in the Courts. Where the interest of a joint undivided family is in issue and one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, that decree *may* afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit.

A suit by a Hindu father for recovery of possession of land alleged to belong to the joint family must be deemed to be a representative suit on behalf of all the co-parceners and the latter are bound by the result of the suit. **Pat** HUKUM MAHTO *v.* SANT SAHO **19**

——— **Joint family**—*Transferees from co-parceners, dispute between—Joint possession, decree for, whether can be passed.*

In a case where the dispute is as between transferees from co-parceners a decree for partial partition or joint possession can be passed. **N** GULAM DASTGIR *v.* AHMED KHAN **650**

——— **Maintenance**—*Agreement fixing rate of maintenance permanently by widow, whether binding.*

An agreement by a Hindu widow not to claim enhanced maintenance is a binding agreement and must be enforced. **M** AYYADEVARA SURYA CHENDRA MAULESWARA RAO *v.* AYYADEVARA DURGAMBA, 19 L. W. 165; 46 M. L. J. 189; (1924) M. W. N. 266; 47 M. 308 **831**

——— **Mitakshara**—*Alienation—Family property—Mortgage—Antecedent-debt—Necessity—Proof.*

In a family governed by the Mitakshara School of Law the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, *first*, that it must have been incurred antecedently to the transaction in suit and, *secondly*, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate.

To establish "necessity" it is not enough to prove that a debt raised by a father on the security of the family property was used in discharging a prior mortgage by him. It must be further proved that the prior mortgage had been effected for necessity. **C** DAMODAR PROSHAD *v.* BRINDAVAN CHANDRA GHOSE **45**

——— *Joint family—Partition—Step-mother, share of—Widow, whether heir—Property acquired by member with assistance of joint funds, whether joint—Marriage and* Janeo, *provision whether can be made for, in anticipation.*

Under the Mitakshara a step-mother is entitled upon partition of joint family property among her sons and step-sons to get a share equal to that of a son.

Hindu Law—contc

A Hindu widow is not an heir of her husband in the presence of his sons, and the share allotted to her on partition is not given to her as an heir but for maintenance. So that, when a co-widow dies the share held by her devolves upon the sons of her husband only and does not go to enlarge proportionately the share held by a co-widow.

Properties acquired by a member of a joint Hindu family with the assistance of joint funds are joint properties liable to be divided amongst the members of the family.

In a decree for partition of joint family property provision cannot be made in anticipation for the marriage or *janeo* of any of the parties. **O** GAYA PRASAD *v.* GIRJA SHANKAR, 11 O. L. J. 286 **574**

——— **Partition** between widows, whether binding on adopted son. *See* HINDU LAW—ADOPTION **284**

——— ——— *Construction of partition-deed Partition between two sisters—Succession—Survivorship.*

Where two sisters, who had inherited the properties of their father after the death of his widow, effected a partition of their properties by a deed which referred to a prior division of the movables, allotted a decree to one sister and a usufructuary mortgage to the other and divided the immoveable properties between them and closed with the sentence,—"Henceforth the only relationship between us will be one of friendship and not of property:"

Held, that each sister renounced all rights to the other's share and on the death of one, the right of succession to her by the other by survivorship was excluded. **M** RUKMANI AMMAL *v.* NARASIMHACHARIAR, 46 M. L. J. 285; 19 L. W. 465 **173**

——— ——— *Jeshtabhagam. See* CIVIL PROCEDURE CODE, SCH. II, PARA. 14 (c) **238**

——— **Partition suit**—Parties—Stranger alienee in possession of part of joint family property, whether necessary party. *See* CIVIL PROCEDURE CODE, O. II, R. 2 **376**

——— **Partnership**—Member of joint Hindu family becoming partner, other members, whether partners. *See* LIMITATION ACT, SCH. I, ART. 106 **198**

——— **Succession**—*Custom v. Personal Law*—Banias of Mauza *Devi Nagar*, Tahsil *Kharar*, *Ambala District*.

Semble:—The *Banias* of *Mauza* Devi Nagar, Tahsil Kharar, Ambala District, are governed by Hindu Law in matters of succession. **L** LALCHAND *v.* MANOHRI **717**

——— ——— *Adoption by widow—Suit by adopted son—Death—Substitution of mother—Second adoption—Right to continue suit.*

A widow has power to adopt several sons in succession if the last adopted son leaves no issues or widow behind.

If during the pendency of a suit by an adopted son the plaintiff dies and his adoptive mother is substituted as his legal representative and she adopts another boy the latter has a right to step in as the representative of the estate which has vested in him after his adoption and the Court should take notice of the adoption before finally adjudicating the rights of the parties. **N** DALLU *v.* PANJAB **95**

Hindu Law—contd.

——— **Succession**—Sister. *See* HINDU LAW—PARTITION **173**

——— **Widow**, *alienation by*—Benami *transaction, whether confers title on alienee.*

An alienation by a Hindu widow is not void but merely voidable. On the other hand, a mere *benami* transaction whereby a Hindu widow places certain property in the names of alienees not on their own behalf but on behalf of herself, does not amount to an alienation and confers no title on the alienees. **Pat** BHIKARI BEHERA *v.* SRIMATI SITAMONI DEVI **467**

———, *alienation by—Re-marriage of widow—Reversioner, possession taken by—Alienation held to be without necessity—Mesne profits, right to.*

Plaintiff obtained a lease from a Hindu widow for a certain number of years. On the re-marriage of the widow defendant, who was the next reversioner, got into possession of the land. In a suit by the plaintiff to recover possession it was held that the lease was not for necessity and was not binding on the defendant and that the latter was, therefore, entitled to possession of the land. It was, however, further directed that the defendant must pay to the plaintiff a certain sum of money which had been found to have been binding on the property:

Held, that under the decree defendant was entitled to continue in possession of the property and was also entitled to mesne profits, and plaintiff was not entitled to mesne profits of the land but was only entitled to the sum of money found by the Court to have been binding on the property. **N** BANI *v.* NARSOO **639**

———, *alienations by—Reversioner, whether bound to challenge all alienations in one suit.*

There is no law which compels a reversioner of a deceased Hindu to bring one common suit to challenge all alienations made by the widow of the deceased, where such alienations are in respect of different rights and in favour of different parties. He can, if he so chooses, get one of several transfers made by the widow set aside, leaving the others unchallenged. **A** BANS LOCHAN RAI *v.* JAGANNATH LAL **873**

———, *alienation by, for spiritual benefit of husband, validity of.*

A Hindu widow can alienate any reasonable portion of her husband's property in which she has a life-estate for pious or religious purposes, or for the spiritual benefit of her husband. She has a larger power to disposition for religious or charitable purposes, which are supposed to conduce to the spiritual welfare of her husband, than what she possesses for purely worldly purposes. **A** BALDEO PRASAD *v.* FATEH SINGH, 22 A. L. J. 190; 10 O. & A. L. R. 667 **654**

——— *or daughter, powers of alienation of—Alienation by daughter—Reversioner, after-born, whether can challenge.*

Hindu Law—concld.

The limitations imposed upon the estate of a Hindu widow or daughter are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she cannot alienate the *corpus* of the property except for legal necessity. If she does alienate it without legal necessity, then, if there be no reversioners in existence at the time, the alienation can be challenged by subsequently born reversioners. L LALCHAND *v.* MANOHRI 717

——— **Widow**, *decree against—Reversionary heirs, whether can impeach in execution.*

A personal decree against a widow may not bind the actual reversioners, but a decree passed against her in her representative character is not liable to be challenged on the execution side at the instance of the reversionary heir merely because it was passed on a confession. N BIHARISINGH *v.* NEWALSINGH, 20 N. L. R. 24; (1924) A. I. R. (N.) 81 136

——— **Will**—*Revocation, what amounts to*—Animus revocandi, *proof of.*

The Will of a Hindu may be revoked by parol and where definite authority is given by him to destory the Will with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

There must, however, be very cogent evidence to prove the *animus revocandi* which is so essential for the purpose of revocation. N BAYA *v.* BHAURAO 865

Income Tax Act (II of 1886), s. 39—*Super Tax Act (VIII of 1917), ss. 3 and 8 -Super Tax neither "charged, paid or recovered" in the assessment year—Suit for refund—Jurisdiction of Civil Court -Interpretation of Statutes.*

It is only when the Super Tax has been charged, paid or recovered in the assessment year, that the jurisdiction of the Civil Court to entertain a suit in respect of the same is barred under section 8 of Super Tax Act, VIII of 1917, read with section 39 of Income Tax Act II of 1886.

Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. S SECRETARY OF STATE *v.* SETH KHEMCHAND THAOOMAL 438

Income Tax Act (VII of 1918), s. 12 (1)—*Exemption, scope of - Losses incurred by assessee as member of Company or firm, whether must be taken into account in fixing total income.*

All that is exempted by section 12 (1) of the Income Tax Act of 1918 is income which has already paid the tax as the income of a Company or firm which happens in cases where the income of the Company or firm exceeds Rs. 2,000. But if the income of a Company or firm does not exceed Rs. 2,000, a share in that income is not exempted from tax either by section 12 (1) of the Act or by the Income Tax Authorities, who add that share to the other income of the assessee as a part of his total taxable income, and not merely for the purpose of ascertaining the rate which he is liable to pay on the remainder.

Income Tax Act—1918—concld.

Any losses incurred by an assessee as a member of a Company or firm must, therefore, be taken into consideration in fixing the amount of his total income. N SETH BALKISHAN NATHANI *v.* COMMISSIONER OF INCOME-TAX 572

———**s. 52**—*Assessment of Income Tax—Suit to contest validity of order, maintainability of—Jurisdiction of Civil Courts, limits of.*

Where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Courts is ousted and in case of injury the party cannot proceed to action.

A Civil Court has no jurisdiction to interfere with or question the propriety of an order which has been passed by a duly constituted Tribunal and which the Legislature has declared to be final.

The Income Tax Act creates a special jurisdiction and provides a special remedy.

Where an Income Tax Officer professes to tax income and income only his order is one under the Income Tax Act, and if it is erroneous it is capable of rectification on appeal to the Commissioner. A Civil Court has no jurisdiction to question the propriety of such an order, as its jurisdiction is expressly barred under section 52 of the Income Tax Act of 1918.

It is only where an Income-Tax Officer assesses something which is not income or levies an assessment on classes of income exempted by the Act, that he over-steps the limits of his jurisdiction and his assessment ceases to be under the Act within the meaning of section 52 of the Income Tax Act of 1918. S DAYARAM RAMDAS *v.* SECRETARY OF STATE 940

Income Tax Act (XI of 1922), ss. 2, 4, 58—*Super Tax—Liability to pay tax on dividends which have already paid it—Agricultural income—Income arising from markets, fisheries, moorings and ferries—Bengal Permanent Settlement Regulation (I of 1793), Art.. VI, effect of—Exemption from all future taxes whether granted—Exemption whether revoked by Income Tax Act.*

Under section 58 of the Income Tax Act of 1922 the intention of the Legislature is to charge super-tax upon the income of Companies as well as upon the income of individual share-holders including in the income of the latter the dividends received from the Company although they had already been charged to super-tax at the flat of one anna in the rupee.

Income derived from markets, fisheries, moorings or ferries cannot be regarded as agricultural income within the meaning of section 4 (3) (*viii*) of the Income Tax Act of 1922, and is not as such exempt from Income Tax.

Per *Dawson Miller, C. J.*, (*Mullick, J.*, dissenting):—The Legislature has power to vary or modify the bargain entered into between the Government and the proprietors by the Permanent Settlement, but this can only be done by clear and specific language in a Statute and not by general implication.

Income Tax Act--1922—concld.

By the Permanent Settlement it was the revenue or rent payable to Government as the paramount landlord that was fixed in perpetuity, and the imposition of the Income Tax on income derived by a landlord from markets, fisheries, moorings and ferries, which had already been taken into account in fixing the permanent *jama*, would amount to an increase in the revenue in contravention of Art. VI of the Bengal Permanent Settlement Regulation of 1793.

The words of section 4 (1) of the Income Tax Act of 1922 do not amount to a legal and effective abrogation of the exemption contained in Art. VI of the Bengal Permanent Settlement Regulation of 1793.

Per Mullick, J.- No unlimited exemption from future taxation was granted by Art. VI of the Bengal Permanent Settlement Regulation of 1793. The exemption granted by the Regulation was limited to the particular objects of the Settlement, namely, use and occupation of the settled area, and the *jama* fixed for ever was the consideration for such use and occupation. The Crown did not in any way surrender its other rights on behalf of the general community.

If this view is not correct, the language of the Bengal Permanent Settlement is at least ambiguous and does not clearly and distinctly give any exemption from all future taxes and rates. The meaning of the Legislature being doubtful, contemporary exposition can validly be resorted to for purposes of interpretation and the uniform view of the Legislature and its servants has been that the Regulation did not intend to surrender all future rights of taxation in respect of the profits of the estates thereby affected.

If the language of the Regulation is not ambiguous and if it clearly indicates an intention to surrender all such future rights of taxation, then the language of the Income Tax Act is sufficient to revoke the exemption. **Pat** MAHARAJADHIRAJ OF DARBHANGA *v.* COMMISSIONER OF INCOME TAX, 2 P. L. R. 25 Cr.; (1924) Pat. 69; 3 Pat. 470; 5 P. L. T. 459; (1924) A. I. R. (Pat.) 474 **783**

Injunction, *mandatory, when to be granted.*

It requires a strong case for a Court to refuse an injunction restraining a further alteration of the character of the property; but a mandatory injunction directing the restoration of the property to its original condition is a most exceptional remedy and one never to be applied except with the greatest safeguards for the prevention of waste as well as injustice. **C** JAGABANDHU KUNDU *v.* RAJMOHAN PAL **599**

Interest--Interest at rate of one per cent. per mensem, whether penal--Post diem interest, when allowed. *See* MORTGAGE **868**

———— *Market rate, proof of.*

Where no evidence is adduced to prove that the rate of interest provided for in the bond is the market-rate, the interest must be calculated at the market-rate. **Pat** KHARAG NARAIN *v.* DWARKA PRASAD SINGH, 3 Pat. 465 **588**

———— Mortgage debt—*Damdupat*, rule of, applicability of—Interest *pendente lite*, whether can be allowed. *See* HINDU LAW—JOINT FAMILY—ALIENATION **711**

Interest—concld.

———, *rate of—Court, when can give relief.*

Two per cent. per mensem is not an unusual rate of interest in India and may be allowed.

The Court should not give relief as to rate of interest on simple ground of hardship in the absence of any evidence to show that the moneylender had unduly taken advantage of the position of the debtor even when the transaction appears to be undoubtedly improvident. **S** RAM SINGH *v.* IBRAHIM **418**

———— Redemption suit--Interest from date of suit—Discretion of Court—Damdupat, rule of, applicability of. *See* CIVIL PROCEDURE CODE, s. 34 **632**

———— Re-sale resulting in deficit, whether interest can be recovered from the auction-purchaser. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 71 **296**

Interpretation of rules—*Court, function of.*

In interpreting a rule of Court which has the force of law, the office of the Court is *jus discere* and not *jus dare* and it has to abide by the words of the rule without attempting to re-form it according to the supposed intentions of the Legislature or attempting to exclude cases which fall within the express meaning of the rule in order to make the law reasonable. **S** HIRIOMAL *v.* HAZARISING **583**

Interpretation of Statutes. *See* CONSTRUCTION OF STATUTE **743**

———— *Fiscal Statute.*

Technicalties in a fiscal statute should be strained, if at all, in favour of the subject and not against him. **N** SETH BALKISHAN NATHANI *v.* COMMISSIONER OF INCOME-TAX **572**

Judgments, inter partes, *admissibility of.*

Where the question in issue is the status of one of the parties to the suit, judgments and orders in previous suits and proceedings between the parties in which the question of status was in issue are admissible in evidence to prove the fact, nature and result of the previous litigation, and may raise a presumption in favour of one of the parties so as to shift the burden of proof. **N** JUMILAL *v.* HALKI **981**

Jurisdiction—Damages for use and occupation, suit to recover. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 8 **383**

———— Goods sent for sale—Conversion—Suit to recover value of goods. *See* CIVIL PROCEDURE CODE, s. 20 (*c*) **991**

Jurisdiction of Civil Courts, limits of. *See* INCOME TAX ACT, 1918, s. 52 **940**

———— *Suit to fix liability of defendant for Government revenue, nature of.*

A suit asking the Court to fix the liability of the defendants in regard to the Government revenue, for which the plaintiff is liable to the Collector, is a suit of a civil nature and is cognisable by the Civil Courts. **Pat** GULAB CHAND *v.* DUKHI RAI **188**

———— **of Civil and Revenue Courts**—Decree by Revenue Court—Declaratory suit in Civil Court, maintainability of. *See* AGRA TENANCY ACT, 1901, s. 167 **628**

———— Mortgage—Mortgagor retaining possession as tenant—Ejectment, suit for—Land-

Jurisdiction of Civil and Revenue Courts—concld.

lord and tenant, relation of - Procedure. *See* PUNJAB TENANCY ACT, 1887, s. 77 (3) (*e*) **423**

——— Partition — Suit for declaration that certain lands are *shamilat*, whether cognisable by Civil Courts. *See* PUNJAB LAND REVENUE ACT, s. 158 **68**

——— Suit between rival claimants to occupancy holding, whether cognisable by Civil Court—Matter decided finally by Revenue Court —Jurisdiction of Civil Court, whether barred. *See* AGRA TENANCY ACT, s. 157 **1008**

——— Suit for enhancement of rent Declaration made by Revenue Court that tenants are under-proprietors—Suit in Civil Court to challenge decision of Revenue Court, maintainability of. *See* OUDH RENT ACT, s. 107 **150**

——— Suit to recover excess area allowed in partition, nature of—Question of title. *See* PUNJAB LAND REVENUE ACT, 1887, s. 158 **1029**

Jurisdiction of Small Cause Court—Question of title, whether cognizable. *See* PROVINCIAL SMALL CAUSE COURTS ACT **872**

——— Suit to recover rent of grazing land, nature of—Suit, whether cognisable by Small Cause Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, ART. 8 **345**

——— Suit to recover value of trees cut and removed by defendant whether cognisable by Small Cause Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 35 (*i*) **371**

——— Suit by a tenant to recover possession of holding from landlord, whether cognisable by Civil and Revenue Court. *See* PUNJAB TENANCY ACT, ss. 50, 77 (3) (*g*) **346**

Laches, *doctrine of.*

The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases lapse of time and delay are most material. But in every case if an argument against relief which otherwise would be justified, is founded upon mere delay, that delay of course not amounting to a bar of any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy. **M** BRUNTON *v.* BRUNTON **299**

Lambardar, *lease granted by, after ceasing to be* Lambardar, *effect of*—Theka *of village, grant of, whether ordinary management.*

Only a person having a proprietary interest can be appointed a *Lambardar*, and though the definition of a proprietor includes a lessee, a person who ceases to retain that capacity ceases to be a *Lambardar* and cannot perform any of the functions

Lambardar—concld.

of a *Lambardar*. The giving of a whole village on lease cannot be said to be an act of ordinary village management. **N** MOTILAL GULABSAO *v.* GANPATRAO **308**

——— *Occupancy rights, surrender of—Co-sharers, claim by, in respect of their shares—Delay, effect of—Discretion of Court—Appellate Court, interference by.*

When a tenant surrenders his occupancy rights to a co-sharer *Lambardar*, the other co-sharers if they wish to recover their shares in the fields surrendered, on payment of a proportionate share of the expenses of acquisition, must prefer their claim without unreasonable delay. Such a claim is a merely equitable one and is within the discretion of the Court to grant or to refuse, and unless there is something wrong with the manner in which that discretion has been exercised, it is unusual to interfere with it in appeal.

When such a claim was preferred more than three years after the date of the surrender and the *Lambardar* had, in the meantime, spent money on the land and leased it out to a tenant:

Held, that the delay was unreasonable and that the lease granted by the *Lambardar* was binding on the co-sharers. **N** MAHADEO *v.* SONBA **532**

——— *, one of two, whether can maintain suit for ejectment Plaintiff ceasing to be* Lambardar *during pendency of suit Decreee, whether can be passed.*

If a party has two agents fully accredited, either can bring a suit on behalf of the other without the concurrence of the other, and if in the course of the suit his powers are taken away, there is nothing to prevent a decree being passed in favour of his principal.

On the same principle one of two *Lambardars* of a *mahal* can bring a suit for ejectment on behalf of the proprietary body of the village without the concurrence of the other *Lambardar*, and a decree can be passed in the suit even after the plaintiff *Lambardar* has been relieved of his office. **N** MAROTI KUNBI *v.* SITARAM **722**

———, *right of, whether transferable.*

Lambardari rights in a village cannot be transferred. **N** CHOONI LAL *v.* NANI SINGH **278**

Land Acquisition Act (I of 1894), ss. 18, 31 *—Property subject to mortgage—Payment of compensation money to mortgagor without notice to mortgagee—Suit against Government for recovery of money due on mortgage—Mortgagee's remedies.*

Where property subject to a mortgage is acquired by Government under the Land Acquisition Act and the whole compensation amount is paid to the mortgagor without notice to the mortgagee the mortgagee may claim a reference under section 18 to the Civil Court and after the expiration of six months he is confined by the Act to a suit under section 31 against the persons to whom the money was wrongly paid. There is no other remedy at all either against the Secretary of State or the Land Acquisition Collector.

Per *Schwabe, C. J.*—Where a new right is brought into existence by a Statute and a remedy in respect of that right is also given by the same Statute, that remedy is exclusive of any ordinary rights,

Land Acquisition Act—concld.

The compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the Statute and nothing else. The Statute in creating the rights has given the remedies to be exercised in respect of those rights.

The principles of the Land Acquisition Act are that the Crown should in the first instance be allowed to recognise the person in possession as ostensible owner. A mortgagee as such need not be recognised at all though he can, within a certain time and within certain limits, come in and institute proceedings provided under the Act. **M** SECRETARY OF STATE *v.* KUPPUSAMI CHETTI, 46 M. L. J. 36; (1924) M. W. N. 138; (1924) A. I. R. (M.) 521 **82**

Land Registration Act (VII of 1876), s. 78, *applicability of.*

Section 78 of the Land Registration Act has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act. **C** PROBODH CHANDRA *v.* HARISH CHANDRA, 27 C. W. N. 888; (1924) A. I. R. (C.) 124 **7**

——— **s. 81,** *applicability of.*

Section 81 of the Land Registration Act has no application to a person who is not himself a proprietor, but who has an interest subordinate to a proprietor. **C** PROBODH CHANDRA *v.* HARISH CHANDRA, 27 C. W. N. 888; (1924) A. I. R. (C.) 124 **7**

Landlord and tenant—Agreement to vacate at specified time—Notice to quit, whether necessary —Tenant holding over, who is—Dissent of landlord. *See* TRANSFER OF PROPERTY ACT, s. 108 **446**

——— *Ejectment, suit for—Tenancy, proof of—Mortgage-deed, unregistered whether can be relied upon to show nature of possession—Registration Act (XVI of 1908), ss 17, 49.*

Where, in a suit for ejectment, the plaintiff comes into Court on the allegation that the defendant is a tenant, it is open to the latter to rely on an unregistered deed of mortgage which was followed by delivery of possession, in order to show the nature of his profession, and to satisfy the Court that he is not holding the land as a tenant. **A** KESRI SINGH *v.* CHANNO **955**

——— *Lease containing forfeiture clause—Non-payment of rent—Suit for rent and forfeiture—Decree directing payment within certain time—Amount enhanced on appeal—Forfeiture, relief against.*

In cases where forfeiture is sought to be enforced by a landlord under the terms of a decree the landlord should prove conclusively that the decree which he is executing has given him that right. The Court ought to lean in favour of the tenant against forfeiture rather than in landlord's favour in such cases.

In a suit by a landlord for recovery of rent and for enforcing the right of forfeiture for non-payment of rent under the lease-deed the Court of first instance decreed a certain sum of money for rent and directed that if the amount was paid within a month from the date of decree the forfeiture would be relieved against. The tenant paid the sum within time but on appeal the amount payable was increased by a small sum, the time for payment one month from the date of the appellate decree. In other respects the lower Court's decree was confirmed:

Held, that the payment of the said excess sum within one month from the date of the appellate decree as directed by the Appellate Court was not a condition precedent to the forfeiture being relieved against. **M** AKKANNA CHETTI *v.* CHANDU CHETTI, (1924) M. W. N. 92 **1007**

——— *Non-occupancy plot—Permission to convert into grove, effect of—Right to transfer trees.*

Where permission is given by a *zemindar* to plant a grove on a non-occupancy tenure, the effect of it is to put an end to the tenancy as such, and to substitute therefor a fresh contract between the parties by which the position of the tenant is converted into that of a grove-holder with transferable rights. **A** SULTAN HUSAIN KHAN *v.* JWALA **480**

——— *Notice to quit—Statement that mesne profits would be claimed in case of delay, whether invalidates notice.*

A notice of ejectment informed the tenant that he was required to vacate the premises by a certain date and that, if he failed to do so, a suit for his eviction would be filed and rent by way of mesne profits would be claimed:

Held, that the last clause meant that, if there were any delay in the tenant vacating the premises in accordance with the notice, he would be liable for damages for his continued occupation, and that the notice was not invalidated by the addition of this clause. **A** BHAGWANA *v.* SHIB SAMETRI PRASAD **651**

——— *Occupancy holding — Lands allotted to several villages—Rent, separate suits for, in respect of lands in each village, maintainability of.*

Where lands comprised in one occupancy holding are distributed among several villages, the occupancy holding is split up into as many holdings as there are villages among which the lands are distributed and a separate suit for rent is maintainable in respect of the lands in each village. **A** BHUP NARAIN RAI *v.* SRI THAKUR RADHA **277**

——— *Occupancy tenant—Usufructuary mortgage by tenant—Landlord, whether can recover rent from mortgagee.*

A landlord cannot sue the usufructuary mortgagee of an occupancy tenancy for rent of the holding, as the relationship of landlord and tenant does not subsist between the parties, the occupancy tenant being prohibited from making such a transfer of the tenancy. **A** KISHUN DAYAL SAHI *v.* SAHIBZADA RAVI PRATAB NARAIN SINGH, 22 A. L. J. 232 **329**

——— *Relinquishment—Vacant possession—Possession delivered to one of several joint landlords, effect of.*

A tenant giving up the demised premises to his landlord is bound to give him vacant possession, and this obligation is implied in every case as one of the terms of the letting.

Where, however, there are more landlords than one and a partition has not been effected between them, possession delivered by the tenant to one landlord would be tantamount to delivery of possession to all. **L** FIRM RAMGOPAL-BHAGWAN DAS *v.*

Landlord and tenant—contd.

PARMESHRI DAS, 6 L. L. J. 197; (1924) A. I. R. (L) 474 **570**

——— *Rent, additional, in respect of fruit trees, legality of*—Abwab—*Custom.*

Abwabs have been abolished under the Regulations for many years but the right to *Bankar*, *Jhalkar* and *Phulkar* was always an exception from the abolitions made by the Regulations and rent in respect of fruit trees or other classes of trees may well be charged in addition to the ordinary rent either under an agreement between the landlord and tenant, or if any custom to that effect can be made out.

A custom whereby the landlord is entitled to charge a certain rate of rent in respect of fruit trees in addition to the ordinary rent payable for the land is not illegal. **Pat** RAMESHWAR SINGH *v.* WAZUL HAQUE **463**

——— *Rent, suit for, questions of title whether relevant.*

There is no rule of law that in a rent-suit questions of title which require to be determined should not be determined, although generally questions of title between the plaintiff and third persons are not strictly relevant in a rent-suit.

In a rent-suit the question of the relationship of landlord and tenant subsisting between the parties and the question of the plaintiff's or anybody else's title are distinct questions. **C** CHITPORE GOLABARI CO., LTD. *v.* GIRDHARI LAL SEROGI, **353**

——— *Site occupied by tenant—Abandonment—Resumption—Grantee, whether can sue original licensor for possession—Sale of proprietary rights, effect of—Site of dwelling house, rights in.*

Where a *zemindar* resumes possession of a site abandoned by a former licensee and grants it to another, the latter, if disturbed in his enjoyment by the former, can maintain a suit for recovery of possession against him.

Where a *zemindar* has resumed possession of a site abandoned by a licensee the latter cannot resume possession of the site without the permission of the *zemindar*.

On an auction-sale of the proprietary rights of a proprietor in a village the entire land appertaining to the property sold passes to the auction-purchaser, and by operation of law the judgment-debtor becomes a *ryot* and the rights of the judgment-debtor in respect of the site occupied by his dwelling house are reduced to those of other persons residing in the village. **A** ZAHUR HASAN *v.* SHAKER BANOO **189**

——— *Tenancy of fractional share of field, validity of.*

There can be no tenancy in respect of a fractional share of a field or fields not defined by metes and bounds and a suit for joint possession of an undivided share in a field on the basis of a lease does not lie. **N** MAROTI KUNBI *v.* BAPUJI **636**

——— *Tenant by sufferance.*

A tenant by sufferance is in by laches of the landlord and is entitled to the benefit of the Law of Limitation. **Pat** HARIGIR *v.* KUMAR KAMAKHYA NARAIN SINGH, (1924) Pat 158; 3 Pat 534 **511**

——— *Tenant using plot in abadi for temporary purpose, whether entitled to build on it.*

Landlord and tenant—concld.

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord, though he may have been using it for a long time for temporary purposes, for instance as a threshing floor. **A** MOHAMMAD TAQI KHAN *v.* DORI **881**

Land tenures—Ubari *tenure, incidents of—Impartibility—Presumption—Burden of proof.*

The *Ubari* tenure has nothing to do with the proprietorship in the lands, but is merely the right to hold the village on payment of a quit-rent to Government, that is, on payment of less revenue than that ordinarily payable.

The ordinary presumption is that a village is partible and alienable, and the burden is on the person who sets up impartibility, which must be strictly proved. **N** ABDUL HUSAIN *v.* MEGHRAJ, 7 N. L. J. 110 **780**

Lease—Zarpeshgi *lease, object of—Redemption, whether can be prevented—Apparent transaction, presumption attaching to.*

The primary object of a *Zarpeshgi* lease is not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor.

Where, therefore, a lease is executed not merely as a contract for the cultivation of land but constitutes a real and valid security to the tenant for the principal sums advanced together with interest thereon, the tenant's possession is that of creditors operating re-payment of the debt due to them by means of their security.

Equity will not permit any device or contrivance to prevent or impede redemption.

An apparent transaction must be assumed to be the real transaction until the contrary is proved. **Pat** KHARAG NARAIN *v.* DWARKA PRASAD SINGH, 3 Pat. 465 **588**

Legal representative. *See* CIVIL PROCEDURE CODE, s. 2 (11) **12**

License—*Denial of licensor's title—Forfeiture—Revocation—Permanent structure built by licensee.*

A license, unlike a lessee, does not forfeit his title by merely denying the title of his licensor.

A license cannot be revoked where the licensee acting upon the license has executed a work of a permanent character on the premises included in the license **A** AMJAD KHAN *v.* SHAFIUDDIN KHAN, **215**

——— *Licensee erecting permanent structures in pursuance of license—Ejectment.*

Persons who have, with the consent of the *zemindar*, been permitted as licensees, to occupy for more than twelve years a plot of land in the village *abadi* which they have used for purposes of agriculture and on which, in pursuance of their license, they have erected constructions of a permanent character, are entitled to be left in undisturbed enjoyment of the plot as licensees, and are not liable to ejectment at this instance either of the *zemindar* or his transferee. **A** NATHU *v.* TULSHI RAM, (1924) A. I. R. (A.) 434 **316**

Limitation Act (IX of 1908), s. 3—*Second appeal—Question of limitation, when can be raised.*

When a question of limitation is not a question purely of law but one of mixed fact and law the Second Appellate Court cannot go into it of its own accord under section 3 of the Limitation Act and dismiss the suit as barred although limitation was not set up as a defence. **N** BHUWAN LAL *v.* MANHORI **960**

——— **s. 5**—*Appeal, delay in filing—Review, time spent in, whether can be deducted.*

Time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under section 5 of the Limitation Act, from the period of limitation provided for an appeal. The mere fact that the applicant for review made a mistake of law in applying for review does not preclude him from obtaining the benefit of the section. **A** PARBHU DAYAL *v.* MURLI DHAR, 22 A. L. J. 365; 10 O. & A. L. R. 528 **677**

——— **s. 5**—*Wrong legal advice, whether sufficient ground for extension- Discretion in allowing time-barred appeals, when to be exercised.*

A wrong legal advice about the period of limitation is not a sufficient ground for extension of period under section 5 of the Limitation Act.

When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained. **N** PADAMRAJ PHULCHAND *v.* MITSUIE BHUSHAN KESHA, LTD. **154**

——— **ss. 5, 12**—*Application for leave to appeal to Privy Council- Time spent in obtaining copy of judgment, whether extended—"Sufficient cause," interpretation of—Time, when can be extended.*

The time spent in obtaining a copy of the judgment can be extended in addition to the time for obtaining a copy of the decree only in cases where the decree is appealed from or sought to be reviewed. In an application for leave to appeal to the Privy Council, it is only the time requisite for obtaining a copy of the decree that can be excluded in computing the period of limitation.

The words "sufficient cause" in section 5 of the Limitation Act must no doubt receive a liberal construction, but when once the time for appeal has passed, a valuable right is secured to a successful litigant of which he must not be deprived unless the Court is satisfied that justice requires that extension of time should be granted and it must further be shown that there has been no inaction or negligence on the part of the petitioner. **S** NUR MAHOMED *v.* HASSOMAL **953**

——— **ss. 5, 12**—*Judgment—Decree not drawn up -Duty of Court -Appeal—Limitation, commencement of.*

Limitation Act—contd.

Where the law creates a limitation and a party is disabled to conform to that limitation without any default in him, and he has no remedy over it, the law will ordinarily excuse him.

There can be no legal obligation on a litigant to apply for a copy of a decree which is non-existent; the existence of a decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring the appeal will commence to run only from that date. **N** PANDU *v.* RAJESHWAR, 20 N. L. R. 131 **996**

——— **s. 5, Sch. I, Art. 173**—Review—Discovery of fresh evidence—Extension of limitation—Sufficient cause - Evidence discovered late. *See* CIVIL PROCEDURE CODE, O. XLVII, R. 7 (1) (c) **527**

——— **s. 7**—*Adult and minor decree-holders—Execution of decree—Limitation -Adult decree-holder, whether can grant discharge—Muhammadan Law -Guardianship - Uncle, whether guardian of nephew's property.*

Where one of two joint execution-creditors is a minor, the other execution-creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor within the meaning of section 7 of the Limitation Act.

Under the Muhammadan Law the uncle is neither the legal nor the natural guardian of the property of his minor nephew, and where he obtains a decree jointly with his nephew he is not competent to grant a valid discharge of the decree within the meaning of section 7 of the Limitation Act, and limitation for execution of such a decree does not, therefore, begin to run till the disability of the minor decree-holder ceases. **L** MUHAMMAD ZULFIKAR ALI KHAN *v.* ABRAR ALI **285**

——— **s. 14**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 100—Execution of decree—Dispossession, objection to—Collector, whether Court - Limitation, extension of.*

A Collector in the Central Provinces is not invested with power to dispose of objections to dispossession in execution of a decree under O. XXI, r. 100 of the Civil Procedure Code. He is not, therefore, a Court for that purpose within the meaning of section 14 of the Limitation Act, and the time occupied in proceedings taken before him under O. XXI, r. 100 of the Civil Procedure Code, cannot be used to extend limitation under that section. **N** BANDAPPA *v.* SHANKAR RAO **580**

——— **s. 14**—*Time spent in prosecuting appeal which is not permitted, whether can be excluded—Party proceeding in ignorance of law, whether acts with due deligence and "in good faith."*

Proceedings which are sought to be brought within the purview of section 14 of the Limitation Act must be such as are recognised by law

as legal in their initiation though a party has carried the proceeding to a wrong Court.

A party who is proceeding in ignorance of law can hardly be said to be proceeding with due diligence or in good faith within the meaning of section 14 of the Limitation Act.

Time spent in prosecuting an appeal which is not permitted under the law cannot be excluded under section 14 of the Limitation Act. **Pat** SHEO DHARI RAM *v.* GUPTESWAR PATHAK **482**

——— **s. 15, Sch. I, Arts. 181, 182 (5)**—*Execution of decree—Injunction restraining execution—Step-in-aid of execution Limitation.*

Execution of a mortgage-decree for sale of a house was first taken out on 7th July 1917. On 12th September 1917 an injunction was issued restraining the sale of half the house. An application to take a step-in-aid of execution with respect to the other half of the house was made on 19th November 1917 and that half of the house was sold. The injunction was dissolved on 8th November 1918. An application for execution with respect to the other half was made on 10th January 1922:

Held, (1) that the last application to take a step-in-aid of execution having been made on 19th November 1917, limitation began to run from that date;

(2) that the only period which the decree-holder was entitled to exclude on account of the injunction was from 19th November 1917, the date on which limitation began to run, to 8th November 1918, the date on which the injunction was dissolved;

(3) that, therefore, the present application made on 10th January 1922 having been made more than three years after the date of the last application, after deducting the period during which the injunction was in force after the date of the last application, was barred by limitation. **Pat** LAL PASI *v.* RAMSARAN LAL CHOWDHRY **478**

——— **s. 19**—*Acknowledgment, what amounts to—Statement in pleading acknowledging mortgage—Promise to pay, absence of, effect of.*

An acknowledgment that a debt is due, without more, will be held to imply a promise to pay. On the other hand, a statement that there was a debt but it has been discharged will not amount to an acknowledgment.

A statement in a pleading that there was a mortgage but that a sale had been effected to pay off the mortgage and that since the date of the sale the vendee had been in possession of the property, does not imply a promise to pay and does not amount to an acknowledgment within the meaning of section 19 of the Limitation Act. **Pat** CHHATERDHARI MAHTO *v.* NASIB SINGH, 5 P. L. T. 551 **919**

——— **s. 19**—Mablakbandi—*Acknowledgment—Contract Act (IX of 1872), s. 25.*

A *mablakbandi* is a good acknowledgment under section 19 of the Limitation Act and will preserve any debt due which was not barred at the time when the *mablakbandi* was made. It is not a promise to pay under section 25 of the Contract Act so as to revive any debt which was barred at the date it was made. **C** KSHITISH CHANDRA DAS *v.* UMED MONDAL **139**

——— **ss. 19, 20**—*Mortgage—Redemption suit—Acknowledgment after expiry of period of limitation—Payment of malikana by mortgagee—Extension of limitation—Admission—Estoppel.*

In a suit for redemption it is for the plaintiff to prove that he has a subsisting right of redemption at the date of suit, and he is not relieved of the burden by showing that the fact of the mortgage was admitted by the defendant at a date when more than sixty years after the mortgage was effected had expired. The admission does not operate as an estoppel and having been made after the expiry of the period of limitation for a suit for redemption cannot serve as a valid acknowledgment under section 19 of the Limitation Act.

An acknowledgment, in order to be operative under section 19 of the Limitation Act, must be signed by the party against whom any particular right is claimed.

Section 20 of the Limitation Act applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to a mortgagor to redeem his property. **L** PIROZE KHAN *v.* KANHIYA RAM, 6 L. L. J. 194; (1924) A. I. R. (L.) 484 **617**

——— **s. 22**—Suit against wrong person—Amendment after limitation, whether permissible. *See* CIVIL PROCEDURE CODE, O. I, R. 10 **312**

——— **Sch. I, Arts. 14,** *applicability of—Suit for possession—Adoption—Mutation—Limitation.*

Article 14 of Schedule I to the Limitation Act applies to acts and orders done in the exercise of powers legally exerciseable by the Executive, and can only be applied where the order is one which needs to be set aside. If in fact there is no provision of law for setting it aside, the Article cannot apply.

Though an order in a mutation case directing mutation in the name of a particular person cannot be directly impugned in a civil suit, yet another person can show by a civil suit that he is the real owner of the property mutated, and, having established his claim in that suit can then go to the Revenue Authorities and ask that mutation be made in his name. Article 14 of Schedule I to the Limitation Act is not applicable to such a suit. **N** MUNNA *v.* SUKLAL **987**

——— **Art. 32,** *applicability of—Easement—Servient tenement, heavier burden imposed on—Suit for removal of burden.*

Defendant who was entitled to place beams on the plaintiff's wall, placed heavier and more numerous beams on the wall than had existed before and plaintiff brought a suit for the removal of the beams:

Held, that Art. 32 of Schedule I to the Limitation Act had no application to the case.

A common instance of the application of Art. 32 of Schedule I to the Limitation Act is that of a tenant who having a right to cultivate land digs a tank in it or builds a house on it. **A** MOHAN *v.* BISHAMBHAR SAHAI, 46 A 68 **193**

——— **Sch. I, Arts. 32, 120, 144**—*Landlord and tenant—Occupancy tenant, constructions erected by, without permission of landlord—Suit for demolition and injunction—Limitation.*

A suit by a landlord against his occupancy tenant for the demolition of certain construction built by the latter on his occupancy lands without the permission of the former and for an injunction, is governed either by Art. 32 or by Art. 120 and not by Art. 144 of Schedule I to the Limitation Act. **A** PIYARE LAL *v.* BED RAM **849**

——— **Art. 61**—*Suit to recover payment made to avoid sale of property belonging to another.*

The substitution of a pre-emptor in place of the vendee takes effect from the date of the sale in favour of the vendee. Where a person who has no interest in a property pays off a mortgage-decree against the property in order to save the property from sale, his claim to recover the amount paid by him is governed by Art. 61 of Schedule I to the Limitation Act. **O** COLLECTOR SINGH *v.* MADARI LAL **738**

——— **Arts. 97, 116**—*Lessee—Registered lease—Dispossession—Suit for damages—Limitation.*

A suit by a lessee under a registered lease for damages for dispossession before the expiry of the period of lease, is governed by Art. 116 and not Art. 97 of the Limitation Act and the limitation runs from the date of dispossession. **N** LAXMICHAND *v.* BAJIRAO **248**

——— **Art. 103**—*Suit to recover dower—Limitation, commencement of.*

Limitation for a suit by a Muhammadan wife to recover the amount of her prompt dower does not begin to run unless there has been a demand on the part of the wife and a refusal to pay on the part of the husband. **O** ZOHRA BIBI *v.* GANESH PRASAD **106**

——— **Art. 106**—*Partnership—Member of joint Hindu family becoming partner, other members, whether partners—Death of partner—Dissolution of partnership—Suit for accounts—Limitation.*

Where one member of a joint Hindu family enters into a contract of partnership with a stranger, the other members of the family do not become partners and cannot sue for dissolution of the partnership. The partnership is dissolved by the death of the member who is a partner, and limitation for a suit for an account of the partnership begins to run from the date of the death of the partner. **N** RAMBHAN *v.* PRAYAGDAS, 20 N. L. R. 49 **198**

——— **Art. 118**—Suit for possession of property by adopted son. *See* HINDU LAW—ADOPTION **284**

——— **Sch. I, Arts. 118, 119**, *applicability of.*

Articles 118 and 119 of Schedule I to the Limitation Act apply only to a suit for declaratory relief pure and simple, and have no application to a suit for possession even though the defendant is in possession under an adoption or the plaintiff's title is based upon an adoption. **N** MUNNA *v.* SUKLAL **987**

——— **Art. 139**—*Limitation.*

The possession of a tenant holding over is wrongful and if there is no evidence from which a fresh tenancy can be inferred in the strict term time begins to run against the landlord when the period of the fixed lease expires. **Pat** HARIGIR *v.* KUMAR KAMAKHYA NARAIN SINGH, (1924) Pat. 158; 3 Pat. 531 **511**

——— **Art. 140**—Suit by remainderman to recover possession of property alienated by life-tenant—Limitation, commencement of. *See* TRANSFER OF PROPERTY ACT, CH. II **633**

——— **Art. 141**—*Mortgage—Mortgagee, interest of, whether immoveable property—Civil Procedure Code (Act V of 1908), s. 66, scope of—Suit by beneficial owner against auction-purchaser, maintainability of.*

The interest of a mortgagee in the property mortgaged is immoveable property for the purposes of Art. 141 of Schedule I to the Limitation Act. The provisions of section 66 of the Civil Procedure Code were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchases. **O** JAI INDER BAHADAR SINGH *v.* SHEO INDER BAHADAR SINGH, 10 O. L. J. 481; (1924) A. I. R. (O.) 218 **393**

——— **Art. 141**—*Suit for possession by daughter—Transfer by widow* inter vivos, *whether effects daughter's title.*

The limitation under Art. 141 of Schedule I to the Limitation Act is 12 years and begins to run from the death of the female. Any dealings with the property by her, or her transferee during her lifetime cannot affect the title of her husband's heirs which does not come into existence a moment earlier than her death. **O** RAJ DULARI *v.* CHANDRSHUR DEI **65**

——— **Art. 142**—*Dispossession and discontinuance of possession—Burden of proof—Constructive possession of owner.*

Where a plaintiff sues for possession on an allegation of dispossession, he must prove possession within twelve years before suit. In order to prove such possession he may rely upon the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession, but if he relies upon this presumption he must prove that the land was incapable of actual possession within twelve years before suit. For instance, constructive possession may be shown by the fact that the land being under water was incapable of actual possession, or that, although it was capable of being possessed, no one had actually taken pos-

session during the period in question. He cannot, however, by proving possession at any period anterior to twelve years before suit, shift the *onus* on to the defendant to prove his possession.

Per *Page, J.*—A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues until he is dispossessed; and upon the cessation of the dispossession before the lapse of the statutory period, constructive it remains.

While the doctrine of constructive possession is equally applicable to cases where the plaintiff seeks to obtain possession of land in the possession of another and to cases where the plaintiff claims to recover possession of lands of which he alleges that he has been dispossessed, a plaintiff who frames his suit to recover possession of lands of which he has been dispossessed must needs prove that he has been in possession and that he has been dispossessed within twelve years prior to commencing proceedings to recover possession of the land. **C** SURESH CHANDRA MUKERJI *v.* SHITIKANTA BANERJEE, 28 C. W. N. 637; 51 C. 669 **679**

——— **Sch. I, Art. 144**—*Adverse possession—Co-sharers—Transferee from co-sharer, suit by, to recover possession—Limitation.*

In the case of co-sharers the possession of one co-sharer is the possession of all, and if one of them sets up a prescriptive title against the others, he must prove that his possession was openly hostile to the latter and that it could not be lawfully referred to a legal title as co-sharer.

But a transferee or an assignee from a co-sharer does not by the mere fact of transfer or assignment become a co-sharer if his rights as such are denied by the other co-sharers. A suit by such transferee or assignee to recover possession of the share transferred to him from the co-sharers of his transferor or assignor must, therefore, be brought within twelve years of the date of the transfer or assignment in his favour. **L** UDI *v.* MARU MAL **159**

——— **Arts. 144, 148**—Mortgage paid off by stranger—Suit to recover mortgaged property—Limitation. *See* AGRA TENANCY ACT, s. 79 **1026**

——— **Art. 166**—*Application to set aside execution sale—Limitation, commencement of.*

Under Art. 166 of Schedule I to the Limitation Act, time for an application to set aside a sale in execution of a decree begins to run from the date of the sale and not from the date on which the deposit of 25 per cent. is made by the decree-holder, or the date on which the sale is confirmed. **N** SITARAM *v.* ASARAM, 19 N. L. R. 162; (1924) A. I. R. (N) 108 **47**

——— **Art. 177**—*Amending Act XXVI of 1920—Death of defendant—Application to bring legal representatives on record—Limitation.*

The words "six months" opposite to Art. 177 in Schedule I, to the Limitation Act have not been altered by anything contained in Act XXVI of 1920 and the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still six months. **L** ARJAN DAS *v.* NANAK CHAND **771**

——— **Sch. I, Arts. 181, 182**—*Civil Procedure Code (Act V of 1908), ss. 144, 151—Application for restitution, nature of—Limitation—Patna High Court, whether bound by decisions of Calcutta High Court.*

Held, by the majority (*Ross, J.*, dissenting):—An application for restitution under section 144 or 151 of the Civil Procedure Code is not an application for execution, and the proper Article of the Limitation Act applicable to such an application is Art. 181 of the First Schedule of the Act.

Per *Das, J.*:—Article 182 of Schedule I to the Limitation Act applies to such applications for execution as are contemplated by the Code of Civil Procedure and are provided in O. XXI of the Code. An application for restitution is not such an application. The jurisdiction to order restitution is inherent in the Court and flows not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. The Code of Civil Procedure and the Limitation Act are the two great Procedure Codes in India. They are Statutes *in pari materia* and are to be taken together as forming one system and as interpreting and enforcing each other.

The Patna High Court should not without very good reason, depart from a long course of decisions of the Calcutta High Court, especially on points of procedure.

Per *Ross, J.*—An application for restitution under section 144 or 151 of the Civil Procedure Code is an application for execution and is governed by Art. 182 of Schedule I to the Limitation Act. **Pat** BALMAKUNDA MARWARI *v.* BASANTA KUMARI DASSI, (1924) Pat. 33; 5 P. L. T. 145; 3 Pat. 371 **200**

——— **Art 182 (5)**—*Execution of decree—Affidavit as to incumbrances, whether application to take step-in-aid of execution.*

An affidavit filed by the decree-holder to the effect that there are no incumbrances on the property sought to be sold in execution does not amount to an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, so as to extend limitation for the execution of the decree. **A** CHIRAUNJI LAL *v.* GANGA SAHAI, 22 A. L. J. 410; 10 O. & A. L. R. 519 **631**

——— **Art. 182 (5), (6)**—*Civil Procedure Code (Act V of 1908), s. 41, O. XXI, r. 10—Execution of decree—Transfer of decree—Application to Court which passed decree, whether made to proper Court—"Applied for" in cl. (6), Art. 182, meaning of.*

Where a decree has been transferred to a Court other than that which passed it for execution, and an application to take a step-in-aid of execution is made to the Court which passed it

before the decree has been re-transferred by the Court to which it was transferred, with the requisite certificate of non-satisfaction, the application cannot be regarded as having been made to the proper Court within the meaning of Art. 182 (5) of Schedule I to the Limitation Act and does not operate to extend limitation.

Clause (6) of Art. 182 of Schedule I to the Limitation Act must be read with clause (5) of that Article and the words "applied for" in the former clause mean "applied for as provided in clause (5)." **L** SHERU MAL-CHINA MAL *v.* HIRA LAL-ANANT RAM **241**

——— **Sch. I, Arts. 182 (5), 183**—*Mortgage-suit -Preliminary decree passed by Privy Council --Final decree by Court in India--Execution of decree--Limitation applicable—Dismissal of application—Continuation—Step-in-aid of application—Limitation, commencement of.*

Under Art. 182 (5) of Schedule I to the Limitation Act, time begins to run from the date when an application to take a step-in-aid of execution is made to the Court and not from the date on which the application is considered and disposed of by the Court.

Where an application for execution is struck off without any default on the part of the decree-holder, a subsequent application for execution must be treated as a continuation of the previous application and no question of limitation can arise.

Where a preliminary decree in a mortgage-suit is passed by His Majesty in Council and a final decree is thereafter passed by the Courts in India, the decree to be executed is the order of His Majesty in Council and the execution of it is governed by Art. 183 and not by Art. 182 of Schedule I to the Limitation Act. **Pat** BHAGWANTA KOER *v.* ZAMIR AHMED KHAN, 5 P. L. T. 451; (1924) (Pat.) 221; 2 P. L. R. 219; 3 Pat. 596 **766**

——— ——— **Art. 183**—*Mortgage-decree in favour of several mortgagees—No community of interest among mortgagees- Revision in favour of one, whether of avail in favour of another mortgagee--Revivor, test of.*

The test whether an order is an order of revivor or not is whether it decided that the decree is still capable of execution and the decree-holder is entitled to enforce it.

Where several mortgagees, whose interests are not at all joint are made plaintiffs and for convenience their claims are tried in one suit and dealt with in one decree, an order operating as a revivor in favour of one of the mortgagee decree-holders can be of no avail to any of the other mortgagee decree-holders. **C** NARAIN DASS DUTT *v.* BANKU BEHARY CHATTOPADHYA **1001**

——— ——— **Art. 183, proviso**—*Sale in execution—Purchase-money deposited in Court--Court, whether agent of judgment-debtor--Payment to decree-holder under order of Court--Subsequent application for further execution of decree--Limitation, operation of.*

A Court directed payment to a decree-holder out of funds standing to the credit of a suit, but

the application for payment out was not made till some years after by the legal representative of the decree-holder and then the order was passed and payment made. On an application for further execution being taken out more than twelve years from the date of the original order but less than twelve years from that of the payment:

Held, that the Court could properly be said to be acting as the agent of the judgment-debtor within the meaning of the proviso to Art. 183 of the Limitation Act, and the payment ordered by the Court could save limitation as the payment made by an authorised agent of the defendant. **M** SABAPATHY CHETTY *v.* SHANMUGAPPA CHETTY, 46 M. L. J. 453; 19 L. W. 582 **832**

Lis pendens, doctrine of, applicability of. *See* TRANSFER OF PROPERTY ACT, S. 51 **308**

Madatmash Inam. *See* BERAR INAM RULES **77**

Madras Estates Land Act (I of 1908), s. 3, cl. (2) (e) and (5)—*Pre-settlement* Inam *in* Zemindari—Inam *treated as part of* Zemindari *in Permanent Settlement, whether "Estate"—Exchange of* Inam *lands for* patta *lands, whether changes character of* Inam *lands—Minor* Inamdar *in* mokhasa, *whether land-holder*—"Mokhasa" *tenure*, "Chathurbagham" *tenure, meanings of.*

Where a pre-settlement *mokhasa Inam* in a *Zemindari* had been granted by the holder thereof on favourable quit rent and at the time of the Permanent Settlement, the *mokhasa* was, notwithstanding section 4 of Madras Regulation 25 of 1802, treated as part of the *Zemindari* assets and in the income taken into account for the purposes of grant of *sanad:*

Held, that the *Inam* formed part of an "Estate" within the meaning of section 3 clause (2) *(e)* of the Estates Land Act, even if the *Inam* land had been exchanged for lands held under Government *pattas.*

A pre-settlement grant would not form part of a *Zemindari* unless it can be brought under any of the sub-clauses of section 3, clause (2) of the Estates Land Act.

Where, at the time of the Permanent Settlement, lands which the Government might have excluded from assessment by reason of the various grounds set forth in clause 4 of the Regulation were, as a matter of fact, included in calculating the assessment payable by the *Zemindar*, and where both the Government and the *Zemindar* from 1802 have acted on the footing that the *Inam* forms part of the *Zemindari*, the tenants who were subsequently introduced into the property have no right to question the acts of the person entitled at the time of the *sanad* to enter into those arrangements.

A minor *Inamdar* in a *mokhasa* is a land-holder within the meaning of section 3 clause (5), of the Estates Land Act.

"*Chathurbagham*" is the fourth part of the annual crop received by Government from holders of certain alienated *Inam* lands.

"*Mokhasa*" tenure is one which is created by an assignment of village or land to an individual either rent free or at a low quit rent on condition

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of service. **M** VEERABHADRAPU *v.* SUBBARINA, (1921) M. W. N. 244; 19 L. W. 671; (1921) A. I. R. (M.) 589 **287**

——— **s. 131** - *Application to set aside sale - Full amount not paid within 30 days Figure given by Court misleading - Subsequent payment of deficiency, effect of.*

If in pursuance of an application to set aside a sale under section 131 of the Estates Land Act (corresponding to O. XXI, r. 89, Civil Procedure Code), the petitioner applies to the Court ordering the sale, for ascertainment of the amount payable by him and pays within 30 days from the date of sale the amount he is asked to pay, the sale will be set aside even if the amount thus paid is less than the full amount and the deficiency is paid after 30 days.

Quære :—Whether the sale of a *raiyat's* holding can be set aside on the ground of irregularity under the Madras Estates Land Act. **M** ADIMOOLA MUDALIAR *v.* MANICKA MUDALIAR, 19 L. W. 238; 16 M. L. J. 329; (1924) M. W. N. 230; 31 M. L. T. 10; (1924) A. I. R. (M.) 592 **142**

Madras Impartible Estates Act (II of 1904), s. 4—*Personal decree against predecessors-in-title of proprietor—Estate, when liable to be proceeded against in execution—Legal necessity.*

Under section 4 of the Madras Impartible Estates Act, before any part of an impartible estate can be taken in execution of a decree for a personal debt against the predecessor-in-title of a proprietor, it must be shown that the debt for which the decree was passed was such as would be binding upon an ordinary joint family estate when incurred by the managing member, in other words, that there was legal necessity for creating the debt. **M** VENKATALINGAMA NAYANUM BAHADUR VARU *v.* ARUNACHELLAM CHETTIAR, 19 L. W. 132; (1924) M. W. N. 214; (1924) A. I. R. (M.) 511 **1012**

Madras Local Boards Act (V of 1884), ss. 16, 144—*Rules made by Local Government for holding election and decision of election disputes—Jurisdiction of Civil Courts—Rules purporting to be made under wrong section if* ultra vires*—Order setting aside election of candidate on the ground of his presence likely to bring administration into contempt—Notice not given to candidate.*

Sections 16 and 144 of the Madras Local Boards Act read together give power to the Government to make rules when an election is contested and also to frame rules declaring the qualifications required of a person before he is validly elected and the rules framed by the Government are not *ultra vires.*

The Local Boards under the Madras Local Boards Act are creations of Statute and the Statute having given power to the Government to frame rules for the purpose of working the Act, it is open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act and rules which take away the jurisdiction of the Civil Courts are valid and *ultra vires.*

Madras Local Boards Act, 1884—contd.

If power is given to the Government by the Act to make rules, the fact that the Government purports to make rules under one section rather than another is not a ground for holding that the rules are *ultra vires.*

An order of the Government setting aside the election of a candidate as a member of a Taluk Board under the Madras Local Boards Act of 1884 and ordering a fresh election on the ground that his presence on the Taluk Board as a member is likely to bring the Local Fund Administration into competent is not invalid on the ground that no inquiry was held and no notice was given or opportunity provided to the person effected to show cause against the allegation. **M** KONA THIMMA REDDI *v.* SECRETARY OF STATE, 19 L.W. 59; 46 M. L. J. 60; (1924) M. W. N. 146; 47 M. 325; (1924) A. I. R. (M.) 523 **91**

Madras Local Boards Act (XIV of 1920), ss. 57, 55, 56, 23 (2), 25, 199 (2) (c)

Judge holding election inquiry whether "persona designata" *or* "Court"*- Civil Procedure Code Act (V of 1908), s. 115* -"*Finality*"*- Appeal —Revision - Validity of nominations to membership of Board - Jurisdiction of District or Sub-Judge to go into --Grounds other than prescribed disqualification-- Election of member as President --Right to question validity of his nomination as member in inquiry regarding election as President —Election if can be set aside—S. 23 (2) and s. 25 --Short absence of President -Right to make appointments to Local Board -Validity.*

A District or Subordinate Judge holding an election inquiry and acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920 is acting as a 'Court' and not merely as a *persona designata.*

The fact that the decision of the Judge is 'final' under section 57 of the Act and the rules thereunder means that there is no appeal against it. It does not preclude revision to the High Court under section 115 of the Civil Procedure Code.

There is nothing either in the sections of, or in the rules under the Madras Local Boards Act giving powers to a District or Subordinate Judge to question the validity of the appointment of a nominated member except under section 57 and on the sole ground of disqualification specified in sections 55 and 56.

Therefore, on a petition dealing with the election of a President of a Local Board, it is not competent to the Judge to go into the question whether a particular candidate was duly appointed a member of the Board.

A District Judge acts wholly without jurisdiction in investigating such a question and his decision upon it is liable to be revised by the High Court under section 115 (*a*) of the Civil Procedure Code.

Per *Schwabe, C. J.*—The proper method of questioning the appointment of a member would be by proceedings in the nature of *quo warranto.*

Obiter :—By reason of sections 23 (2) and 25 of the Madras Local Boards Act the mere absence for a few days of the President of a District Board from his jurisdiction does not necessarily vest in the

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Vice-President the power of appointing members to a Taluk Board.

Per *Ramesam, J.*—An error of law leading to an erroneous order does not justify interference in revision but one leading to the exercise of jurisdiction which does not exist justifies such interference. **M** KOKKU PARTHASARATHY NAIDU *v.* CHINTALACHERRU KOTESWARA RAO, 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; 47 M. 369; (1924) A. I. R. (M.) 561 **98**

Malabar Law—Tarwad—*Alienation by* karnavan—*Suit to recover property, form of—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 44, 91, 144.*

The members of a Malabar *Tarwad* need not sue to set aside an invalid alienation by the *Karnavan* but can sue to recover possession on the strength of title and it makes no difference that the *Karnavan* purporting to act not only as *Karnavan* but also as guardian of the minor members of the family.

Such a suit is governed neither by Art. 44, nor by Art. 91, but by Art. 144 of Schedule I to the Limitation Act. **M** KAUNA PANIKKAR *v.* NANCHAN, 46 M. L. J. 340; 19 L. W. 395; 34 M. L. T. 89, (1924) A. I. R. (M.) 607 **564**

Master and servant—*Termination of service—Notice reasonable, what is.*

In the absence of an express agreement or established custom to the contrary, a contract of service is terminable by reasonable notice, and there is no authority for holding that a servant hired by the month is entitled to one month's notice. Ordinarily, fifteen days' notice will be sufficient in such a case. **L** GANGA RAM *v.* DUNI CHAND BHANDARI **763**

Minor *defendant—Guardian* ad litem—*Mother, when can be appointed.*

A Court is not competent to appoint the mother of a minor defendant as his guardian *ad litem* without her express consent. **C** JAGADISH CHANDRA *v.* HARIHAR, 40 C. L. J. 39 **219**

Mokarrari, malguzar, *meaning of.*

The word *malguzar* means, primarily, rent payer. It may equally be applied to a tenure-holder or a *raiyat*. In North Behar it generally means tenure-holder. **Pat** UCHIT KOPRI *v.* ADHIK MANDAL **492**

"Mokhasa" tenure. *See* MADRAS ESTATES LAND ACT, s. 3 **287**

Months, meaning of. *See* CONSTRUCTION OF DOCUMENT **338**

Mortgage—Accession to mortgaged property—Tenancies acquired by mortgagee. *See* TRANSFER OF PROPERTY ACT, s. 63 **466**

——— Amount left with mortgagee to pay off creditor of mortgagor—Period within which payment must be made—Reasonable time—Failure to make payment, effect of—Mortgagee, whether entitled to possession. *See* CONTRACT ACT, s. 16 **738**

——— Antecedent-debt. *See* HINDU LAW—MITAKSHARA—ALIENATION **45**

Mortgage—contd.

——— by unauthorised person—Subsequent acquisition of interest—Interest whether can be made subject of mortgage. *See* EVIDENCE ACT, s. 111 **850**

——— executed by unauthorised person—Executant subsequently succeeded to portion of property—Mortgage, whether can be enforced against executant. *See* TRANSFER OF PROPERTY ACT, s. 43 **180**

——— *Foreclosure and redemption, rights of, whether co-extensive.*

The ordinary presumption that the rights of redemption and foreclosure are co-extensive may be negatived by a special provision in the mortgage-deed in the interests of the mortgagor. For instance, when the deed provides that the mortgagor may redeem within a certain period, it implies that the mortgagee has no right to foreclose before the expiry of that period. In such a case limitation will not begin to run against the mortgagee till after the expiry of the period fixed in the deed. **N** HARBHAGAT *v.* NARAYANANRAO **338**

——— Hypothecation to secure contingent liability, whether mortgage. *See* TRANSFER OF PROPERTY ACT, s. 58 **457**

——— *Interest at rate of one per cent. per mensem, whether penal—*Post diem *interest when allowed—Surety, liabilities of—Liability, how far extends—Failure of creditor to sue, whether discharges surety—Preliminary decree, effect of.*

Interest at the rate of one per cent. per mensem on a mortgage-security is not penal and may be allowed.

Where a mortgage-deed does not expressly provide for payment of *post diem* interest but its provisions, taken as a whole, without exclusive attention to any one of them stipulate that interest is to run without any limitation as to the period of its currency, *post diem* interest ought not to be refused.

In the absence of anything to show that his liability was otherwise limited, surety for payment of interest is liable to pay the same until the debt is naturally satisfied and not only for the time mentioned in a deed for payment of the principal amount.

The fact that *post diem* interest is recoverable from a mortgagor under the terms of the mortgage-deed and not by way of damages does not necessarily make the liability of the surety to pay interest co-extensive with that of the mortgagors.

The surety must never be charged beyond the precise terms of his engagement.

The mere forbearance on the part of the plaintiff to sue does not discharge the surety of his liability.

A preliminary decree operates as merger with regard to the liability to pay future interest and releases a surety from his liability under the deed. **S** TULSIDAS KESHOWDAS *v.* HASHIM **868**

——— *of* khewat *land*—Shamilat *acquired subsequent to date of mortgage—Extinguishment of right of redemption*—Shamilat, *whether transferred to mortgagee.*

Mortgage—contd.

Plaintiffs executed a mortgage of certain *khewat* lands in favour of defendants prior to 1856. In the latter year a large area of Government waste land was entered in the Revenue Records as *shamilat* of the village. In 1881 plaintiffs sued to redeem their mortgage, but their suit was dismissed as time barred. In 1905, the *shamilat* was partitioned and plaintiffs' share was entered in the name of the defendants who had become owners of the *khewat* land which had been mortgaged to them. Plaintiffs brought the present suit for possession of the *shamilat* land·

Held, (1) that it must be assumed that Government made a present of the waste in 1856 to the proprietary body of the village and that the plaintiffs, who were at that time members of that body, became rightful owners of a share in it in proportion to their *khewat* holding;

(2) that the mere fact that they had subsequently lost their *khewat* land did not operate to transfer their rights in the *shamilat* to the defendants. L SHARADAT *v.* GANESH DAS **368**

——— Mortgagee in possession -Settlement of *bakasht* lands -Tenants, position of. *See* TRANSFER OF PROPERTY ACT, s. 72 **943**

——— *Mortgagor, whether can sue to recover unpaid balance of mortgage-money- Implied contract.*

An implied contract gives a cause of action no less than an express contract. There is an implied contract in the case of a mortgage that the mortgagee is to pay the whole of the amount for which the land is mortgaged.

A suit is, therefore, maintainable by the mortgagor to recover the unpaid balance of the mortgage-money from the mortgagee. L IMAM DIN *v.* DITTU **445**

——— *Occupancy tenancy, joint -Mortgage by some co-tenants -Co-tenant, whether can repudiate entire mortgage.*

A mortgagor is estopped from denying the validity of the mortgage after having received the consideration thereof from the mortgagee.

Similarly, a joint occupancy tenant who desires to repudiate a mortgage of the tenancy made by his co-tenants, can get back possession of his own share in the tenancy, but he cannot repudiate the entire mortgage made by his co-tenants and get back possession of their shares, without paying to the mortgagee the money realised from him by his co-tenants. A SHAIKH MUDI *v.* MOHIB ALI **1022**

——— *Prior and subsequent mortgagees -Sale under first mortgage—Property purchased by first mortgagee--Redemption by second mortgagee --First mortgagee, position and rights of.*

Where a first mortgagee brings the mortgaged property to sale and himself purchases it in execution, and a second mortgagee then seeks to redeem the first mortgagee, the latter occupies a double position, *viz.*, that of a mortgagee and of the owner of the equity of redemption as purchaser of the property, and in his latter character he is in turn entitled to redeem the second mortgagee on payment to him of the sum found due on his mortgage as well as the sum, if any, deposited by him to redeem the first mortgage. Pat DHANWANTE CHOWDHRANI *v.* HURGOBIND PRASHAD, 5 P. L. T. 103; 3 Pat. 435; (1924) A. I. R. (Pat.) 484 **614**

——— *Redemption--Mortgagee failing to deliver possession of entire mortgaged property Mesne profits, liability to pay.*

On redemption a mortgagee is bound to hand over to the mortgagor the property of which he got possession in the capacity of mortgagee and in no other capacity. If he claims to have become a co sharer in the property during the pendency of the mortgage, the proper procedure is for him to hand over to the mortgagor the whole quantity of the lands of which he obtained possession as mortgagee and then to settle with the mortgagor as to which portion should be handed back to him as representing his share.

If the mortgagee fails to deliver possession of the lands of which he obtained possession in the capacity of mortgagee he will be liable to pay mesne profits to the mortgagor. A DILDAR *v.* SHUKRULLAH, 46 A. 152; (1921) A. I. R. (A.) 444 **1023**

——— *Redemption, suit for Muafi land assessed to revenue -Revenue paid by mortgagee, whether can be added to mortgage-money Interest, mortgagee whether entitled to.*

Where in the case of a mortgage of *muafi* land, the land is assessed to revenue during the continuance of the mortgage, and the mortgagee is compelled to pay the revenue, he is entitled to add the amount so paid to the mortgage-money and claim it from the mortgagor at the time of redemption. He is not, however entitled to claim interest on the amount unless the terms of the mortgage give him that right. L RAJA RAM *v.* GAHI **1033**

——— Redemption suit—Persons claiming paramount title, whether can be joined as defendants. *See* CIVIL PROCEDURE CODE, O. II, R. 4 **885**

——— Redemption—Tenant from year to year, whether can redeem. *See* TRANSFER OF PROPERTY ACT, s. 91 (*a*) **47**

——— **decree** in favour of several mortgagees—No community of interest among mortgagees—Revision in favour of one, whether of avail in favour of another mortgagee. *See* LIMITATION ACT, SCH. I, ART. 183 **1001**

——— **suit**—*Execution—Recitals, on whom binding—Mortgage executed by widow—Adoption after mortgage, whether binding on adopted son.*

In an action to enforce a mortgage security where there is no contest by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recital as to payment of consideration for the deed which he executed is untrue. Where, however, a stranger to the transaction is a party, and the claim is contested by him and he denies execution and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case.

In case the attesting witnesses are either hostile or not available and the writer of the bond is dead the mortgagee should give independent evidence to identify the handwriting of the person who pur-

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ported to put the mark or to write the name of the executant and also that of the witness who purported to attest the deed but whose direct evidence is not procurable.

A recital in a deed binds only the maker, *i.e.*, the party to the instrument, and not persons who are not parties thereto, although they may have derived their title from such maker. A person who is not a party to a transaction is in the category of a stranger, and as such can set up an inconsistent claim or defence whether he be a plaintiff or defendant.

Although a person adopted by a Hindu widow gets the title to her husband's estate by virtue of his adoption by her, yet he does not derive his title through her, and, therefore, cannot be looked upon as a party to a deed of mortgage executed by her before his adoption. **N** BALIRAM *v.* KAMALJA **330**

——— Transferees after mortgage not impleaded in mortgage suit, effect of. *See* CIVIL PROCEDURE CODE, O. XXI, R. 60 **279**

Muhammadan Law *Joint family property—Presumption—Commensality—Partition amongst Muhammadans—Property acquired by one member—Jointness—Burden of proof.*

There is no such thing as joint family property under Muhammadan Law and the presumption of Hindu Law that money spent by a member of the family came from the joint fund is not applicable to Muhammadans.

Amongst Muhammadans mere commensality is insufficient to prove jointness in estate.

In a partition-suit amongst Muhammadans the burden of proof that property acquired by one member only was purchased out of the joint fund, is on the members who allege it. **S** YUSIF MAHOMED *v.* ABUBACKER IBRAHIM **817**

——— **Co-sharers,** possession of, whether adverse. *See* ADVERSE POSSESSION **282**

——— **Custom** *—Marwari Silawata community—Succession—Exclusion of females from inheritance—Evidence—Instances—Opinion—Burden of proof—Essentials of valid custom.*

There is no custom amongst members of the *Marwari Silawata* community by which, in derogation of the rules of Muhammadan Law, females are excluded from inheritance.

To establish the exclusion of females from inheritance it is of vital importance to prove that some of the females asserted their rights as heirs and that their rights were denied. Mere passive acceptance of their position by females in cases where their male relations accord to them all that is necessary for their daily sustenance and their refraining from actively asserting their rights to any share in property is not enough to prove that they are excluded from inheritance.

Where females are dependent upon their male relations and subservient to their control, to establish their exclusion from inheritance, it must be satisfactorily proved that they were aware that they were excluded by reason of a custom having the force of law.

Muhammadan Law—contd.

The party relying on a custom which is to have the effect of overriding the ordinary law, must prove it by clear unambiguous evidence.

A custom to be valid must be (1) immemorial, (2) reasonable, (3) continued without interruption, (4) certain.

In questions of custom evidence merely of the opinion of leading members of caste is not enough, instances must be proved in which the alleged custom has been established and proved. When the oral evidence emanates from a class of highly interested witnesses, it is of infinitesimally small value.

Per *Kennedy, J. C.* - Numerous instances of non-taking of inheritance by women would not be sufficient to establish the custom of their exclusion from inheritance unless it were shown that the women wished to take their share of inheritance and were refused on the ground of the custom and unless it were also shown that there were no instances to the contrary. **S** USMAN *v.* ASAT **23**

——— **Dower**—*Widow in possession of husband's property, whether entitled to retain it till entire dower is paid.*

When a Muhammadan widow is in possession of her husband's property in lieu of dower, she is not liable to piecemeal suits by every separate heir of her husband. She is entitled to retain the entire property until her entire dower is satisfied. **A** JAN BIBI *v.* BATULAN BIBI **214**

——— **Gift** - Marz-ul-maut, *what is—Deed executed by old man suffering from carbuncle a few days before death, validity of.*

A feeble old man of over eighty years of age who was suffering from a carbuncle, from which he eventually died, executed a deed of gift a few days before his death:

Held, that the gift was invalid having been executed during *marz-ul-maut*. **A** FAIZ BIBI *v.* QUDRAT-ULLAH **977**

——— *—Revocation—Possession not delivered, effect of - Suit to impeach gift—Limitation Limitation Act (IX of 1908), Sch. I, Art. 91.*

Where a deed gift is executed by a person governed by the Muhammadan Law, and possession of the property comprised in the deed is not delivered to the donee, the gift is void *ab initio*, and in such a case, no question of limitation for a suit to impeach the gift can arise. The right of the donor to impeach such a gift can only accrue from the moment when by receipt of possession by the donee the gift can become operative by law.

Under the Hanafi Law a gift cannot be revoked after the subject of the gift has increased in value owing to some accession thereto made by the donee which is inseparable from it. **A** MULANI *v.* MAULA BUX, 22 A. L. J. 149; 46 A. 260; (1924) A. I. R. (A.) 370 **222**

——— **Guardian,** de facto, *power of, to sell minor's property.*

A *de facto* guardian of a Muhammadan minor has no power to enter into a contract for the sale of the minor's property.

Specific performance will not be decreed of a contract to sell immoveable property entered into

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by a guardian on behalf of a minor. **Pat** ABDUL HAQ *v.* MUHAMMAD YAHYA KHAN, (1924) A. I. R. (Pat.) 81; 4 P. L. T. 553; 2 P. L. R. 181 **483**

——— **Guardian**—Uncle, whether guardian of nephew's property—Competency to give valid discharge of decree. *See* LIMITATION ACT, s. 7 **285**

——— **Minor**—*Guardian de facto, alienation by, of minor's property, validity of.*

A guardian of a Muhammadan minor, who is not a guardian under the law, is a pure and simple outsider or *fazuli*, and cannot bind the property of the minor by any act of his, whether there be any necessity or benefit to the minor or not. **A** GANESHI LAL *v.* NOBIN CHANDRA BOSE **1024**

——— **Wakf**—Marz-ul-maut—*Mutwalli's failure to act according to trust, effect of.*

When there is no evidence that the *wakif* on the day he executed the *wakfnama* was under an apprehension of immediate death, the mere fact that he was suffering from phthisis or that he died a few days after the execution of the deed, is not enough to establish what in Muhammadan Law is technically called *marz-ul-maut*. In fact lingering diseases like phthisis remove the suspicion of apprehension of immediate death on the mind of the patient.

If a *mutwalli* does not act according to the trust imposed upon him by the *wakf* deed, that could not effect the character of the endowment. It cannot be said that a *wakf* is not good because it has not been acted upon. **C** REZA ALI *v.* KAZI NUR-UD-DIN AHMED **174**

Necessity, proof of. *See* HINDU LAW—ALIENATION **11**

——— Proof of. *See* HINDU LAW—MITAKSHARA—ALIENATION **45**

Negotiable Instruments (Act XXVI of 1881), s. 4—*Pro-note—Acknowledgment of debt.*

Plaintiff sued to recover a sum of money on the basis of a document which was in the following terms:—

"We have Rs. 900 of yours in deposit with us. We shall pay interest on it at the rate of ten annas per cent.:"

Held, that the document did not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given was to pay interest at the rate of ten annas per cent. coupled with an acknowledgment of the debt; it was not, therefore, a promissory-note within the meaning of section 4 of the Negotiable Instruments Act. **L** NANAK CHAND-KISHORI LAL *v.* RAM SARUP-GUJAR MAL **163**

Nuisance *Discomfort, when actionable—Nature of interference Test.*

Discomfort caused by a nuisance to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age, or estate of health.

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The nature of the interference has to be examined in each case in the light of the circumstances of the place, where the thing complained of actually occurs, and the degree of inconvenience caused must determine the nature of the relief to which the person complaining may be entitled.

Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does exist elsewhere, not far from the place, cannot be left out of account. **A** BEHARI LAL *v.* MACLEAN, 22 A. L. J. 165; 46 A. 297; (1924) A. I. R. (A.) 392 **506**

Oudh Laws Act (XVIII of 1876), s. 5—*Muhammadan Law—Dower paid by husband—Court, whether can question arrangement.*

A time-barred debt can form a valid consideration for a transfer of property. If a husband is willing to pay a certain amount of the dower-debt due to his wife and has as a matter of fact paid it by a transfer of property, a Court cannot interfere with the arrangement on the ground that if the husband had resisted the claim for dower under section 5 of the Oudh Laws Act, the amount decreed to the wife would have been less than the value of the property transferred by the husband in lieu of dower. **O** ZOHRA BIBI *v.* GANESH PRASAD **106**

Oudh Rent Act (XXII of 1886), ss. 32 (A), 32 (B), 127—*Suit to recover arrears of rent—Alternative claim for use and occupation—Duty of Court.*

Plaintiff sued to recover arrears of rent from the defendant and based his claim on a *kabuliyat* alleged to have been executed by the defendant. In addition to the *kabuliyat* he sought to prove that the defendant had been paying rent to him as a tenant. His suit was dismissed by the lower Appellate Court on the ground that he had failed to prove the *kabuliyat*:

Held, that the Court was bound to adjudicate on the alternative claim of the plaintiff that the defendant was in occupation of the land as plaintiff's tenant apart from the *kabuliyat* and had been paying rent to him. **O** RAJA MUHAMMAD MAHDI ALI KHAN *v.* TAWAKKUL KHAN **764**

——— **ss. 107H, 108 (5) (5A)**—*Suit for enhancement of rent—Declaration made by Revenue Court that tenants are under-proprietors—Suit in Civil Court to challenge decision of Revenue Court, maintainability of—Jurisdiction of Civil and Revenue Courts.*

When a Revenue Court, dealing with a proceeding for the enhancement of rent under section 108 (5) of the Oudh Rent Act, makes a declaration under section 107 H of the Act that the tenants are under-proprietors in relation to the land in dispute, a Civil Court has no jurisdiction to entertain a suit by the *zemindar* for a declaration that the persons declared to be under-proprietors by the Revenue Court are not under-proprietors. The jurisdiction to make such a declaration is

vested exclusively in the Revenue Courts. **O** BISHNATH SARAN SINGH *v.* UMA DAT, 11 O. L. J. 255 **150**

——— **s. 108, cl. 15**—*Interest on arrears*—Lambardar's *liability.*

According to the rule in the English Courts of Equity an accounting party may under certain circumstances be charged with interest.

A *lambardar* stands in a fiduciary position to his co-sharers in the village and if he fails to account to them for their share of the profits, he is liable to pay interest **O** ADITYA PRASAD *v.* CHHOTE LAL, 10 O. & A. L. R. 246; 11 O. L. J. 206 **85**

——— **s. 127**—*Mortgage—Ejectment suit by mortgagee—Burden of proof—Evidence—Mortgagor whether can plead non-performance of contract by mortgagor—Specific Relief Act (I of 1877), s. 24 (b)—Contract Act (IX of 1872), s. 57.*

Before a suit for ejectment can be held to be maintainable under the provisions of section 127 of the Oudh Rent Act, the plaintiff must show a title in ejectment against the defendant.

Where a mortgagee seeks to eject his mortgagor from the mortgaged property on the ground that the latter is his tenant, the primary evidence of the relationship of the parties must consist of the terms of the mortgage-deed.

Though a deed of mortgage is a conveyance, yet, when the mortgagee seeks to enforce the covenant in it relating to possession of the mortgaged lands, it is open to the mortgagor to set up the equitable defence of the mortgagee not having performed his part of the mortgage contract. **O** AVANTIKA PRASAD SHUKUL *v.* GUR BAKHSH, 10 O. & A. L. R. 29; 27 O. C. 60; 11 O. L. J. 197 **804**

Pardanashin lady, *person claiming under transfer by, duty of—Burden of proof—Quantum of evidence.*

It is incumbent on a person claiming property belonging to a *pardanashin* lady on the basis of a transfer in his favour effected by a person who purported to act under a power-of-attorney granted by the lady to give satisfactory evidence that the power-of-attorney had been explained to and was understood by the lady.

No uniform standard of evidence which will satisfy the Court on this point can be laid down and each case must be decided on its own facts. **A** AISHA BIBI *v.* MAHFUZ-UN-NISSA, 22 A. L. J. 205; 46 A. 310; (1924) A. I. R. (A.) 362 **180**

Partition, private—Large area left undivided—Collectorate partition, whether barred. *See* BENGAL ESTATES PARTITION ACT, s. 7 **653**

Partnership—*Contract between parties—Disclosure of material facts necessary—Voidable contract—Election, right of bar exercised.*

A contract which is liable to be avoided by reason of misrepresentation, fraud, non-disclosure of material facts, or undue influence continues valid till the party affected has determined his election by avoiding it. So long as he has made no election, he retains the right to determine it either way, subject to this that if an innocent third party has acquired, an interest in the property, or, if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.

Where one partner enters into a contract with another in relation to the interests of the partnership, it is his duty to make a full disclosure of all the material facts within his knowledge, which would assist the other party in deciding whether to enter into the contract or not. **M** BRUNTON *v.* BRUNTON **299**

——— Partner agreeing to share of other partner being sold in execution of decree, effect of. *See* CIVIL PROCEDURE CODE, s. 47 **731**

Person, meaning of. *See* CIVIL PROCEDURE CODE, O. XL, R. 1 **625**

——— —, meaning of. *See* COMPANIES ACT, 1882, s. 4 **441**

Pleadings—*Appeal—New case, whether can be made—Events during pendency of suit Court, whether can take notice.*

A Court of Appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had no notice during the hearing of the suit.

Ordinarily, every plaintiff has got a right to say that the rights of the parties should be adjudicated upon as they existed at the date of the suit, and that the Court should not take notice of any events that have happened during the pendency of the suit. This, however, is not an invariable rule and a Court will, in exceptional cases, depart from it, especially when by so doing it can shorten a litigation and best attain the ends of justice by preserving the rights of both parties. It is not only in the power but it sometimes is the duty, of even a Court of Appeal to take notice of events which have happened during the pendency of appeal, and such events not appearing on the record can be allowed to be proved by extrinsic evidence. **N** ANANT RAM *v.* MURLI DHAR **194**

——— Attachment and sale of debt due to tenant—Suit to recover debt—Plea of payment, whether can be taken. *See* TAKAVI ADVANCE **373**

——— *Decree can be given only on case made by plaintiff—Amendment.*

No Judge should give a decree to a plaintiff on a case which is not made in the plaint. If the Judge disbelieves the case as made in the plaint he should dismiss the suit; or in the interest of justice he may give the plaintiff an opportunity to amend the plaint. **C** GOLAK CHANDRA NUNDY *v.* NISHI CHANDRA SIL **162**

——— *Person not party to contract whether can enforce it.*

A person who becomes an owner by purchase after a settlement is made is not entitled to enforce a contract which was entered into at the

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time of the settlement. **A** SHEO PRASAD DUBE *v.* SARJU MAHTO, 46 A. 35 **519**

——— Question of law, whether can be raised for first time in second appeal. *See* APPEAL, SECOND **221**

Possession *acquired under deed—Title whether can be repudiated.*

If a man obtains possession of property under a deed he cannot afterwards set up another title to the property against the deed, though the deed did not operate to pass the property in question to him, and if he remains in possession of the property till twelve years have passed and the title of the true owner is extinguished he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the deed.

A person who obtains possession of certain property as the adopted son of a deceased person cannot, therefore, subsequently set up a title by adverse possession on the ground that his adoption was invalid, and claim the property as his self-acquisition. **N** JAGESHWAR *v.* PANDURANG, 7 N. L. J. 82; (1924) A. I. R. (N.) 73 **840**

——— *Injunction—Recurring right—Dispossession—Burying dead bodies in land belonging to another.*

An owner of waste land cannot be held to have been dispossessed by the mere fact that certain persons have been burying dead bodies in the land. At any rate, the possession of the owners is not affected in respect of that portion of the land in which there are no graves.

The right of the owner of land to restrain persons from burying dead bodies therein is a continually recurring right. **L** MANGAT RAM *v.* SIRAJUL HASAN, 6 L. L. J. 130; (1924) A. I. R. (L.) 492 **152**

Possessory title *—Dispossession Suit to recover possession.*

If a person is in possession of land even without title thereto, he cannot be successfully turned out by another person who also has no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he has a title to the land. **Pat** AKAL *v.* BAIJNATH DAS **228**

——— *Suit to recover possession from trespasser—Plaintiff's title defective, effect of.*

A person who is ousted from possession of land by another who has no title whatever to the land, is entitled to eject the latter, however defective his own title may be. **N** MAROTI KUNBI *v.* SITARAM **722**

Practice—*Appeal from preliminary decree pending—Final decree, appeal from, whether necessary.*

Where an appeal from a preliminary decree is pending it is not necessary to file another appeal from the final decree. The result of the appeal in the preliminary decree would govern the final decree as well. **O** MUHAMMAD SHER KHAN *v.* SETH SWAMI DAYAL **411**

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——— Handwriting, comparison of—Opinion formed by Judge in absence of evidence, danger of. *See* EVIDENCE ACT, s. 73 **668**

——— Question of law, whether can be raised for first time in second appeal. *See* APPEAL, SECOND **221**

——— *Second appeal—Question of title—Question of adverse possession—Mixed question of law and fact.*

When a question of title rests on the interpretation of certain documents and the legal inferences to be drawn from them, it is competent to the High Court to entertain it in second appeal.

The question of adverse possession is a mixed question of fact and law can be discussed in second appeal referred to. **O** INDERPAL SINGH *v.* THAKUR DIN SINGH, 10 O. L. J. 646; (1924) A. I. R. (O.) 266; 27 O. C. 77 **895**

——— Succession certificate not produced—Objection taken in appeal—Procedure. *See* SUCCESSION CERTIFICATE ACT, s. 4 **307**

Pre-emption—*Construction of document—Sale—Mortgage by conditional sale—Option of re-purchase, whether immovable property—Sale of option, whether can be pre-empted.*

Two co-sharers in a village sold their shares by one sale-deed for a joint consideration. On the same day the vendee executed an agreement in favour of one of the vendors which provided that if the latter paid back a certain sum of money within a certain period he could get back his share of the property sold, and that if he paid back a certain further sum within the same period he could get back the share of the other vendor also:

Held, that the transaction was one of sale with an option of re-purchase and not one of mortgage by conditional sale.

A mere option of re-purchase cannot be said to be immoveable property and the sale of such a right cannot, therefore, be pre-empted. **A** WASI FATIMA BIBI *v.* ABDUL GHAFFAR KHAN **171**

——— *Custom—Wajib-ul-arz containing recital of pre-emption—Subsequent partition of village—New* Wajib-ul-arz *maintaining right intact—Custom whether still exists.*

Plaintiffs sued for possession by pre-emption of certain land alleging that a custom of pre-emption applied to the *mahal* and that they were co-sharers in it. The existence of a custom applicable to the village as originally constituted and carrying the incidents as recorded in the *wajib-ul-arz* of that period was not disputed, but it was contended that on a subsequent partition of the village into two *mahals* the custom was abrogated in its entirety. It appeared, however, that the *wajib-ul-arz* of the *mahal* in suit prepared at the time of partition maintained intact the rights of certain specified persons:

Held, that what was recorded in the *wajib-ul-arz* at the time of partition could not be regarded as a contract, but a continuation of the

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application of the custom to the altered state of affairs, and that, therefore, the plaintiffs were entitled to sue for pre-emption. **A** BENI PRASAD *v.* SHRODIN, 22 A. L. J. 289; 46 A. 361; (1924) A. I. R. (A.) 425 **586**

——— *Pre-emptor, substitution of, in place of vendee, date of.*

The right of pre-emption is "a right to the benefit of a contract," or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee, in respect of all the rights and obligations arising from the sale under which he has derived his title.

A right of pre-emption is not a mere right of re-purchase, either from the vendor or from the vendee involving a new contract of sale, but it is simply a right of substitution. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. **O** COLLECTOR SINGH *v.* MADARI LAL **738**

——— Wajib-ul-arz—*Earlier document containing no recital of pre-emption—Later document creating right of pre-emption—Custom, whether proved.*

Plaintiff sued for possession by pre-emption of certain lands alleging the existence of a custom of pre-emption and basing his right on a clause in the *wajib-ul-arz*. It appeared that there were two *wajib-ul-araiz* on the record and that whereas one created a right of pre-emption in favour of certain classes of persons, the other contained no definite recital of a custom at all:

Held, that on these two documents it was impossible to conclude that there was clear and unambiguous evidence of the existence of a custom of pre-emption in the village and the plaintiff's suit was liable to be dismissed. **A** MUTSADDI LAL *v.* KHARAG BAHADUR SINGH **508**

Presumption—*Agnates.*

There is no presumption against the *locus standi* of agnates beyond a definite degree of relationship to challenge an alienation. **L** KYAS MUHAMMAD *v.* BANNA **183**

Principal and agent—*Suit for account—Right of agent to sue for account.*

Before being entitled to an order for an account the plaintiff must satisfy the Court that the defendant is an accounting party.

An agent cannot maintain a suit against his principal for an account unless he makes out a special case, *e. g.*, where the account between him and his principal is of a complicated nature. **S** FIRM OF JESSARAM BHAGWANDAS *v.* RATANCHAND FATEHCHAND **846**

Probate and Administration Act (V of 1881), ss. 3, 51—*Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 8—Additional District Judge, jurisdiction of, extent of—Probate cases transferred to Additional Judge—Jurisdiction to revoke Probate granted by District Judge.*

By virtue of the provisions contained in section 8 of the Bengal, N.-W. P. and Assam Civil Courts Act, an Additional District Judge exercises with

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respect to the cases transferred to him by the District Judge the same powers as the District Judge. Where, therefore, the cases under the Probate and Administration Act have been transferred to an Additional District Judge by the District Judge the Additional District Judge becomes the Judge of the principal Civil Court of Original Jurisdiction within the meaning of section 3 of the Act and has jurisdiction to revoke a Probate granted by the District Judge. **Pat** DAHO KUER *v.* TURAL DEI, 3 Pat. 609 **701**

——— **ss. 128, 130**—Demonstrative legatee against other legatee. *See* WILL—CONSTRUCTION **274**

Probate Court—*Jurisdiction to deal with title to property—Compromise decree passed by Probate Court—Property more than Rs. 100 in value—Title, whether can be destroyed by decree.*

A Probate Court has no jurisdiction to deal with title to property covered by a testamentary instrument. Therefore, title to property cannot be abandoned by a compromise decree passed by a Probate Court in accordance with the terms of the compromise, nor can such abandonment, whether stated orally or written in the petition of compromise, destroy title to immoveable property exceeding Rs. 100 in value, unless there is a registered conveyance. **C** SRIMATI HARIDASI DEBI *v.* PRAMATHA BHUSAN **14**

Provincial Insolvency Act (III of 1907), ss. 16 (6), 36, 37—*Fraudulent preference—Burden of proof—Intention to prefer—Mortgage executed to pay off creditors, validity of—Debt due to insolvent paid to his creditors—Discharge of liability.*

Under section 37 of the Provincial Insolvency Act of 1907, the onus is upon the Official Receiver to show that the intention of the insolvent was to prefer one creditor to others and there must be some evidence of intention to prefer other than the mere fact that he was insolvent.

If money is raised by an insolvent by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying the creditors, if the mortgagee acts *bona fide*, the transaction would be valid against the Official Receiver.

By virtue of section 16 (6) of the Provincial Insolvency Act of 1907, the property of the insolvent by reason of the principle of relation back, on the date the insolvency petition is presented, becomes the property of the Official Receiver, and a payment made by a debtor of the insolvent to his creditors after that date would not relieve him from liability to pay the amount to the Official Receiver. **M** JANAKI RAM VILAS NIDHI LD. *v.* OFFICIAL RECEIVER, COIMBATORE **16**

Provincial Insolvency Act (V of 1920), ss. 4, 80—*Official Receiver, power of—Sale by Official Receiver—Objections—Procedure.*

An Official Receiver has no power to make an order in a claim petition. It is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act.

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If the claimant wants to prevent a sale of the property as belonging to the insolvent, he should apply to the District Judge direct to take action under section 4 of the Act. **M** VELLAYAPPA CHETTIAR *v.* RAMANATHAN CHETTIAR, 46 M. L. J. 80; (1924) M. W. N. 163; 19 L. W. 251; 47 M. 312; (1924) A. I. R. (M.) 448 **1017**

——— **ss. 28, 53, 75**—*Second appeal—Insolvent—Receiver not appointed—Powers of Court—Creditor's remedy for recovery of debts.*

A second appeal will lie against an order under section 53 of the Provincial Insolvency Act (V of 1920), under section 75 of the Act, but only on a point of law as provided in sub-section (1) of section 100 of the Code of Civil Procedure.

If no Receiver is appointed in an insolvency case, the Insolvency Court can itself move under section 53 of the Provincial Insolvency Act on the matter being brought to its notice by a creditor.

A creditor of an insolvent has no remedy against his property in respect of the debt other than that provided by section 28 of the Act. **N** SETH SHEOLAL *v.* GIRDHARILAL **140**

——— **s. 68**—*Official Receiver disallowing creditor's claim—Proceedings instituted by creditor against order—Official Receiver, whether necessary party—District Court, whether bound to take fresh evidence.*

The Official Receiver is an officer of Court and there is no provision in the Insolvency Act which makes it obligatory on the District Court to have the Official Receiver made a formal party to proceedings under the Act, and the fact that he is not impleaded does not vitiate any order passed therein.

There is no provision in the Insolvency Act laying down any obligation on the District Court to take fresh evidence in matters brought before it although it would be open to the Court to take such evidence if it thinks desirable to do so.

In certain insolvency proceedings the Official Receiver allows the claim of a creditor only in part. The creditor applied to the District Judge praying that the whole of his claim be allowed. The District Judge granted the prayers and another creditor appealed to the High Court against the order:

Held, (1) that inasmuch as the creditors were made parties and notice had been given to all of them, it was open to them to appear themselves before the District Court or to have moved the Official Receiver to represent the whole party of creditors before the Court and to state their objections and the proof tendered and that, therefore, it was not necessary to make the Official Receiver a formal party to the proceedings;

(2) that as the District Judge was merely considering the correctness of the order of the Official Receiver there was no objection to his acting on the evidence given before that officer. **M** KUMARASWAMI NADAR *v.* VENAKTASWAMI KOUNDAN, 19 L. W. 193; 46 M. L. J. 242; (1924) M. W. N. 212; 34 M. L. T. 337 **857**

——— **ss. 68, 80**, *scope of—Official Receiver when can deal with properties of insolvent—Invalid sale, application for setting aside—Limitation.*

Under section 80 of the Provincial Insolvency Act 1920, the power to make the vesting order is not delegated to the Official Receiver.

The Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order.

Section 68 of the Provincial Insolvency Act presupposes that the decision is by a Receiver properly appointed and does not apply where the sale is invalid as being made by a person who was not authorised to sell.

An insolvency petition having been filed in the District Court, the District Judge made an endorsement on it that it was "transferred for disposal to the Official Receiver." No further orders were made by the Court in the case. After the adjudication of the insolvent the Official Receiver sold two properties belonging to the insolvent and two creditors, therefore, applied to the District Judge to get the two sales set aside. The District Judge dismissed their application on the ground that they were out of time having been filed more than 21 days from the date of the two sales. The creditors appealed to the High Court;

Held, that the order of the District Judge could not be taken to include a vesting order made in anticipation of the adjudication of the insolvent and the Receiver had, therefore, no power to deal with the properties;

(2) that the sales being invalid, section 68 of the Provincial Insolvency Act did not apply and the rules were liable to be set aside. **M** SANKARA RAO *v.* RAMAKRISHNAYYA, 46 M. L. J. 184; (1924) M. W. N. 198; 34 M. L. T. 2; 19 L. W. 450; (1924) A. I. R. (M.) 461 **294**

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision Court, whether can vary decree in favour of non-petitioner—Discretion of Court. *See* CIVIL PROCEDURE CODE, s. 115 **736**

——— **Sch. II, Arts. 6, 11**—Suit for money based on hypothecation bond, nature of. *See* CIVIL PROCEDURE CODE, s. 102 **652**

——— **Art. 8**—"*Rent*", *meaning of—Damages for use and occupation, suit to recover, nature of—Jurisdiction of Small Cause Courts.*

The word "rent" in Art. 8 of Schedule II to the Provincial Small Cause Courts Act is intended to be understood in the ordinary sense of a return in money or kind for the enjoyment of special property held by one person from or under another, and does not include damages for the use and occupation of land by a trespasser.

A suit to recover such damages, therefore, does not fall within the Article and is not excluded from the cognisance of a Small Cause Court. **L** GAJJAR *v.* GURU SURDUL SINGH **383**

——— **Art. 8**—*Suit to recover rent of grazing land, nature of—Suit whether cognisable by Small Cause Court.*

Plaintiff obtained a lease of some grass land situate in a Cantonement from the Cantonement Com-

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mittee and sub-let the land for grazing purposes to the defendant at a fixed rate per cattle. In a suit by the plaintiff for recovery of the rent from the defendant:

Held, that the suit was not one for the recovery of the price of a grass sold to be cut, but was one for the recovery of rent and being covered by Art. 8 of Schedule II to the Provincial Small Cause Courts Act, was excluded from the cognisance of Small Cause Court. **A** AUSERI LAL *v.* MULLHAN, 22 A. L. J. 339; 10 O. & A. L. R. 451; 46 A. 369 **345**

——— **Sch. II, Art. 11** *-Question of title -Jurisdiction of Small Cause Court.*

A Small Cause Court has no jurisdiction to determine questions of title, and a pronouncement made by a Small Cause Court on a question of title cannot affect the entries in the Revenue Record.

A correction of the Record of Rights means an actual alteration of the entries therein **N** RAMBUX *v.* MOTI, 20 N. L. R. 70 **872**

——— **Art. 35 (i)**—*Suit to recover value of trees cut and removed by defendant, whether cognisable by Small Cause Court.*

A suit by a landlord to recover the value of trees belonging to him cut and removed by the defendant who had purchased them in execution of a decree obtained against the tenant of the plaintiff falls under Art. 35 (i) of Schedule II to the Provincial Small Cause Courts Act and is, therefore, excluded from the cognisance of a Small Cause Court. **A** GANESH DAS *v.* RAJA SURAJ PAL SINGH, 46 A. 233 **371**

Punjab Courts Act (VI of 1918) s. 41 (3)—*Appeal, second- Remand, findings on- Finding of fact, whether can be questioned--Finding on question of custom- Certificate whether necessary.*

All that is laid down in section 41 (3) of the Punjab Courts Act is that no appeal shall lie to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the lower Appellate Court. There is no provision that when once an appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing

The provision as to a certificate is only intended to apply as a condition precedent to the filing of an appeal and not as a condition precedent to the challenging of a finding on a question of custom remanded to the lower Appellate Court. Once a second appeal has been legally instituted the appellant can contest at the hearing any findings of the lower Appellate Court which are against him, so long as he has taken exception to them in his ground of appeal.

When, therefore, an issue on a question of custom is remanded in second appeal under O. XLI, r. 25 of the Civil Procedure Code, the finding on that issue recorded by the lower Appellate Court can be questioned before the High Court without a certificate. **L** RAM MEHR *v.* PALI RAM, 6 L. L. J. 145; (1924) A. I. R. (L.) 455 **404**

Punjab Custom (Power to Contest) Act (II of 1920), ss. 5, 6, *applicability of--Suit for possession by heirs, resisted by appointed heir—Appointment of heir by female.*

Section 6 of the Punjab Custom (Power to Contest) Act deals only with the case of an allegation that the appointment of an heir is contrary to custom, it has no application to a case where the plaintiff sues for possession as heir and is resisted by the defendant on the ground that he is an appointed heir. The Act has no application to the case of an appointment of an heir by a female. **L** RICHPAL *v.* MULA **123**

Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (xvii), (xviii) *--Jurisdiction of Civil and Revenue Courts—Partition—Suit for declaration that certain lands are* shamilat, *whether cognisable by Civil Courts.*

A suit for a declaration that certain lands are *shamilat* and should be partitioned on that basis is not a suit contesting the mode of partition and does not fall within the purview of clauses (*xvii*) and (*xviii*) of section 158 (2) of the Punjab Land Revenue Act. The cognisance of such a suit by a Civil Court is not, therefore, barred. **L** GELA RAM *v.* SOHNA RAM . **68**

——— **s. 158 (2) (xvii)**—*Jurisdiction of Civil and Revenue Courts--Suit to recover excess area allotted in partition, nature of Question of title.*

A suit to recover possession of a certain area of land on the allegation that the area in dispute had been allotted to the defendants at a partition of *shamilat* land in excess of the share to which they were entitled in accordance with the mode of partition agreed to by the parties and adopted by the Revenue Authorities, raises a pure question of title and is not excluded from the jurisdiction of the Civil Courts by clause (*xvii*) of section 158 of the Punjab Land Revenue Act. **L** KHANU *v.* RAJA **1029**

Punjab Pre-emption Act (I of 1913), s. 3 (1) *-Agricultural land, what is Land not used for agricultural purposes for several years.*

The question whether, on the facts found, the property in dispute is to be classed as agricultural land or as village immoveable property within the meaning of section 3 (1) and (3) of the Punjab Pre-emption Act is a question of law.

The test for determining whether a piece of land is or is not agricultural land is the use to which the land is put at the time of sale, and each case must be decided on its own facts.

It is not a necessary implication that land is not agricultural land merely because at the time of sale it bears no crop. Agricultural land often lies fallow in the ordinary course of agriculture, and often remains unsown by reason of paucity or excess of moisture.

Land which has not been used as agricultural land for a period of six years and has been proposed for sale as a building site cannot be regarded as agricultural land within the meaning of section 3 (1) of the Punjab Pre-emption Act. **L** GOPI MAL *v.* MUHAMMAD YASIN **443**

——— **s. 3 (2)**—*Village immoveable property—Village, what is—Machine Mohalla of Jhelum City, whether village.*

Punjab Pre-emption Act—concld.

The expression "village" ordinarily connotes an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto.

That part of village Pira Ghaib which is included in the Machine Mohalla, has become a part of Jhelum Town and can no longer be regarded as village immoveable property within the mean of section (2) of the Punjab Pre-emption Act. L DIWAN CHAND *v.* NIZAM DIN 991

——— **s. 22 (4)** —*Civil Procedure Code (Act V of 1908), s. 148—Pre-emption suit—Failure to deposit one-fifth of purchase-money—Extension of time—Procedure.*

Section 148 of the Civil Procedure Code, which gives the Court a general power to enlarge the period fixed or granted for the doing of any act, is applicable to a case where the plaintiff in a pre-emption suit has failed to make the deposit required by section 22 of the Punjab Pre-emption Act within the time fixed by the Court.

The words "his plaint shall be rejected" in clause (4) of section 22 of the Punjab Pre-emption Act read with the provisions as to an extension of time contained in the same clause, means that the plaint shall be rejected if the Court should not deem it proper to allow further time, or, if the deposit is not made within such further time as the Court may allow.

Where a plaintiff in a pre-emption suit fails to make the deposit required by section 22 of the Punjab Pre-emption Act within the time fixed by the Court, his plaint should not be rejected without affording him an opportunity to furnish an explanation of his failure to make the deposit and considering the question whether time should or should not be extended. L RAM RATAN *v* RAJA RAM, (1923) A. I. R. (L) 643; 5 L. L. J. 454 61

——— **s. 30** —*Pre-emption suit—Vendee in possession as lessee before sale—Physical possession—Limitation.*

Where a vendee of land is, on the date of the sale, in physical possession of the land as lessee, he cannot take physical possession of the land under the sale, within the meaning of section 30 of the Punjab Pre-emption Act, and limitation for a suit for pre-emption in respect of the sale would commence to run from the date of the mutation. L SHEO RAM *v.* INDRAJ 57

Punjab Redemption of Mortgages Act (II of 1913), s. 12—*Application for redemption—Order directing redemption on payment of a certain sum—Suit for declaration by mortgagee that a larger sum is due on mortgage—Limitation.*

Defendant made an application under the Punjab Redemption of Mortgages Act for redemption of a mortgage. The Collector made an order directing redemption on payment of a certain sum. The mortgagee instituted the present suit for a declaration that the charge on the land was a sum higher than that determined by the Collector and that he was entitled to retain possession of the land until the sum claimed by him was paid to him :

Held, that the position of the mortgagee in the suit was not that of a plaintiff but was more analogous to that of a defendant, the suit being virtually a defence against an order divesting the mortgagee of possession before payment of the sum due, and no question of limitation for the suit could, therefore, arise. L RAM SARAN DAS *v.* MULA, (1923) A. I. R. (L.) 648; 4 L. 316; 5 L. L. J. 513 103

Punjab Redemption of Mortgages Act—concld.

Punjab Tenancy Act (XVI of 1887), ss. 50, 77 (3) (g)—*Landlord and tenant—Suit by tenant to recover possession of holding from landlord, whether cognisable by Civil or Revenue Court.*

A suit by an occupancy tenant to recover possession of his holding from the landlord by whom he has been wrongfully dispossessed is cognisable only by a Revenue Court and not by a Civil Court even though brought more than one year after the date of the plaintiffs' dispossession. L MALINDAR SINGH *v.* ALLAH DITTA, (1921) A. I. R. (L.) 539 346

——— **s. 59**—*Occupancy tenancy—Succession—Collaterals inter se rule applicable to whole blood whether excludes half blood.*

While succession to an occupancy tenancy is governed by section 59 of the Tenancy Act the rights of the collaterals *inter se* would be governed by the relevant tribal or village custom, so that among themselves those related to the deceased in the whole blood may exclude those who are only related to him in half blood. L POHLO RAM *v.* SURJAN 450

——— **ss. 77 (3) (e), proviso, 98**—*Jurisdiction of Civil and Revenue Courts—Mortgage—Mortgagor retaining possession as tenant—Ejectment, suit for—Landlord and tenant, relationship of—Presumption—Procedure.*

The general rule is that jurisdiction is governed by the allegations made in the plaint and not by the defence set up.

The proviso to section 77 of the Punjab Tenancy Act is mandatory and has the effect of transferring to a Revenue Court exclusive jurisdiction to decide a case which, nevertheless, so far as the allegations of the plaintiff alone are concerned, may have been rightly instituted in a Civil Court.

The jurisdiction of a Revenue Court, however, is not ousted by a pleading raised in defence.

Where a Revenue Court is confronted with a suit by a mortgagee who seeks to eject his mortgagor in the capacity of his tenant, it is for the Court to see from the plaint, the mortgage-deed, and the plaintiff's own explanation of his case, whether he is actually the landlord, that is whether the mortgagee is actually holding under him as tenant, and to proceed with the case if it considers that this is *prima facie* established, but to decline jurisdiction if it is not. If it does not decline jurisdiction on this ground, and if the defendant's pleas raise an issue which it is necessary to determine for the decision of the whole suit and which strikes at the question of the status of landlord and tenant, the Revenue Court can always find on that issue itself and dismiss the suit if the defendant succeeds

Such dismissal does not, however, in any way, bar the plaintiff from suing in a Civil Court on his mortgage. The finding of the Revenue Court on this issue does not constitute *res judicata* against the Civil Court.

Where there is not only a deed describing a mortgage as one with possession, but also a practically simultaneous deed of lease by which the mortgagor retains possession of the mortgaged land, paying what is described in the deed as rent to the mortgagee, there is a presumption that the latter is entitled to assume the capacity of landlord. **P** MIAN FEROZE SHAH *v.* SOHBAT KHAN **423**

Railways Act (IX of 1890), s. 72—*Responsibility of Railway—Bailee.*

A gun is not an explosive or dangerous when unloaded and a Railway Company is under no obligation to open a package containing an unloaded gun.

The liability of a Railway Company under section 72 of the Railways Act is that of a *bailee* under sections 151, 152 and 161 of the Indian Contract Act. The Company is bound to take as much care of the goods bailed to them as a man of ordinary prudence would of his own goods and, in the absence of any special contract, they are not responsible for damage to goods. **N** ROHILKHUND AND KUMAON RY. CO. *v.* ZIHRUS SYED ALVI **34**

——— **ss. 72, 76**—*Risk Note, Form B—Consignment of goods for carriage—Loss of goods—Suit to recover value—Burden of proof.*

Section 76 of the Railways Act does not apply to contracts limiting the liability of a Railway Company under section 72 of the Act.

In a suit against a Railway Company to recover the value of goods consigned to the Company for carriage under Risk Note, Form B, the plaintiff must prove that the loss of the goods was due to the wilful negligence of the Company. **C** EAST INDIAN RAILWAY CO. *v.* SIB PROSAD DUTT RAI **449**

——— **ss. 72, 76**—*Risk Note, Form B—Goods carried at owner's risk for portion of route and at Railway risk for remainder—Goods destroyed in transit over latter route—Damages, suit for—Burden of proof.*

Plaintiff consigned certain goods for carriage to the defendant Company and paid freight for a certain section of the route at the owner's risk rate and for the rest of the route at the ordinary rate. He signed an owner's Risk Note for the entire route, but it was found that the Company had not published an owner's risk rate for the latter portion of the route. The goods were destroyed by fire while in transit over the portion of the route for which freight had been paid at the ordinary rate. In a suit by the plaintiff to recover the value of the goods:

Held, (1) that the mere fact that the plaintiff had signed an Owner's Risk Note for the entire route did not make the note applicable to that portion of the route over which the ordinary freight had been paid;

(2) that the burden lay on the defendant Company of proving that they had exercised the ordinary amount of care with respect to the goods. **A** GADODIA AND CO. *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY, 22 A. L. J. 1; 46 A. 161; (1924) A. I. R. (A.) 254 **893**

——— **ss. 72, 76**—*Risk Note, Form B—Suit for compensation for non-delivery of goods—Loss, plea of—Wilful neglect, proof of—Theft, allegation of.*

In answer to a suit for compensation for non-delivery of goods consigned under Risk Note, Form B, it is sufficient for the defendant Company to plead loss as contemplated by the Risk Note, and it need not call evidence to satisfy the Court that the goods are still not in its possession.

Wilful neglect on the part of the Railway Administration or of servants is not established merely by the fact that the Company allege that the wagon in which the goods were being carried was broken into by thieves. **Pat** SRI NEWAS SITARAM *v.* EAST INDIAN RY. CO. **479**

——— **s. 77**—*Consignments last on different dates—One notice served on Railway for all lost consignments—One suit instituted about all—Court-fee.*

It is open to a plaintiff, who has sustained losses in respect of different consignments of different dates by reason of the negligence of a Railway Administration, to consolidate his claim and to serve the Railway with one notice, under section 77 of the Railways Act, in respect of all the losses. Where one notice is served in such a case it is a part of the "cause of action" of the plaintiff and it is impossible for him to maintain separate suits in respect of the separate losses or causes of action. Consequently, the Court-fee in such a case is chargeable on the consolidated sum of money and not the aggregate amount of fees calculated separately on the amount of each distinct loss. **Pat** EAST INDIAN RAILWAY CO. *v.* AHMADI KHAN, (1924) Pat 175 **415**

——— **ss. 77, 140**—*Claim against Railway—Notice to Manager or Agent, necessity of—Notice to subordinate officer—Burden of proof.*

Section 77 of the Railways Act, read with section 140 of that Act, does not absolutely require that a person making a claim against a Railway should himself give notice to the Manager or Agent of the Railway, but if he chooses to run the risk of giving the notice to any person other than the Manager or Agent, it is necessary for him to show that the notice was delivered on his behalf to the proper person, that is the Manager or the Agent of the Railway, as the case might be, within six months. **S** FIRM OF BIRDICHAND POONAMCHAND *v.* THE SECRETARY OF STATE **735**

Receiver, *appointment of, pending arbitration proceedings—Jurisdiction of Court—Civil Procedure Code (Act V of 1908), s. 151, Sch. II, para. 8, cl. (2).*

A Court has jurisdiction to appoint a Receiver while an arbitrator is proceeding with a reference but this power of the Court should not be exer-

Receiver—concld.

cised except in exceptional circumstances, without the concurrence of the Arbitrator.

A Court has also power to appoint a Receiver in the *interim* between the submission of the award and the final acceptance or rejection of it. **S** CHETANSING *v.* GULIBAI **84**

——— *Decree passed in scheme suit—Appeal—Receiver appointed pending appeal—Appeal substantially confirming scheme decree—Receiver if becomes* functus officio*—Application to discharge Receiver—Remedies of parties.*

Pending an appeal against a decree framing a scheme in relation to a temple, a Receiver was appointed on allegations being made that the trustee did not act in accordance with the scheme. The original decree for scheme was confirmed by the Court of Appeal with slight modifications. On summons being then taken out by the trustee for the discharge of the Receiver on the sole ground of his having become *functus officio* after the order in appeal:

Held, that the effect of the order in appeal, which merely varied the scheme, was not *ipso facto* to discharge the Receiver but that it continued to be in force till it was duly put an end to.

Remedies of parties pointed out. **M** DURAIVELU MUDALIAR *v.* AUDIKESAVALU NAIDU, (1924) M. W. N. 235; 46 M. L. J. 343; 19 L. W. 388; 34 M. L. T. 90; (1924) A. I. R. (M.) 557 **133**

———, *duty of, towards Court—Receiver appointed by one Court—Another Court, whether should appoint Receiver—Leave to sue Receiver, effect of—Possession, whether surrendered by Court granting leave.*

A Receiver is merely an officer of Court through whom the Court takes possession of property, the subject-matter of a litigation, and it is not for the Receiver to take up any attitude except one of absolute loyalty and obedience to the Court appointing him.

It is of the utmost importance that, where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction.

Where a Receiver has already been appointed by a Court of competent jurisdiction and has taken over possession of the properties in respect of which he has been appointed, another Court should not appoint a Receiver in respect of any portion of those properties. It is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried, so that the claim of the third party may be tried in the presence of the Receiver. But by giving leave to sue the Receiver, the Court does not relinquish possession of the properties to the Court in which the claim of the third party may be asserted. It retains full control and dominion over the property, though it may give leave to a stranger to sue the Receiver. **Pat** SIRDHAR CHOWDHRY *v.* MUNGNIRAM BANGAR, (1924) Pat. 54; 5 P.L.T. 243; 3 Pat. 357; (1924) A. I. R. (Pat.) 491 **520**

Registration Act (XVI of 1908), s. 2 (7)—*Conditional agreement to execute lease, if compulsorily registrable.*

A conditional agreement to execute a lease is not an agreement within the meaning of section (7) of the Registration Act, which contemplates a present demise and is not, therefore, compulsorily registrable. **S** AMIRBUX *v.* JANIMAL **71**

——— **s. 17**—*Award—Registration — Private partition—Agreement to collect rent—Powers of proprietor—C. P. Tenancy Act (XI of 1898), ss. 2, 89—Surrender.*

An award of arbitrators is not compulsorily registrable.

There is no distinction between a private partition and a partition effected under the Land Revenue Act.

If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rent from those tenants whose lands fall within his share and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his *patti* within the meaning of the Tenancy Act and is alone entitled to take surrender of lands situated in his *patti* under section 89 of the Tenancy Act. **N** KHETSINGH *v.* MANMODSINGH **134**

——— **ss. 17, 49**—Unregistered mortgage-deed, whether can be relied upon to show nature of possession. *See* LANDLORD AND TENANT **955**

——— **s. 17 (1) (a)**—*Compromise declaring right to immoveable property—Registration, whether necessary.*

A petition of compromise filed in mutation proceedings which purports to declare the rights of the parties to immoveable property of the value of more than Rs. 100 falls within the purview of section 17 (1) (*a*) of the Registration Act and requires registration. **A** BISHUNATH OJHA *v.* SHEOPRAGASH OJHA **1043**

——— **s. 17 (1) (a)**—*Deed of surrender without consideration, nature of—Registration, whether necessary.*

A document whereby rights in immoveable property are surrendered without any consideration is in effect a deed of gift which requires registration under section 17 (1) (*a*) of the Registration Act. **L** HIRA SINGH *v.* PUNJAB SINGH **113**

——— **s. 17 (1) (b)**—*Agreement to transfer land, whether requires registration.*

Plaintiff and defendant were plaintiffs in two rival pre-emption suits. Plaintiff withdrew his suit on the defendant executing an agreement that he would transfer a certain area of land in favour of the plaintiff without charging any price therefor if he succeeded in obtaining a decree in the pre-emption suit instituted by him. In a suit to enforce the agreement:

Held, that as the agreement purported to make the plaintiff owner of the area of land specified therein from the date on which the defendant's suit was decreed, it fell within the purview of section 17 (1) (*b*) of the Registration Act and required registration, and being unregistered was inadmissible in evidence. **L** IDA *v.* MUHAMMAD DIN **444**

——— **s. 17, cl. (b)**—*Family settlement—Acknowledgment of antecedent title—Registration.*

Registration Act—concld.

A deed of compromise which merely recognises the antecedent title of the parties and defines their interest in the property, is in the nature of a family settlement and is exempt from the provisions of section 17, clause (*b*) of the Registration Act. **O** SAMI DAYAL *v.* TIRBHAWAN, 11 O. L. J. 213 **878**

——— **s. 28**—*Place of registration — Property fictitious, included for purposes of registration — Registration, validity of—Fraud.*

Section 28 of the Registration Act lays down that to give a Sub-Registrar jurisdiction to register a deed, the property included in the deed or a part of it must be within the jurisdiction of that officer. No question of fraud by one party or the other enters into the language of the section. Where it is found that, as a matter fact, no part of the property included in a mortgage-deed was situate within the jurisdiction of the Sub-Registrar who registered the deed, the registration is void irrespective of the fact whether the mortgagee was or was not aware of the fact. **A** BISAL SINGH *v.* ROSHAN LAL, 22 A. L. J. 241 (1924) A. I. R. (A) 373 **265**

——— **s. 28**—*Place of registration—Small item of property included for purposes of registration —Registration, validity of.*

The mere fact that a small item of property situate in a particular district is included in a deed of transfer in order to give jurisdiction to the Sub-Registrar of that district to register the deed, will not invalidate the registration, if the property was actually intended to be conveyed by the deed.

The use of the word *mukarrari* does not in itself imply any permanent interest but merely fixity of rent. **Pat** UCHIT KOPRI *v.* ADHIK MANDAL **492**

——— **s. 28**—*Title of mortgagor in dispute— Sub-Registrar, whether has jurisdiction to go into question of title—Refusal to register because title defective—Knowledge of parties that title is disputed, whether affects legality of deed—Presumption as to knowledge of law.*

The requirements of section 28 of the Registration Act are all that have to be complied with; if any portion of the property to which the document relates is situate within the jurisdiction of the Sub-Registrar where the deed is registered, that being sufficient to give him jurisdiction, it is not the province of the Sub-Registrar to enquire or investigate into the title of the mortgagor or vendor or others presenting the documents to registration and to refuse admitting them to registration on the ground of want of title of the executants.

The knowledge of the parties to a document that the title of the executant is in dispute, does not affect the validity of the document and the Sub-Registrar has no jurisdiction to refuse registration on that ground. **N** TULSIRAM *v.* TUKARAM **398**

Relinquishment, what amounts to. *See* BENGAL TENANCY ACT, s. 25 **497**

Rent, meaning of. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 8 **383**

Repudiation, what amounts to. *See* BENGAL TENANCY ACT, s. 25 **497**

Res judicata—*Appeal—Decision in Appellate Court confined to one ground—Other grounds whether matters of estoppel.*

When a case is taken from one Court to another on appeal and is finally disposed of on a particular ground, that ground alone and no other, is matter of estoppel by record between the parties, although other grounds may have been relied upon by the Trial Court. **C** CHITPORE GOLABARI CO. LTD., *v.* GIRDHARI LAL SEROGI **353**

——— Co-defendants — Fraud — Party, whether can plead his own fraud—Estoppel. *See* CIVIL PROCEDURE CODE, s. 11 **921**

———, essential requisites of—Finding in unnecessary suit, whether constitutes *res judicata*. *See* CIVIL PROCEDURE CODE, s. 11 **3**

——— Husband and wife, question of divorce decided between—Question, whether can be re-agitated by wife's father. *See* CIVIL PROCEDURE CODE, s. 11 **1049**

——— *Parties claiming through the same person.*

It is a well settled rule of law that when both parties in the subsequent litigation claim through the same person, there is no bar of *res judicata*. **O** RAJ DULARI *v.* CHANDESHUR DEI **65**

——— Status as agriculturist not pleaded by defendant—*Ex parte* decree passed, whether defendant can plead to be agriculturist in execution proceedings. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 3 (*w*) **806**

——— Suit dismissed—Findings adverse to defendant. *See* CIVIL PROCEDURE CODE, s. 11 **147**

——— Suit to recover whole property dismissed —Suit to recover portion, whether barred—*Res judicata* between co-defendants, requisites of. *See* CIVIL PROCEDURE CODE, s. 11 **1055**

——— Suit to protect property from sale as *wakf*, dismissal of Suit, subsequent, on basis of personal right. *See* CIVIL PROCEDURE CODE, s. 11, Expl. IV **402**

Review—Error of law, whether sufficient ground. *See* CIVIL PROCEDURE CODE, O. XLVII, R. 1 **993**.

Revivor, test of. *See* LIMITATION ACT, SCH. I, ART. 183 **1001**

Right to sue for damages—Whether debt—Attachment, whether valid. *See* CIVIL PROCEDURE CODE, 1908, s. 60 (*e*) **409**

Rule of Court of Judicial Commissioner, Sind, rule 28—*Execution of decree—Judgment-debtor, whether can raise plea of being agriculturist—Court, duty of.*

Under rule 28 of the Rules of the Court of the Judicial Commissioner of Sind, it is open to a judgment-debtor to raise the plea of his being an agriculturist in execution proceedings, though no such plea was raised by him at any earlier stage of the proceedings; but, such a plea can be successfully raised only for the purpose of having the decree transferred to the Collector for execution.

In that event, the executing Court is bound to inquire into the status of the judgment-debtor and in the event of finding him to be an agriculturist transfer the decree for the sale of property specifically mortgaged to the Collector for execution. **S** HARIOMAL *v.* HAZARISING **583**

Sale of goods—*Construction of document—Condition precedent—Seller bound to give arrival notice after taking delivery of goods—Failure to give notice, effect of—Breach of contract.*

Plaintiffs agreed to purchase certain goods from the defendants and paid a certain sum as advance. The agreement contained the following clause :-

"On the said bales being received by *R* and then from him by *L* and then from him by us, we shall then and there send to you notice of arrivals. On the very date of receipt of such advice, you shall pay the balance left after deducting advance and obtain delivery of the goods. In default you are liable to pay the damages and costs incurred. If on receipt by us of advice of the arrivals of the goods we fail to give information thereof to you or make delivery of goods for which money is paid we are bound to pay to you the damages, etc., thereby incurred by you."

Some time after, the defendants gave notice to the plaintiffs that I had given them intimation that part of the goods had arrived and asked plaintiffs to pay the money and take delivery of the goods. It was found that the defendants had not taken delivery of the goods from *L*. Plaintiffs refused to pay for the goods and take delivery. In an action by the plaintiffs to recover the sum paid by them as advance :

Held, (1) that under the agreement the giving of arrival notices by the defendants to plaintiffs, was a condition precedent and no obligation on the part of plaintiffs could arise till such notices were given :

(2) that no arrival notices could be given by the defendants till they had actually received the goods from *L*. ;

(3) that the defendants not having taken delivery of the goods from *L*. were not in a position to give arrival notices to the plaintiffs and were consequently guilty of breach ;

(4) that the plaintiffs' suit was, therefore, entitled to succeed. **M** ALAGIRISAMI AIYAR *v.* RUNA CHENNAMANA NAVANNA ONA & BROS., 19 L. W. 654 **326**

Samudayan tenure. *See* ADVERSE POSSESSION **37**

Shamilat, *whether accessory to* khewat *land.*

The rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, and a transfer of the latter does not *ipso facto* convey any rights in the former to the purchaser.

A clause in a *wajib-ul-arz* providing that shares in the *shamilat* are proportionate to the *khewat* lands held by each proprietor cannot confer any rights in the common land on a purchaser of *khewat* land to whom such rights have not been conveyed by the deed of sale. Such a clause in a *wajib-ul-arz* merely fixes the measure of the right of the proprietors in the *shamilat* with reference to their separate or *khewat* lands, for purposes of partition and cannot be construed to work forfeiture of valuable rights in the land by automatically transferring them to a purchaser of *khewat* lands. **L** SHAHADAT *v.* GANESH DAS **368**

Ship—*Deck Cargo — Jettison — Right of cargo owner, to contribution for general average—"At merchants' risk", meaning of—Bill of Lading, office of—Exemption clauses.*

Ship—concld.

A jettison of goods which are carried on deck, even without the consent of cargo owner, does not entitle their owner to contribution unless the carriage of goods on deck is permitted by the established custom of navigation or where the other cargo owners have consented that goods jettisoned should be carried on the deck of the ship.

The office of a Bill of Lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution for general average.

The endorsement "at merchants' risk" on a Bill of Lading will not exempt a ship-owner from liability in a case of proper jettison but will exempt him from liability in case of an improper jettison. The words cover a case not only of improper jettison but of a loss caused by a collision and stranding owing to the negligence of the Master or crew, in fact, any act which, being done by them as servants of the ship-owner, would otherwise make him liable.

If a ship-owner wishes to introduce into his Bill of Lading so novel a clause as one exempting him from general average contribution, a clause which not only deprives the shippers of an ancient and well understood right but which might avoid his policy and deprive him also of all recourse to the under-writer he ought not only to make it clear in words but also to make it conspicuously, inserting it in such a type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. **S** DHARAMDAS THAWERDAS *v.* THE PERSIAN GULF STEAM NAVIGATION CO., LTD. **972**

Sind Encumbered Estates Act (XX of 1896), s. 19, cl. 3, *whether applies to execution proceedings.*

Section 19 clause (3) of the Sind Encumbered Estates Act applies to execution proceedings as well as to suits. **S** MURAD *v.* DAYARAM, **49**

Specific performance - *Contract of sale—Price referred to valuer Over-valuation—Mistake—Court, whether can interfere.*

Where a contract for the sale of immoveable property refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration, and the inadequacy of the consideration would be strengthened as a defence to a suit for specific performance if any circumstances arise which throw a doubt on the accuracy with which the valuation is made. If the under-valuation or over-valuation is such as to convince the Court that the valuer has acted under fraud or mistake, the contract would be incapable of enforcement in equity. **A** HIRA LAL *v.* KHAIRATI LAL, 22 A. L. J. 76; 46 A. 211; (1924) A. I. R. (A) 36) **1037**

—— —, *suit for—Contract of sale, subject to approval of Solicitors, if valid—Purchaser, if can pray for enquiry into vendors' title—Bankruptcy of plaintiff, effect of—Mutuality of contract, doctrine of, when applicable.*

Specific performance—concld

An agreement for sale subject to the approval of the Solicitors is a perfectly valid and enforceable agreement.

It is open to the purchaser to claim an enquiry into the title of the vendor of the property, but he must accept the title as it is, if he choses to purchase the property.

If time be made the essence of the contract, that may be waived by the conduct of the purchaser and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase then time is no longer of the essence of the contract.

But a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the ti ne.

If a plaintiff (purchaser) in a suit for specific performance becomes a bankrupt before the institution of the suit, he cannot have the contract enforced specifically. But it is otherwise if he becomes bankrupt after his suit has been decreed and the purchase-money is deposited by him.

There is no authority for holding that the principle of mutuality applicable to suits for specific performance of contracts before the institution of a suit, applies to the parties after the suit has been decreed and the *money has been deposited by the purchaser* before he becomes a bankrupt. **C** KAMAL KRISHNA KUNDU CHOWDHURY *v.* CHATOORBHUJ DASSA **962**

Specific Relief Act (I of 1877), ss. 12, 21

Contract to grant lease - Specific performance —Compensation in money, whether adequate - Intention of Legislature.

The Legislature did not intend that persons who entered into contracts to transfer or lease immoveable property should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made could be compensated in money. The Explanation to section 12 of the Specific Relief Act requires the Court to presume that such compensation cannot be adequate unless and until the contrary is presumed. **A** BRIJ BALLAB DAS *v.* MAHABIR PRASAD, 10 O. & A. L. R. 394 **167**

——— **ss. 15, 16, 17, 27 (b)**—*Contract by guardian for himself and minor—Specific performance of whole or part, whether can be decreed —Mutuality, want of, effect of.*

The operation of section 27 (4) of the Specific Relief Act is confined to cases where the contract is, in the first instance, enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon the antecedent liability of the party to the contract under whom he claims, and arises by reason of the fact that as such transferee he takes subject to the transferors' pre-existing contractual obligation. But where there is no pre-existing contractual obligation, the case entirely fails against the transferee.

The Court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. It may be that the contract though in form one and entire, is in substance divisible, and where this is so there is nothing to prevent the Court from carrying into effect that portion of it, in substance a separate contract, which is capable of being carried into effect. But a contract for the sale of immoveable property in one lot will generally be considered indivisible

A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Want of mutuality in the contract is a well recognized defence to a suit for specific performance.

When, therefore, whether from personal incapacity to contract or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.

Where a person is jointly interested in an estate with another person and purports to deal with the entire estate, specific performance will not be granted against him as to his share.

Sections 15 and 16 of the Specific Relief Act are inapplicable to such a case. **Pat** ABDUL HAQ *v.* MUHAMMAD YAHYA KHAN, (1924) A. I. R. (Pat.) 81; 4 P. L. T. 553; 2 P. L. R. 181 **483**

——— **s. 42**—*Declaration, suit for—Discretion of Court—Relief, when to be refused.*

The relief of declaration is more or less a discretionary relief, and the Courts are not ordinarily prepared to grant such relief where it would be only by way of anticipation or where the main heads of the plaintiff's complaint failed.

For instance, where in a suit for a declaration of plaintiff's character as a reversioner and an injunction to restrain waste by the defendant, who is the widow of the last male holder, the plaintiff fails to make out a case of waste, the declaratory relief will not be granted. **N** JUMILAL *v.* HALKI **981**

——— **s. 42**—*Declaration, suit for—Interest, proof of.*

It may be that in certain cases a defendant has no *locus standi* to call in question a transaction alleged by the plaintiff, but where a plaintiff is seeking a declaration from the Court, the Court before granting the declaration ought to be satisfied that the plaintiff has an interest in the property in respect of which the declaration is claimed which is a valid and subsisting interest. **Pat** BHIKARI BEHERA *v. Srimati* SITAMONI DEVI **467**

——— **s. 42**—*Whether plaintiffs bound to claim all available consequential reliefs—Suit for declaration that bequest for "Dharmaoo kam" is void - Advocate-General, whether necessary or proper party.*

In a suit for declaration that a bequest of a property is void and for an injunction against the trustees restraining them from spending income of the property in pursuance thereof, plaintiffs need not sue for possession of the property also. Section 42 of Specific Relief Act

Specific Relief Act—contd.

Specific Relief Act--concld.

does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless, at the same time, he asks for a relief which he does not want.

In a suit of this nature, the Advocate-General is a proper party, though not a necessary party. **S** SHAMBAI *v.* GOVERDHAN **249**

Stamp Act (II of 1899), ss. 26, 35, Sch. I, Arts. 5 (c), 57 (b)—*Agreement of service and security-bond without limit, duty payable on—Deficiency—Procedure—Penalty, whether can be recovered.*

Where no limit is defined in a security-bond or the limit is exceeded, the instrument falls under clause (*b*) of Art. 57 of Schedule I to the Stamp Act and a fixed duty is payable thereon Section 26 of the Stamp Act, which must be read subject to section 35 of the Act, has no application to such an instrument.

A combination of an agreement of service and a security-bond in which no limit is defined falls under Arts. 5 (*c*) and 57 (*b*) of Schedule I to the Stamp Act, and if the stamp paid on such an instrument is not sufficient the deficiency can be made up under section 35 of the Act Section 26 of the Act has no application to such an instrument. **N** NILKANTH *v.* KESHEORAO **956**

Subject, meaning of. *See* COURT FEES ACT, s. 17 **415**

Succession Act (X of 1865), s. 179—*Executor, title of, date of commencement of- Executor impleaded as party to proceeding before Probate —Proceeding whether binding on estate.*

An executor derives his title from the Will and not from the Probate; the Probate is the only proper evidence of the executor's appointment, but the executor represents the estate of the testator from the time of his death and not from the date of the Probate.

Once Probate is taken out by an executor all intermediate acts which he has done in connection with the estate of the testator are validated.

Where an executor is substituted as the legal representative of the testator in a proceeding before Probate is obtained, the estate of the testator is sufficiently represented and the result of the proceeding is binding on the estate, provided Probate is, as a matter of fact, obtained by the executor. **A** MEGHRAJ *v.* BHATTACHARJI, 22 A. L. J. 193; 46 A. 286; (1924) A. I. R. (A.) 365 **243**

Succession Certificate Act (VII of 1889), s. 4--*Succession certificate not produced - Objection taken in appeal -Procedure.*

Under section 4 of the Succession Certificate Act the production of a succession certificate is not a condition precedent to the institution of a suit, it is sufficient if the certificate is produced at any time before the decree is made.

Where an objection is taken for the first time in appeal that the suit should not have been decreed inasmuch as the plaintiff had not produced a succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate. **Pat** ZAHUR MIAN *v.* PURAN SINGH, (1924) Pat. 103; 5 P. L. T. 504; (1924) A. I. R. (Pat.) 525 **307**

Suits Valuation Act (VII of 1887), s. 8—*Court Fees Act (VII of 1870), s. 7* (ix)—*Redemption suit—Jurisdiction, valuation for purposes of.*

Prima facie it is the plaintiff's claim which determines jurisdiction, and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive.

Section 8 of the Suits Valuation Act does not cover redemption suits, so that in such a case valuation for the purpose of jurisdiction does not necessarily follow the valuation for the purpose of Court-fees.

The valuation of a suit for redemption for the purpose of jurisdiction depends not on the amount assured but on the amount ultimately found to be due. **C** SARADA SUNDARI BASU *v.* AKRAMANNESSA KHATUN, 28 C. W. N. 710; 51 C. 737 **747**

Super Tax Act (VIII of 1917), ss. 3, 8— Super Tax neither "charged, paid or recovered" in the assessment year—Suit for refund—Jurisdiction of Civil Court. *See* INCOME TAX ACT, 1886, s. 39 **438**

Surety, liabilities of—Liability, how far extends—Failure of creditor to sue, whether discharges surety—Preliminary decree, effect of. *See* MORTGAGE **868**

Takavi advance- *Attachment and sale of debt due to tenant- Suit to recover debt—Plea of payment, whether can be taken.*

Certain tenants borrowed money from the Government as *takavi*. This was sought to be realised by attachment of the rent said to have been payable to the borrowers by their sub-tenants. The latter protested that they had paid up the rent and nothing was due from them, but their application was dismissed in default. The alleged debt was then put to auction and was purchased by the plaintiff who brought a suit to recover the amount from the sub-tenants. It was found that the latter had paid up the rent previous to the attachment:

Held, that the suit was liable to be dismissed as there was no guarantee that the debt purchased by the plaintiff was actually due and the dismissal of the defendants' protest did not in any way operate to bar their plea of payment in answer to the suit. **A** SOBHA RAM *v.* RAM PRASAD **373**

Taluka- *Mortgage held by* talukdar—*Mortgage decree - Property purchased by* talukdar, *nature of -Costs of mortgage-suit—Contribution.*

When the holder of a *taluqa* brings suits to enforce mortgages held by his predecessor and in execution of the mortgage-decrees purchases the mortgaged properties, the properties cannot be considered as accretions to the *taluqa* property but must be treated as properties governed by the personal law of inheritance of the original mortgagee and his other heirs under that law are entitled to recover their shares in the properties subject to the payment of their proportionate shares of the costs of the mortgage suits. **O** JAI INDER BAHADAR SINGH *v.* SHEO INDER BAHADAR SINGH, 10 O. L. J. 481; (1924) A. I. R. (O.) 218 **393**

Transfer of Property Act (IV of 1882), s. 1, whether in force in the Punjab. *See* TRANSFER OF PROPERTY ACT, s 55 (2) **374**

——— **s. 3** - *Machinery, whether immoveable property.*

Machinery even though housed in a building is not immoveable property for the purposes of the Transfer of Property Act A MEGHRAJ v BHATTACHARJI, 22 A L. J. 193, 46 A 286; (1924) A I R. (A.) 365 **243**

——— **Ch. II**—*Family arrangement, construction of—Life-estate and remainder over to grandsons of living persons, validity of—Limitation Act (IX of 1908) Sch. I, Art 141—Suit by reversioner to recover possession of property alienated by life-tenant - Limitation, commencement of - Appeal—Alternative view, whether can be put forward.*

By an arrangement entered into between a Hindu widow and the next reversioner of her husband it was agreed that the latter should remain in possession of certain property as trustee for the widow during his lifetime, without power of alienation and that the widow should receive a certain sum as maintenance It was further provided that, after the reversioner's death, the property should go to his sons, if any should survive, and in default of sons it should go to the widow The reversioner made an alienation during his lifetime, and after his death the widow brought a suit for possession of the property against the transferees of the reversioner's transferee describing the reversioner as a trustee and stating that the cause of action had accrued to her on the death of the reversioner The Trial Court dismissed the suit as time-barred. In appeal the widow [illegible] only a life-tenant and as the widow was entitled to possession till his death, limitation began to run only from his death :

Held, (1) that the arrangement entered into between the widow and the reversioner was perfectly legal and did not offend against any of the provisions of Chapter II of the Transfer of Property Act ;

(2) that the reversioner being merely a life-tenant, the widow's right to claim possession accrued on his death and limitation began to run from the date of his death ;

(3) that the widow was entitled to put forward an alternative view of her case before the Appellate Court as it was based on the allegations which were contained in the plaint. A DURGA KUNWAR v. CHUNNA KUNWAR **633**

——— **s. 6** - *Arrears of rent, whether can be transferred*

The assignment by a co-sharer of the right to profits (arrears of rent) is an assignment of a mere right to sue and the transfer of such a right is unlawful under section 6 of the Transfer of Property Act. N CHOONILAL v. NAFI BEGUM **278**

——— **s. 6 (e)**—*Assignment of right to recover mesne profits, validity of.*

An assignment of the right to recover mesne profits which has already accrued is an assignment of a mere right to sue within the meaning of section 6 (e) of the Transfer of Property Act and is invalid. Pat JAY NARAIN PANDEY v. KISHUN DUTT MISRA, 3 Pat. 575; 5 P. L. T. 581 **705**

Transfer of Property Act—contd.

——— **s. 6 (e)**—*Contract for sale of land, transfer of rights under, nature of—Contract Act (IX of 1872), s 73—Breach of contract to sell land—Damages, measure of.*

A transfer of all the rights of the vendee under a contract to sell land, even after the vendor has refused to perform the contract is not a transfer of a mere right to sue, although a right to sue is involved in it. The vendee or his transferee has still the right to enforce specific performance of the contract, in spite of the breach by the vendor. The Law of India in respect of breaches of contract for sale of immoveable property differs from that of England, and the ordinary rule as to the measure of damages laid down in section 73 of the Contract Act applies to such breaches, the measure of damages being the difference between the contract price and the market value of the land on the date of breach

In a suit to recover damages for breach of a contract to sell immoveable property, the plaintiff has no power to postpone the date of the breach of contract to that on which he demanded a conveyance for the last time L AKHTAR BEG v. HAQ NAWAZ **87**

— **s. 35** Devise of property belonging to legatee Legatee retaining his property in his own title—Election. *See* WILL - CONSTRUCTION **274**

——— **s. 35**—*Election - Permanent lease - Acceptance of rent - Waiver.*

When a person who succeeds to an estate accepts [illegible] by reason of the fact that the tenant claims to hold under a permanent lease granted by an intermediate holder of the estate, which he had no power to grant, such acceptance does not amount to an election or to a waiver of the landlord's right to object to the validity of the lease. A GOPI KOERI v. RAJ ROOP **191**

——— **s. 43**—*False representation by transferor - Estoppel Mortgage by unauthorised person Subsequent acquisition of interest - Interest whether can be made subject of mortgage.*

In cases falling under section 43 of the Transfer of Property Act the estoppel rests on the representation made by a transferor that he is "authorised to transfer", which representation subsequently turns out to be erroneous. But when the truth of the matter is known to both parties there can be no estoppel.

Where a person having no title to the land purports to mortgage it to one who is fully aware of the absence of title in the mortgagor, and the latter subsequently acquires an interest in the same property by inheritance, such interest cannot be made the subject of mortgage under section 43 of the Transfer of Property Act.

Estoppel is a rule of equity and cannot apply to validate a mortgage which is void under section 23 of the Contract Act. O DWARKA PRASAD v. NASIR AHMED, 11 O. L. J. 219 **850**

——— **s. 43**—*Mortgage executed by unauthorised person - Executant subsequently succeeding to*

portion of property—Mortgage, whether can be enforced against executant.

A mortgage-deed in respect of property belonging to defendant No. 1 was executed in favour of the plaintiff by defendant No. 2 purporting to act as the agent of defendant No. 1. On a suit on the mortgage it was held that defendant No. 2 was not bound by the mortgage. Defendant No. 2 admitted that he had received the mortgage-money and used it himself. During the pendency of the suit defendant No. 1 died and defendant No. 2 succeeded to one-fourth of the property :

Held, that the mortgagee was entitled to a decree for the full amount of the mortgage against defendant No. 2 and was entitled, on the principle laid down in section 43 of the Transfer of Property Act, to enforce it against the one-fourth of the property to which defendant No. 2 had succeeded. **A** AISHA BIBI *v.* MAHFUZ-UN-NISSA, 22 A. L. J. 205; 46 A. 310; (1924) A. I. R. (A.) 362 **180**

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Mortgage-suit—Lease granted by defendant during pendency of suit, whether binding on mortgagee.*

A lease effected for agricultural purposes and a *theka patra* are within the purview of section 52 of the Transfer of Property Act, and it is incumbent upon a person taking such a lease or *theka patra pendente lite* to show that the rights of the true owner of the land leased are not affected thereby.

After the passing of a final foreclosure decree in a mortgage-suit, the judgment-debtor is not entitled to grant a *theka* or lease of the property included in the decree. **N** MOTILAL GULABSAO *v.* GANPATRAO **308**

——— **s. 53**—*Fraudulent transfer—Transfer preferring one creditor to others—Time-barred debt, whether valid consideration.*

In a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. **O** ZOHRA BIBI *v.* GANESH PRASAD **106**

——— **s. 54**—*Sale-essential constituents—Test.*

The two essential constituents of a real sale are the transfer of ownership and the payment or promise of payment of price ; a transaction from which either of these is absent is not a sale at all.

Therefore, a sale-deed which recites that the vendee has already spent a thousand rupees on the vendor's litigation and that the vendor has "this day" received another thousand rupees and deposited the money with the vendee for defraying the further costs of the same litigation, and purports to make a transfer of ownership for a price paid and not for a price promised or part-paid and part-promised does not satisfy more than half the definition of a sale and is not a sale at all. **N** HEMRAJ *v.* TRIMBAK KUNBI **1011**

——— **s. 55 (2)**—*Sale—Covenant for title whether implied in Punjab.*

The Transfer of Property Act is not in force in the Punjab. Its provisions are no doubt useful guides in deciding points of equity and are frequently so applied by the Courts of this Province, but there is no obligation upon the Courts so to use the Act as if every particular detail of it was the law of the Province.

The question whether the broad principle contained in section 55 (2) of the Transfer of Property Act is to be applied to a particular case in the Punjab depends upon the facts of that case.

Plaintiff purchased a house from the defendant which the latter had purchased at an insolvency sale, of which the plaintiff was aware. A third person subsequently established his right to one-half of the house and plaintiff was deprived of that portion. Thereupon he brought the present suit to recover the purchase-money which he had paid to the defendant :

Held, that as the plaintiff was aware that the defendant had purchased the house at an insolvency sale he must have known that the latter was conveying to him the interest which he had acquired in the auction and that the plaintiff was to stand at his shoes;

that, therefore, equity did not demand that the Court should presume a covenant for title in favour of the plaintiff. **L** DULA SINGH *v.* BELA SINGH **374**

——— **ss. 55 (5) (b)**—*Sale of mortgaged property by mortgagor—Money left with purchaser to redeem mortgage—Purchaser whether personally liable to mortgagee.*

The purchaser of a mortgaged property had given a verbal undertaking to the mortgagor-vendor to pay off the mortgage and collaterally with that undertaking a clause had been inserted in the sale-deed to the effect that the mortgagor-vendor had "left in deposit with the purchaser" the sum necessary to redeem the mortgage. The mortgagee sued on the basis of the mortgage and obtained a decree making the purchaser personally liable after the sale of the property :

Held, that as the plaintiff was no party to the sale-deed he could not take advantage of the undertaking given by the purchaser to the mortgagor and his suit was, therefore, liable to be dismissed. **Pat** KAMTA PRASAD SINGH *v.* NANKU PRASAD SINGH **545**

——— **ss. 56, 82**—*Properties subjects to common mortgage—Alienation of one property with covenant against encumbrances—Mortgagor's right to claim contribution from purchaser.*

Per *Venkatasubba Rao, J.*—The general rule enacted in section 82 of the Transfer of Property Act as to contribution between properties subject to a common mortgage is subject to the exception in section 56 of the same Act that a mortgagor who sells a part of an encumbered estate with a covenant against encumbrances cannot claim contribution from the purchaser. **M** VISWANATHA *v.* VENGAMA, 19 L. W. 567 **52**

——— **s. 58**—*Mortgage—Hypothecation to secure contingent liability, whether mortgage.*

A mortgage can be created for the discharge of a contingent liability.

A present hypothecation of property to secure a future liability to re-pay the mortgage-money if the mortgagee should be deprived of possession of the mortgaged property amounts to a mortgage. **Pat** NAND LAL *v.* DHARAMDEO SINGH **457**

——— **s. 58 (c)** *Construction of document Mortgage or sale Test Precedents, value of.*

A deed of transfer which was ostensibly a sale provided for a right of redemption within a certain period on payment of the money advanced, and in the event of default of payment within that period the sale was to become absolute. In the event of redemption, the person exercising the right was liable to pay interest on the principal sum at the rate mentioned in the deed :

Held, that the transfer was a mortgage by conditional sale within the meaning of section 58 (c) of the Transfer of Property Act.

Each document must be construed with the aid of the language used therein and such other surrounding circumstances as may be relevant to the question of construction, and precedents can be referred to only in so far as they lay down any general principle of interpretation.

One test which may be applied in determining whether a transaction is a mortgage or not is, whether the remedies are mutual and reciprocal and the transferee has all the remedies a mortgagee is entitled to. **O** GULZAR SINGH *v.* SHEO NATH, 11 O. L. J. 275 **547**

——— **s. 58 (c)** *Mortgage by conditional sale— Transfer Agreement to reconvey Construction of deeds.*

Plaintiff executed a deed of transfer of certain land in favour of the defendant. On the same date the latter executed a document called *ikrarnama taidi*, which provided that, on re-payment being made by the seller at a time when the land was free from crops, the buyer would reconvey the property to the seller. It was further provided that in the event of the buyer refusing to transfer the property to the seller the latter may deposit the money in Court :

Held, that the deed of transfer and the agreement taken together constituted a mortgage by conditional sale within the meaning of section 58 (c) of the Transfer of Property Act. **O** MAHABIR *v.* BHARATH BIHARI, 11 O. L. J. 312 **426**

——— **s. 59** *Equitable mortgage—Deposit of title-deed Pro-note given by debtor, whether inconsistent with mortgage.*

A debtor handed over the title-deeds of certain property to his creditor saying that the latter was to hold them as security against the liabilities already incurred and that should be incurred thereafter by the debtor. He subsequently signed a memorandum in respect of the deposit of the title-deeds with the creditor :

Held, that an equitable mortgage by deposit of title-deeds was created in favour of the creditor as soon as the title-deeds were handed over to him.

There is nothing inconsistent in a debtor executing a promissory-note in favour of his creditor and at the same time making a deposit of title-deeds by way of security for payment of the debt. **C** GLASTAUN *v.* SONATAN PAL **668**

——— **s. 60** *Mortgage Default in payment— Possession, suit for, by mortgagee—Redemption, whether can be allowed.*

A mortgage-deed provided that the mortgage-money would become payable at the expiry of ten years and that if it was not paid on the expiry of that period the mortgagees would be entitled to take possession of the mortgaged property for a period of twenty years. Default was made and the mortgagees brought a suit to recover possession of the mortgaged properties :

Held, that the only decree which could properly be passed in the suit would be one allowing the mortgagor to redeem the property on payment of the sum due within a time to be fixed by the Court and in default to direct that possession of the mortgaged property be delivered to the plaintiffs.

A mortgagee can enforce his rights under a mortgage only consistently with, and not in derogation of, the rights of the mortgagor under the same transaction. **O** BAKHTAWAR SINGH *v.* BAKHTAWAR SINGH **232**

——— **s. 63** *Mortgage Accession to mortgaged property Tenancies acquired by mortgagee.*

Tenancy lands which are acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property and the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expense of acquiring them. **Pat** BABU RAM RAI *v.* MAHESHWAR PRASAD SINGH **466**

——— **s. 68** *Mortgage suit Money decree.*

One of the reliefs claimed in a mortgage suit asked for a direction to make the amount due under the mortgage-bond a charge upon the surplus sale-proceeds of one of the mortgaged properties which had been sold. Towards the end of the paragraph it was stated that the balance of the decretal amount may be ordered to be realised from the property and the person of the defendant or defendants who may be liable. The Court refused a mortgage decree and passed a decree under section 68 of the Transfer of Property Act in the following terms :— "The suit for Rs. 5,877-10-0 with proportionate costs be decreed in terms of relief 5 of the plaint. He is further declared to have a charge on the surplus sale-proceeds which is in deposit in the Collectorate. I allow interest on the sum decreed at Rs. 6 per cent. per annum from the date of the decree till realisation of the same.":

Held, that only that portion of the relief No. 5 of the plaint was granted by the decree which related to the creation of a charge on the surplus sale-proceeds with respect to the amount due under the mortgage-bond, and that the decree did not by implication include a direction that the balance of the decretal amount could be recovered from the persons and properties of the defendants who were purchasers of the mortgaged properties and were not expressly made personally liable under the decree. **Pat** KISHENDEO SINGH *v.* JAGLAL SAHU, 5 P. L. T. 603 **774**

——— **s. 68 (6)**—*Mortgage by conditional sale—Personal liability—Court, duty of, to advance just claims.*

In every mortgage there is a personal covenant to pay the mortgage-debt unless the contrary is expressly stated in the terms of the bond or appears by necessary implication from them.

The astuteness and acumen of a Court of Justice should be devoted to the advancement of a just claim and not to its defeat. **N** SETH GOPIKISSAN *v.* MANKUWAR, 20 N. L. R. 46; (1924) A. I. R. (N.) 97 **239**

——— **ss. 72, 76** - *Mortgagee in possession - Settlement of* bakasht *lands--Tenants, position of.*

Under sections 72 and 76 of the Transfer of Property Act, it is one of the rights of a mortgagee in possession to settle land with tenants.

A mortgagee in possession, with all *zemindari* rights vested in him, has a right to settle *bakasht* lands with tenants during the continuance of the mortgage, and the persons with whom the settlement is made would, in any event, acquire non-occupancy rights in the land. **Pat** MAHADEO LAL *v* SRI GOBIND LAL SAHU **943**

——— **s. 74**—Subrogation. *See* CONTRACT ACT, s. 69 **177**

——— **s. 81**—*Mortgage--Marshalling—Mortgagee, subsequent, purchasing mortgaged property in execution of decree, effect of.*

The object of section 81 of the Transfer of Property Act is to protect a subsequent mortgagee from the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also, and a subsequent mortgagee does not lose the benefit of the section merely by reason of the fact that he has purchased mortgaged properties in execution of a mortgaged-decree obtained by him on foot of his subsequent mortgage. **Pat** RAJKESHWAR PRASAD NARAIN SINGH *v.* MUHAMMAD KHALIL-UL-RAHMAN, 5 P. L. T. 223; 3 Pat. 522; (1924) A. I. R. (Pat.) 459 **796**

——— **s. 84**—*Redemption, suit for--Deposit, effect of--Mortgagee, liability of, to account for profits—Separate suit, whether lies.*

Where in a redemption suit it is found that the mortgagor had made a valid deposit of the amount due under the mortgage which was not accepted by the mortgagee, the Court should take an account of the profits recovered by the mortgagee from the mortgaged property during the period from the date of the deposit to at least the filing of the redemption suit, and should reduce the amount payable on redemption by the amount of those profits. No separate suit should lie for the recovery of such profits. **N** SAVITRI *v.* MADHORAO **772**

——— **s. 88**—*Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 12—Mortgage decree under s. 88, subsequent to passing of Civil Procedure Code of 1908- Order absolute—Final decree —Execution proceedings.*

Where a mortgage decree was passed in 1908 under the old Procedure of section 88 of the Transfer of Property Act, the proceedings thus started must be continued under that Act, though the new Code of Civil Procedure had come into operation.

The mere fact that an order absolute for sale instead of a final decree for sale is passed does not render the execution proceedings invalid. **M** ITIKYALA PEDDA ASWATHAPPA *v.* ANKULUGADU, 19 L. W. 290; (1924) M. W. N. 306; (1924) A. I. R. (M.) 603 **70**

——— **s. 91 (a), (b)**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1 - Mortgage Redemption- Tenant from year to year whether can redeem -Construction of document Lease* bila miad, *whether perpetual Ejectment on non-payment of rent, absence of stipulation as to - Independent documents, whether can be read together.*

Mere silence in a lease on the subject that the lessee would be liable to ejectment on non-payment of rent does not imply that the lessee cannot be so ejected.

Plaintiffs were granted a lease *bila miad* to cultivate the land, and were enjoined to pay the rent, and the lessors were given the right of recovering the rent by suit or by distraint:

Held, that the lease was one from year to year and not perpetual.

Two independent documents which contain no reference to each other cannot be combined to constitute a *zar-i-peshgi* lease

A tenant on a year to year lessee is not a person who has such an interest in the property given to him for cultivation as is contemplated in clauses (*a*) and (*b*) of section 91 of the Transfer of Property Act, so as to enable him to redeem the property. **O** KALU SINGH *v.* HANSRAJ UPADHIYA, 9 O. & A. L. R. 812 **47**

——— **s. 100** *Charge—General words- Property not specified- Charge, whether created- Account-books, whether sufficient to prove purpose of loan.*

Mere general words are insufficient to create a charge on property either moveable or immoveable if it is not specifically indicated. A covenant that the obligee should recover from the "person and property" of the debtor is too wide to fasten a charge on any of his property.

A mere covenant to charge an estate does not create a charge unless the property can be identified by existing facts and circumstances so that there may be no ambiguity about them. There must be expression of a present intention coupled with the necessary words of hypothecation in order to constitute it.

A creditor is bound to prove purposes for which loan is borrowed by independent and reliable evidence and mere entries in his account-books will not constitute such proof. **N** TULSIRAM *v.* ANUSUYA **380**

——— **ss. 105, 107**—*Lease, what is - Registered,* kabuliyat, *whether creates tenancy,*

Transfer of Property Act—concld.

A lease is a transfer of porperty and can be made only by the transferor and not by the transferee. The transfer can only be made by the volition of the transferor, but in the case of a lease for a term exceeding one year the transfer does not become effective until a registered instrument comes into being; the instrument must, however, be effected by the transferor.

Therefore, a registered *kabuliyat* executed by the person occupying the premises and accepted by the person owning the premises is not sufficient tobestow a title upon the person occupying the premises and can in no way be considered a lease as defined in section 105 of the Transfer of Property Act. **A** KEDAR NATH *v.* SHANKAR LAL, 22 A. L. J. 185; 46 A. 303 **934**

——— **s. 106,** *applicability of—Contract to the contrary—Notice to quit—One month's notice—Notice whether must expire with month of tenancy.*

Section 106 of the Transfer of Property Act applies only when there is no contract to the contrary.

The rule as to notice contained in section 106 of the Transfer of Property Act is applicable or inapplicable as a whole.

A contract stipulating for a month's notice without any specification of the time when the notice is to expire, is a contract to the contrary within the meaning of section 106 of the Transfer of Property Act and in such a case it is not necessary that the notice should expire with the month of the tenancy. **N** SAIK KASAM *v.* HAJI YUSUF KARIM ADU **445**

——— **s. 106**—*Landlord and tenant—Agreement to vacate at specified time—Notice to quit, whether necessary—Tenant holding over, who is—Dissent of landlord.*

Where a tenant agrees to give up possession at a particular time, he is not entitled to a notice to quit under section 106 of the Transfer of Property Act, as that section has no applicability to such a case.

There must be absence of both assent and dissent on the part of the landlord to constitute a tenant, a tenant on sufferance or as one holding over. Where there is express dissent by the landlord, for instance, by refusal to accept rent, the tenant cannot claim to be holding over. **N** DINA SINGH *v.* JAMAL SINGH **446**

——— **s. 130.** *See* CONTRACT ACT, 1872, ss. 38, 50 **127**

Trust—*Illusory trust—Performance of religious ceremonies, effect of—Trust, essentials of* Dharmsala, *what is—Administration of assets—Executor—Assets converted into building, effect of—Money borrowed by executor—Executor, liability of, nature of—Building constructed partly out of assets, ownership of.*

The term *dharmsala* means a place where a certain section of the public can claim residence as of right without any payment. A building in the nature of a public boarding-house does not convey the idea of *dharmsala.*

The performance of the *hawan* ceremony on the occasion of the laying of the foundation stone of a building will not turn an illusory trust in respect of the building into a definite one.

Trust—concld.

As the execution of a trust is under the control of the Court the trust must be of such a nature that it can be under the control of the Court, so that its administration can be reviewed by the Court, or, if the trustee dies, the Court itself can execute the trust.

Where an executor invests a portion of the assets of the deceased in constructing a building, an administrator who succeeds the executor can claim the building as part of the assets.

Except in certain special cases, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator.

Where a building is constructed by an executor out of the assets of the deceased together with money belonging to or borrowed by himself, the building becomes the property of the deceased and the executor in proportion to the money belonging to each spent thereon. **O** ANANT RAM *v.* ISHRI PRASAD **320**

——— Suit under section 92, Civil Procedure Code—Relief against alienee of trust property—Trustee *de son tort*, liability of. *See* CIVIL PROCEDURE CODE, s. 92 **950**

——— *Trustee repudiating trust, whether bound to surrender possession.*

A trustee acting under a trust which he knows or subsequently discovers to be void or invalid, is not bound to surrender the possession of the trust property before he can be allowed to repudiate it by giving evidence to explain away his admission arising from his conduct as a so-called trustee. **N** KRISHNABAI *v.* DHONDO RAMCHANDRA, 20 N. L. R. 63 **542**

Trusts Act (II of 1882), s. 5—*Trust relating to immoveable property, creation of, mode of.*

Under section 5 of the Trusts Act a trust relating to immoveable property must be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the Will of the author of the trust or trustee. **O** ANANT RAM *v.* ISRI PRASAD **320**

——— **s. 48,** *scope of—Co-trustees—Suit for ejectment—Refusal of one trustee to join—Suit by other trustee alone, whether maintainable.*

If one of the two trustees refuses to join as plaintiff and is joined as a defendant, the other trustee alone can maintain a suit for eviction of a person from the trust property. **N** SHUKOOR *v.* JAGAIYYA **347**

Trustee, *office of, whether transferable—Property not dissociable from office of trustee—Alienation of such property, validity of.*

The office of trustee is incapable of transfer Therefore, where it is impossible to dissociate the office of trustee from the possession of property, the transfer of property virtually amounts to parting with the office, and such an alienation cannot be recognised.

An assignee of a part of the mortgage security is not liable to contribute as against the mortgagor

Trustee - concld.

to the payment of the mortgage-debt. Therefore, if a mortgagor sells a part of an encumbered estate a covenant against encumbrances, he cannot claim contribution from the purchaser because he is himself liable for the whole debt. **M** VISWANATHA *v.* VENGAMA, 19 L. W. 567 **52**

U. P. Land Revenue Act (III of 1901), s. 36—*Ex-proprietary tenant—Order fixing rent based on agreement, whether binding on heirs of tenant.*

An order fixing the rent of an ex-proprietary holding is binding on the heirs of the ex-proprietary tenant even if it merely adopted an agreement between the landlord and the ex-proprietary tenant. **A** MUSADDI LAL *v.* OHHOTU **349**

——— **ss. 40, 57**—*Entry in Revenue Record, correction of - Possession, basis of—Title, question of—Plot entered as* sir*—Entry, whether open to disproof.*

Under section 40 of the U. P. Land Revenue Act where the Revenue Authorities can find that a certain person is in possession the entry must be made on the basis of possession and the question can be re-opened on a basis of title in either a Civil or a Revenue Court.

Where land has been recorded as *sir* at the last settlement and has been continuously so recorded since, the correctness of the entry is open to disproof under section 57 of the U. P. Land Revenue Act. **A** LALMAN *v.* FAZAL MUHAMMAD KHAN **115**

——— **ss. 87, 88**—*Commutation of rent - Suit to recover arrears of rent—Court, whether bound by entry in Revenue papers.*

In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon the papers unless those rates are entered erroneously by a clerical mistake; and where there is a binding order of some competent authority, such as an order by the Settlement Officer under sections 87 and 88 of the U. P. Land Revenue Act, or under sections 43 to 46 of the Agra Tenancy Act, the Court has no discretion but must allow the rent at the rates directed. If either the landlord or the tenant has any objection to those rates he must apply to the proper authorities to have those rates altered, but a Court trying a suit for arrears of rent has no authority in the matter. **A** YAQUB ALI *v.* DHAN SINGH, 22 A. L. J. 212; 46 A. 316; (1924) A. I. R. (A.) 429 **863**

——— **s. 233K**, *applicability of—Evidence Act (I of 1872), s. 115—Estoppel—Partition—Co-sharer, permitting another person to remain recorded as co-sharer and participate in partition proceedings—Representation.*

Per *Stuart, J.*—Section 233 K of the U. P. Land Revenue Act ordinarily operates only as against those recorded co-sharers who have been parties to the partition proceedings.

A Muhammadan tenant-in-common cannot be held to be represented in partition proceedings by another Muhammadan tenant-in-common merely because their interests are identical.

U. P. Land Revenue Act—concld.

Where, however, a co-sharer permits another person to continue recorded as a co-sharer in respect of property which belongs to the former and to participate in partition proceedings as a co-sharer, he is estopped from subsequently objecting to the proceedings on the ground that he was not a party to them or had no notice of them.

Per *Mukerji, J.*—The rule of estoppel by substantial representation is based on broad principles. The rule applies with great force in the case of a Hindu family because of the constitution of it, but it would apply in other cases also provided the facts are sufficient for its support.

Courts are to dispense justice, and rules of procedure should not be allowed to defeat the ends of justice. **A** KARIM BAKHSH *v.* WAHAJUDDIN, 22 A. L. J. 73; 46 A. 214; (1924) A. I. R. (A.) 427 **1035**

Waiver. *See* TRANSFER OF PROPERTY ACT, s. 35 **191**

Wajib-ul-arz - Earlier document containing no recital of pre-emption - Later document creating right of pre-emption Custom, whether proved. *See* PRE-EMPTION **508**

———, *entry in, value of.*

The record of a custom in a *wajib-ul-arz* entry is the most valuable evidence in support of the custom recorded. **L** SHER MUHAMMAD KHAN *v.* DOST MUHAMMAD KHAN **451**

Wakf - *Dedication, proof of—Installation of idol or construction of temple, whether necessary.*

The name given to a deity is only a sacred convention. The deity is supposed or believed to exist from eternity. The idol is virtually treated as a visible symbol of the deity in whose favour the dedication is made or by whom the purchase is to be effected; and the mere fact that the installation takes place afterwards does not affect the validity of the dedication or of the purpose for which the purchase is made.

A certain village was purchased in the name of an idol and the income derived from the village was used for the purposes of worship of the idol and other charitable purposes. Idols bearing the name mentioned in the sale-deed were also purchased, but there was no formal installation of the idols and no temple was built for them:

Held, that there was a sufficient dedication of the village to the idol and the village had become *wakf* property. **A** SARAB SUKH DAS *v.* RAM PRASAD, 46 A. 130; (1924) A. I. R. (A.) 357 **1018**

Will—*Bequest for* "Dharmaoo Kam" *whether void for uncertainty—Hindu Law—Registered Will whether can be varied by unregistered document.*

A bequest for *dharmaoo kam* is void for uncertainty.

[Indian and English case law on the subject reviewed and discussed.]

The law does not require a compulsory registration of a Will by a Hindu. There is, therefore, no bar to its terms being varied by an unregistered document, even if it be a registered Will. **S** SHAMBAI *v.* GOVERDHAN **249**

WILL -contd.

——— *Construction Earlier clause clear and unambiguous Later clause ambiguous—Transfer of Property Act (IV of 1882), s. 35—Devise of property belonging to legatee -Legatee retaining his property in his own title—Election -Probate and Administration Act (V of 1881), ss. 128, 180 -Demonstrative - Legacy - Interest -Suit for account by residuary legatee against other legatee -Defendant suppressing account-books -Burden of proof.*

The principle that the later clause of a Will should have preference over the earlier is inapplicable to a case where the earlier clause is clear and unambiguous and can be read in such manner as not to interfere with the later one.

A testator has no right to devise property belonging to another person, but if he does devise such property and at the same time leaves a legacy for that person the latter must acquiesce in the devise if he wishes to receive the legacy. But if he chooses to retain his property by virtue of his own title, under the doctrine of election he is not entitled to the legacy under the Will.

A demonstrative legacy which partakes partly of the nature of a specific legacy and partly of a general legacy and which is directed to be paid out of a certain specified property bears interest from one year after the testator's death even in cases where no provision for interest is made in the Will, notwithstanding that the Probate and

WILL -concld.

Administration Act does not deal with interest on demonstrative legacies.

In a suit for accounts by a residuary legatee against other legatees if it appears that the defendants had seized a large portion of the testator's property, were in possession of the accounts kept by the testator and were suppressing the same, it is not necessary for the plaintiff to prove each item of property he claims beyond the possibility of doubt, but if he makes a *prima facie* case the burden is cast upon the defendants to show that the property did not belong to the testator or was subsequently accounted for. **M.** VENKATARAMAYYA *v.* PITCHAMMA **274**

——— *Gift -Construction of document—Will or gift.*

If, under a document purporting to be a gift and handed over to the alleged donee, the donee gets nothing until the death of the donor, there is no disposal of any immediate rights of possession or any immediate interest in the property, the document is a Will and not a deed of gift.

The fact that the document purports to reserve a life-interest in the property to the donor is not a decisive circumstance against its being a Will. **M** VENKATACHALAM CHETTY *v.* GOVINDASWAMY NAICKER, 46 M. L. J. 288; 19 L. W. 434; (1924) A. I. R. (M.) 605 **156**

——— Revocation, what amounts to—*Animus revocandi*, proof of. *See* HINDU LAW—WILL **865**